

The Crisis of the Judicial Leadership in the Kingdom of Lesotho

Report of the High-Level Mission
of the International Commission of Jurists
in the Kingdom of Lesotho



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The Crisis in Judicial Leadership in the Kingdom of Lesotho

Report of the High-Level Mission of the International Commission of Jurists to the Kingdom of Lesotho

Justice S. Sandile Ngcobo

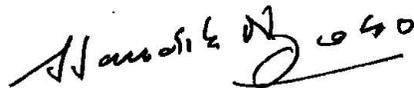
Justice Julian M. Nganunu

Justice Augustino S. L. Ramadhani

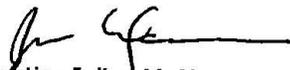
To: The Secretary-General
International Commission of Jurist
GENEVA.

Sir,

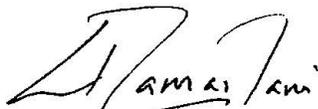
In accordance with our appointment under letter dated 14 February 2013, to investigate and report on the **Crisis in Judicial Leadership** in the Kingdom of Lesotho, we have pleasure in submitting our report herewith.



Justice S. Sandile Ngcobo
Chairperson



Justice Julian M. Nganunu
Member of the Mission



Justice Augustino S. L. Ramadhani
Member of the Mission

Dated in Johannesburg this 6th day of May 2013

Table of Contents

| | |
|---|----|
| Introduction | 6 |
| Mission Scope..... | 8 |
| Methodology | 9 |
| Report Structure..... | 11 |
| Framing the Conflict – The Meaning of Judicial Leadership | 12 |
| Legal Context for the Crisis | 12 |
| <i>Constitutional Framework</i> | 13 |
| <i>The Court of Appeal</i> | 14 |
| <i>The High Court</i> | 16 |
| <i>The President of the Court of Appeal</i> | 21 |
| <i>The Chief Justice</i> | 22 |
| <i>Conclusions on the Legal Context</i> | 24 |
| Historical Context for the Crisis..... | 25 |
| <i>Ad Hoc Court of Appeal and Administration by Chief Justice</i> | 25 |
| <i>The Clash of Personalities</i> | 27 |
| <i>The Official Order of Precedence</i> | 30 |
| <i>The Role of Cabinet in Determining the Head of the Judiciary</i> | 32 |
| The Key Episodes in the Conflict..... | 37 |
| <i>The Incident at the Celebration of the King’s Birthday</i> | 37 |
| <i>Cancellation of the January 2013 Session of the Court of Appeal</i> | 39 |
| Current Relationship between the Chief Justice and the President of the Court of Appeal | 42 |
| Impact of the Conflict on Lesotho’s Judiciary..... | 46 |
| <i>Compromising the Effectiveness of the Administration of Justice</i> | 47 |
| <i>Compromising Public Confidence in the Judiciary</i> | 47 |
| <i>Compromising the Independence of the Judiciary</i> | 48 |
| <i>Backlog and Delays in the Justice System</i> | 51 |
| <i>Discipline within the Judiciary</i> | 53 |
| <i>The Structure of the Judicial Service Commission</i> | 57 |
| <i>Issues Relating to the Ad Hoc Nature of the Court of Appeal</i> | 59 |
| <i>Establishment of a pool from which to appoint judicial officers</i> | 62 |
| <i>Strengthening of Ethics within the Legal Profession</i> | 63 |
| The Steps that must be taken to Address the Conflict | 63 |
| <i>Accountability for the Crisis</i> | 64 |
| <i>Addressing Judicial Leadership in the Constitution</i> | 66 |
| Concluding Remarks..... | 72 |
| Key Recommendations | 76 |
| Conclusion | 77 |

Acknowledgments

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We would also like to acknowledge the cooperation of members of the Judicial branch, in particular: the President of the Court of Appeal, the Honourable Justice M. Ramodibedi; the former President of the Court of Appeal, the Honourable J. Steyn; the judges of the Court of Appeal, namely Justices C. Howie, D. Scott and N. Hurt; the Chief Justice of Lesotho, the Honourable Justice M. Lehohla; the judges of the High Court; and Acting Justice K. Mosito who agreed to meet with our mission team.

We would also like to acknowledge: the Law Society of Lesotho, in particular, the President of the Law Society, Advocate M. Rasekoai, and the Vice-President of the Law Society, Advocate N. Thabane; the Federation of Women Lawyers, represented by Mr. Lerato Seema; Women and Law in Southern Africa Research Trust, represented by Ms. Mamosa Mohlabula and Ms. Seboku Hlabi; Lesotho Lawyers for Human Rights, represented by Advocates Z. Mda and P. Sakoane; the Transformation Resource Centre represented by Mr. Hoolo Nyane; and members of the media, in particular, Mr. Tapera Chikuvira and Mr.

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We are indebted to all these individuals and organizations for their cooperation without which this report would not have been possible.

We are also indebted to the staff of the International Commission of Jurists for the administrative and logistical support they provided, as well as to Ms. Hlubi Mzaidume and Mr. Mtutuzeli Mama, both of the Office of the Chief Justice in South Africa, for their assistance.

Introduction

The International Commission of Jurists (ICJ) organized a high-level mission to the Kingdom of Lesotho during March 2013. The purpose of the mission was to gather facts concerning a crisis in judicial leadership in Lesotho emerging from a dispute between the office of the Chief Justice, presently occupied by the Honourable Justice M Lehohla¹, and the office of the President of the Court of Appeal, presently occupied by the Honourable Justice M Ramodibedi, over the issue of which of them is the head of the judiciary, and to make recommendations on possible solutions to the crisis. The International Commission of Jurists considers that a resolution of this crisis is necessary to bring about harmony in the administration of justice in Lesotho, to facilitate access to justice, to protect the independence of the judiciary and to preserve public confidence in Lesotho's judicial institutions.

While the Constitution of Lesotho outlines the powers and functions of these two offices, it does not explicitly state which is the head of the judiciary.² This lack of clarity has resulted in conflicting claims to judicial leadership by the individuals occupying the offices of the Chief Justice and the President of the Court of Appeal. The resultant deterioration in the relationship between the two senior judges has been widely covered in the Lesotho media and has attracted significant public scrutiny. Matters recently came to a head when a special session of the Court of Appeal that was due to be held

¹ It should be noted that Chief Justice Lehohla has since announced that he would be taking leave until his retirement in August 2013.

² The Constitution of Lesotho was published as Order No. 5 of 1993 and came into effect on 2 April 1993. This Constitution, as subsequently amended, is herein referred to as "the Constitution".

in January 2013 had to be cancelled, largely because of the ongoing dispute.

The mission team interviewed a number of key stakeholders both inside and outside the judiciary. These included the Prime Minister, Minister of Law, Human Rights and Constitutional Affairs, the Minister of Justice and Correctional Services, the Attorney-General, the Speaker of Parliament, the President of the Court of Appeal and judges of the Court of Appeal, the Chief Justice and judges of the High Court, and various representatives of the legal profession, civic organizations and the media. In addition, the mission studied the legal framework governing the judiciary in Lesotho, and other comparable jurisdictions in the light of international human rights standards on judicial independence and the frameworks of other comparable jurisdictions. This report is a product of those interviews and that study.

In the course of the interviews, a number of issues which require urgent attention were drawn to our attention. These issues include: the backlog of cases and delays in the delivery of judgments in the High Court; the representativeness of the Judicial Service Commission (JSC); the desirability of having a permanent Court of Appeal; the need to ensure that more citizens of Lesotho are appointed permanently to the Court of Appeal; developing a representative pool of qualified judicial candidates; and developing a properly structured, skilled and disciplined legal profession. While all these issues require urgent attention, they require thorough investigation that is beyond the scope of this report.

In this report, we focus narrowly on the matters that are germane to our brief, namely the factual and legal backdrop to the crisis of leadership within the Lesotho judiciary. That said, we make reference to certain of the above critical issues confronting the judiciary to the extent that they may have contributed to the escalation of tensions between the Chief Justice and the President of the Court of Appeal or otherwise provide evidence of the ill effects that the power struggle has had on Lesotho's justice system. As these issues affect the administration of justice, the call for their investigation, echoed by the Law Society and other stakeholders within the justice system, requires serious consideration by the government of Lesotho.

We would also like to state that an advance copy of this report was handed over to the authorities in Lesotho in May 2013.

Mission Team

The high-level mission organized by the ICJ was comprised of three retired Chief Justices from the Southern African region: Justice S. Sandile Ngcobo of South Africa, as Chairperson; Justice Julian M. Nganunu of Botswana; and Justice Augustino S.L. Ramadhani of Tanzania. Advocate Tererai Mafukidze, of the Johannesburg Bar, and Ms. Angela Mudukuti assisted the Mission delegates.

Mission Scope

Our brief was to:

- (a) analyse the legal framework governing the judicial hierarchy in Lesotho;

- (b) gather facts surrounding the breakdown of the relationship between the offices of the Chief Justice and the President of the Court of Appeal;
- (c) consider the implication of the crisis of leadership in the Lesotho judiciary, on the independence of the courts, the image of the judiciary as a whole and the delivery of justice;
- (d) engage in a comparative analysis of the judicial hierarchy in other countries, within the Southern African region and beyond; and
- (e) make appropriate recommendations towards normalization of the situation.

In sum, our brief was aimed at establishing the cause of the conflict between the offices of the Chief Justice and the President of the Court of Appeal and making recommendations on how to mitigate existing tensions, reduce the negative impact they have had on the judiciary, and facilitate a healthier judicial administration going forward.

Methodology

The mission team conducted interviews in Lesotho between 4 and 7 March 2013. As noted above, the team interviewed key stakeholders that included the Prime Minister, the Minister of Law, Human Rights and Constitutional Affairs, Minister of Justice and Correctional Services, the Attorney-General, the Speaker of Parliament, the President and judges of the Court of Appeal, the Chief Justice and judges of the High Court, and various representatives of the legal profession, civil society organizations and the media. As the

Court of Appeal was not sitting during this period, further interviews were conducted in the Kingdom of Swaziland, where the President of the Court of Appeal of Lesotho also sits as the Chief Justice of Swaziland, and Cape Town, where the former President of the Court of Appeal and most of the judges of the Court of Appeal live. The Chairperson, on behalf of the mission team, conducted these further interviews. Transcripts of these further interviews were circulated to the full mission team prior to preparing this report.

The mission relied on the cooperation of the stakeholders, some of whom made themselves available at a fairly short notice. In addition, we relied on correspondence and documents that were made available to us by the offices of the Chief Justice and the President of the Court of Appeal and, by the Law Society. We also benefited from a collection of news reports relating to the conflict that were made available to us by the media, which assisted us in understanding the background and depth of feeling of the two senior judges to the conflict as it has been discussed in the Lesotho press.

Because of the nature of the fact-finding mission, we do not possess the tools for resolving factual conflicts where they emerged as we would in our capacity as judges sitting in a court of law. We have therefore relied on facts that were either common cause or not disputed in assembling this report. We have made every effort to comply with the principles of natural justice in relation to allegations that we consider germane to the subject matter of our inquiry, in particular, as they related to the Chief Justice and the President of the

Court of Appeal. This process helped to clarify certain facts and to put others in perspective.³

The mission delegates did not have dedicated research assistance. It had to rely on limited assistance offered by the staff of the ICJ. This occasioned some delay in accessing some documents and other materials from Lesotho, some of which were not readily accessible. This regrettably resulted in the delay in the finalization of this report.

Report Structure

This report will begin by setting out the legal and historical framework within which the conflict over the leadership of the judiciary has developed. This will entail an exploration of what leadership of the judiciary means at a conceptual level, followed by a discussion of how the judiciary is structured from a constitutional perspective and how, as a matter of historical fact, it has functioned. Having traced both the constitutional and historical origins of the conflict, this report will then provide detail relating to key stages of the conflict and the current relationship between the two senior judges concerned. We will then consider the impact of the ongoing conflict on the effective administration of justice in Lesotho, on the independence of the judiciary and on public confidence in the justice system, as well as how the ongoing conflict has prevented the judiciary from effectively dealing with other critical issues with which it is faced. Finally, this

³ There is at least one area in respect of which a factual conflict remained unresolved. That matter relates to who, between the Chief Justice and the President of the Court of Appeal, was responsible for the unfortunate near collision incident that occurred during His Majesty the King's 2012 birthday celebration. We deal with this matter more fully later in the report.

report will make specific recommendations as to a potential path forward and will present its conclusions on how this crisis may be solved.

Framing the Conflict – The Meaning of Judicial Leadership

At the heart of the judicial crisis in Lesotho is the question of which senior officeholder – the President of the Court of Appeal or the Chief Justice – is the head of the judiciary and thereby the leader of one of the three branches of government. As the history of the dispute indicates, the thrust of the dispute has centered around which officeholder should officially rank above the other in the hierarchy of government.

When considering the question of who leads the judiciary, a distinction must be drawn between who, as a matter of rank within the machinery of government, leads the judiciary as the head of the judicial branch of government, and who, as a matter of judicial process, leads the development of jurisprudence in Lesotho. A judge who presides at the apex court is generally seen as the leader of the development of jurisprudence. For constitutional and historical reasons discussed herein, it is not necessarily the case that the administrative head of the judiciary and the senior jurist who leads the development of jurisprudence are one and the same judge.

Legal Context for the Crisis

The question of who heads the judiciary in Lesotho is fundamentally a constitutional question. It is therefore important to

consider the constitutional framework governing judicial hierarchy in Lesotho in order to understand the extent to which the question of who heads the judiciary is answered by the Constitution, as well as to understand what type of judicial leadership (jurisprudential or administrative) the Constitution speaks to. While under the Constitution the President of the Court of Appeal presides at the apex court and does not have any administrative powers or other functions beyond those associated with the functioning of the appeal court, and the Chief Justice presides in a lower court (the High Court) but has a number of administrative powers and functions beyond those associated with the functioning of the High Court, the Constitution does not explicitly say who between them is the head of the judiciary.

Constitutional Framework

Chapter XI of the Constitution deals with the judiciary under the heading "The Judicature". The judicial structure in Lesotho is comprised of a Court of Appeal, a High Court and subordinate courts and tribunals.⁴ The Court of Appeal sits at the apex of the judicial structure⁵ and is presided over by a President.⁶ It hears appeals from the High Court⁷, which is presided over by a Chief Justice.⁸ The High Court has unlimited original jurisdiction as well as appellate jurisdiction.⁹ It hears appeals from decisions of subordinate courts,

⁴ Section 118(1).

⁵ Section 123(4) identifies the Court of Appeal as "a superior court of record" and section 129(1) sets out the cases in which decisions of the High Court can be appealed to the Court of Appeal. The role of the Court of Appeal as an apex court is affirmed by the provisions in the Constitution relating to succession to the throne of Lesotho (section 45) and the appointment of a Regent (section 46), which provide that decisions made by the High Court pursuant to the succession and appointment processes set out in the Constitution shall be appealed to the Court of Appeal (section 47(1)).

⁶ Section 123(2).

⁷ Sections 129(1) and 47(1).

⁸ Section 119(2).

⁹ Section 119(1).

courts martial and other tribunals.¹⁰ In addition, it considers questions of constitutional interpretation that are referred to it by subordinate courts and tribunals and its decisions on such questions are subject to appeal to the Court of Appeal.¹¹

The Court of Appeal

The Court of Appeal is generally only in session twice per year, that is, in April and October, unless the President of the Court of Appeal determines that it is necessary to convene a special session. The Court is regarded as an *ad hoc* court. The President of the Court of Appeal is appointed by the King on the advice of the Prime Minister; Judges of the Court of Appeal, including acting judges, are appointed by the King "in accordance with the advice of the Judicial Service Commission after consultation with the President."¹² Under the Constitution, the President of the Court of Appeal is not an *ex officio* member of the Judicial Service Commission, but he or she may serve as the appointed member, if appointed by the King acting in accordance with the advice of the Chief Justice.¹³ The current President of the Court of Appeal, President Ramodibedi, is not currently a member of the Judicial Service Commission.

Under section 123 (2) (c) of the Constitution, the Chief Justice and other judges of the High Court are *ex officio* judges of the Court of Appeal. The Lesotho Court of Appeal has articulated the rationale and the operation of this provision as follows:

"As regards the alternative contention, relating to the

¹⁰ Section 119(1) and Section 130.

¹¹ Section 128.

¹² Section 124 (1) and (2) of the Constitution.

¹³ Section 132 of the Constitution.

perception of the public, this overlooks section 123(2)(c) which provides that the judges of the Court of Appeal include "the Chief Justice and the puisne judges of the High Court ex officio". There is no room for the "perception" raised by the appellant, if the Constitution - the supreme law of Lesotho - itself provides in the clearest terms for that very State of affairs. That it does so is doubtless for the reasons suggested by Guni J in her judgment: the fact that Lesotho is a poor country, drawing on a small pool of skilled lawyers. The balance struck in the Constitution is between a situation in terms of which it is possible to convene a Court of Appeal bench drawing (in part or in whole, as exigencies require) on full-time members of the High Court, but also (pursuant to section 124 of the Constitution) to appoint suitably qualified other persons to serve as Judges of Appeal on a non-full-time basis."¹⁴

President Ramodibedi is the only permanent member of the Court who is a citizen of Lesotho. Other members of the court are retired judges from South Africa who, with very few exceptions, were previously judges of the Supreme Court of Appeal of South Africa, the second highest court of appeal in South Africa.

As an indication of the *ad hoc* nature of the Court of Appeal, the justices of the Court of Appeal, including the President, do not earn a salary and are instead paid a sitting allowance for each court sitting

¹⁴ *Sole v Cullinan and Others* (C of A (CIV)29/2002), [2004] LSHC 153, Delivered on 10 December, 2004 at paragraph 28.

and an additional allowance for reading and preparing.¹⁵ Their remuneration is not governed by the Statutory Salaries Order No 8 of 1972, as amended by the Statutory Salaries (Amendment) Act No. 3 of 1994, which governs the remuneration of the Chief Justice and other judges of the High Court. Justices of the Court of Appeal come to Maseru, the seat of the judiciary, for court sessions and depart at the end of the session. The Court follows a commendable practice of delivering judgments at the end of each session in all cases heard during a session. All those who commented on the Court emphasised its efficiency and the speedy manner in which it delivers judgments.

According to the justices of the Court of Appeal, the Court has a very light caseload. Since its inception, it has dealt with very few, if any, appeals from civil trials and deals mostly with appeals emanating from motion proceedings.¹⁶ The justices expressed the view that the current workload of the Court does not justify a full-time Court of Appeal. They also expressed concern that the real disputes between the parties are never dealt with in courts, as lawyers focus mainly on technical points and other procedural issues.

The High Court

The King, acting in accordance with the advice of the Prime Minister, appoints the Chief Justice and appoints judges of the High Court, acting in accordance with the advice of the Judicial Service Commission.¹⁷ There are eleven judges of the High Court. Concerns

¹⁵ We were not able to establish the legal basis upon which the allowances payable to the justices of the Court of Appeal are determined. Our attempts to secure documents setting out these allowances were unsuccessful.

¹⁶ The justices of the Court of Appeal that were interviewed, including retired Judge Steyn could not recall hearing an appeal from a civil trial.

¹⁷ Sections 120 (1), (2) and 120(5) of the Constitution.

were expressed on the quality of justice in the High Court. This was based on the delays in delivering judgments and the competence of some of the judges of the High Court. Some attributed this to the fact that judges of the High Court are generally drawn from the ranks of registrars and magistrates.¹⁸ The lack of appointment of lawyers from private practice was attributed to the salary of judges, which, we were told, is not attractive to many successful legal practitioners.¹⁹ Apart from remuneration, there is the absence of the tradition, common in other jurisdictions, that when members of the bar are invited to accept appointment to the bench, they consider themselves obliged to accept the appointment.

At the meeting with the judges, they appeared demoralized and had a litany of complaints ranging from being overworked, lack of facilities, failure by the Chief Justice to attend to their complaints, poor pay, lack of leadership, to failure by the President of the Court of Appeal to invite them to sit in the appeal court and allegations of his unfair persistent criticism of their work. However, they candidly admitted that there are delays in delivering judgments. They attributed this to pressure of work and lack of proper facilities.

Delays in the administration of justice impede the rights of the parties to access justice and may violate the right to trial within a reasonable time at least in criminal cases.²⁰ They are a matter of

¹⁸ Lesotho is not alone in appointing judges from the ranks of registrars and magistrates. Tanzania follows the same practice. In South Africa judges are also appointed from the ranks of magistrates, although this is a recent development.

¹⁹ The remuneration of the Chief Justice and the judges of the High Court are set out in a Schedule to the Statutory Salaries Order No 8 of 1972 as amended by the Statutory Salaries (Amendment) Act No. 3 of 1994. This schedule is updated from time to time. We were unable to get an updated schedule reflecting the current salaries of judges.

²⁰ The right to access to justice before independent, impartial and competent courts established by law is enshrined, *inter alia*, in Article 14(1) of the International Covenant on

public concern and have drawn adverse comments from the Court of Appeal²¹ and the Law Society, which have called upon the Chief Justice to take corrective measures in respect of the delays.²² They have also triggered an investigation into the causes of the backlog in the High Court by a Parliamentary Portfolio Committee on Public Safety, Justice and Law and which reportedly blamed the backlog of cases in the Lesotho courts “on laziness by both judges and lawyers.”²³

Under international law and standards government are required to ensure that the judiciary has sufficient human and financial resources for the timely administration of justice.²⁴ The judiciary in particular is required to ensure that it administers justice in a timely manner. Indeed, a judge is required to “perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with

Civil and Political Rights (ICCPR), to which Lesotho, as a party, is bound to comply. Access to justice is also inherent in Article 2(3) of the ICCPR, guaranteeing the right to a remedy for violations of rights enshrined in the ICCPR. The right to justice in proceedings without undue delay is set out in Section A(2)(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and People’s Rights. The right of people charged with a criminal offence to trial within a reasonable time is guaranteed in Article 14(3)(c) and Article 9(3) (the latter of which is applicable to individuals detained pending trial) of the ICCPR.

²¹ *Otubanjo v Director of Immigration and another* (35/05) [2006] LSCA 7 (11 April 2006) at paragraphs 19-25.

²² Letter of Law Society addressed to the Chief Justice dated 24 April 2006.

²³ We were not able to secure a copy of the report of the Portfolio Committee and had to rely on media reports for its findings. See “Court Backlog: Lazy judges blamed”, *Lesotho Times* 10 February 2010.

²⁴ Principle 7 of the Basic Principles on the Independence of the Judiciary, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by UN General Assembly resolutions 40/43 of 29 November 1985 and 40/146 of 13 December 1985.

Human Rights Committee General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/ Rev.1/Add.13 (2004), paragraph 4. (The Human Rights Committee is the body of independent experts, established under the ICCPR, and mandated therein to monitor the implementation of the treaty by States which are parties to it. Among other things, it adopts General Comments which provide authoritative interpretation of States’ obligations under the provisions of the ICCPR; it also periodically reviews each State Party’s implementation of the treaty and publishes conclusions and recommendations following such reviews and for those States which are parties to the Optional Protocol to the ICCPR, makes findings on cases submitted alleging violations of a State’s obligations of the ICCPR in respect of States that are parties to the Optional Protocol to the ICCPR.)

reasonable promptness.”²⁵ The Commonwealth’s Latimer House Guidelines (which are annexed to the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government), which deal with the preservation of the independence of the judiciary, address the issue of funding of the judiciary and provide:

“Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.”²⁶

Sitting of High Court Judges in the Court of Appeal

Shortly after his appointment, President of the Court of Appeal Ramodibedi wrote a letter to the Chief Justice and informed him “it will no longer be necessary to use the High Court judges for the Court of

²⁵ Principle 6 and 6.5 of the Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, supplementing the UN Basic Principles on the Independence of the Judiciary. See also Principle IV (d) of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, approved by the Commonwealth Law Ministers and endorsed by the Commonwealth Heads of Government in 2003. (They are also known as “the Latimer House Principles”) (Superior Court decisions should be published and accessible and be given in a timely manner).

²⁶ Guideline II paragraph 2 of Latimer House Principles

Appeal until further notice.”²⁷ The President of the Court of Appeal cited the backlog of cases in the High Court as one of the reasons for this decision. It would appear that one of the unarticulated reasons for not inviting High Court judges to the Court of Appeal was a concern by the President of the Court of Appeal about their ability and competence. This impression emerges generally from the attitude of the President of the Court of Appeal as well as from the comments of judges of the Court of Appeal.

The President of the Court of Appeal, in a letter to the Prime Minister, expressed the view that invitation to sit in the appeal court must be based on merit and that not all judges of the High Court deserve to sit on the appeal court.²⁸ In addition, the judges of the Court of Appeal told us that the High Court judges who are invited to sit in the appeal court, invariably do not participate in the debates during the hearing and are not assigned to write judgments. In addition, they also commented adversely on the quality of some of the judgments of the High Court.

On the other hand, the Chief Justice and the Judges of the High Court take the view that, as they are *ex officio* judges of the Court of Appeal in terms of the Constitution, they each should be given an opportunity to sit in the apex court and that this must be done on a rotational basis. As we show later on, the decision not to invite High Court judges to sit in the Court of Appeal taken by the President of the Court of Appeal without prior consultation, stoked the fires of the battle for leadership of the judiciary. Indeed, whether the judges of

²⁷ Letter of the President of the Court of Appeal dated 11 February 2009.

²⁸ Letter of the President of the Court of Appeal addressed to the Prime Minister dated 5 December 2012.

the High Court had to be invited to sit on the Court of Appeal, and if so, the criteria for inviting them and to whom these invitations were to be addressed, provided the battleground for the leadership dispute.

The President of the Court of Appeal

The King appoints the President of the Court of Appeal on the advice of the Prime Minister.²⁹ The predecessors to the current President of the Court of Appeal were expatriates. They would come to Maseru for the sessions of the Court of Appeal and they did not generally attend State or other ceremonial functions. In addition, the administrative duties associated with the Court of Appeal did not require the President of the Court of Appeal to be resident in Lesotho throughout the year. As pointed out above, the current President of the Court of Appeal does not sit on the JSC and is only consulted on appointments to the Court of Appeal. Other than the functions and powers associated with the functioning of the Court of Appeal, the President of the Court of Appeal does not have any other constitutional powers and functions.

The *ad hoc* nature of the Court of Appeal, the fact that its judges including its President are paid a sitting allowance as well as the fact that the President of the Court of Appeal has no additional functions beyond those associated with the running of the appeal court, meant that it was not necessary for a President of the Court of Appeal to remain in Lesotho beyond the court sessions. But it also meant that it was not necessary for the President of the Court of Appeal to attend

²⁹ Section 124(1) of the Constitution. In terms of section 124(4), if the office of the President of the Court of Appeal is vacant or if the President is, for any reason, unable to exercise the functions of his or her office, the King acting in accordance with the advice of the Prime Minister, and after consultation with the President of the Court of Appeal if he or she is available, appoints one of the judges of the Court of Appeal or any person who is qualified to be appointed as a judge of the Court of Appeal.

State functions and other official functions except those that occurred during the court sessions. It was generally accepted that the Chief Justice, as the head of the High Court and a perennial fixture on the domestic political scene, would attend State and official functions and represent the judiciary. It was also accepted that the Chief Justice is responsible for the administration and supervision of the High Court and subordinate courts, while the President of the Court of Appeal was responsible for the administration of the Court of Appeal.

President Ramodibedi became the first Lesotho citizen to be appointed permanently to the Court of Appeal in 2008 and later into the position of its President in 2009. The powers and functions of a President of the Court of Appeal have not changed with his appointment to this position. At the present time, the Court of Appeal still sits only twice per year. This has allowed the President Ramodibedi to take up the position of the Chief Justice of the Kingdom of Swaziland and the head of the judicial branch of Justice government in that country. But unlike his predecessors, President Ramodibedi, however, attends State and other ceremonial functions in Lesotho. As we indicate below, the issue of the head and leadership of the judiciary in Lesotho arose shortly after his appointment as the President of the Court of Appeal in Lesotho.

The Chief Justice

The King appoints the Chief Justice, acting in accordance with the advice of the Prime Minister.³⁰ Chief Justice Lehohla was appointed to this position in 2002. Unlike the position of the President of the

³⁰ Section 120(1) of the Constitution.

Court of Appeal, the position of the Chief Justice is a salaried full-time position.

Apart from presiding in the High Court and performing all functions associated with the running of the High Court, the Constitution confers certain additional powers and functions on the Chief Justice. These powers include administering the oath of office to the King or Regent, as the case may be;³¹ serving as the chairperson of the JSC;³² selecting members for any tribunal which may consider the removal from office of an appointee to the Constituency Delimitation Commission,³³ removal of the Chief Electoral Officer,³⁴ removal of the Director of Public Prosecutions,³⁵ or removal of the Auditor General;³⁶ advising the King on of the appointment of judges to the Council of State,³⁷ ,amongst others.

Although the Chief Justice is an *ex officio* judge of the Court of Appeal, we were told that he does not sit on that court. There were suggestions that, for the last ten years, he has not sat in contested matters in the High Court because of the potential to be overruled by judges of the Court of Appeal, whom he reportedly considers to be below him in status as the head of the judiciary. He has refuted these allegations, citing the administrative workload as reason for not sitting in the High Court.

³¹ Section 51(3) of the Constitution.

³² Section 132(1) (a) of the Constitution

³³ Section 66(6)(a) of the Constitution.

³⁴ Section 138(7)(a) of the Constitution.

³⁵ Section 141(6)(a) of the Constitution.

³⁶ Section 142(6)(a) of the Constitution.

³⁷ Section 95(2)(c) of the Constitution.

As pointed out above, the Chief Justice attends State functions and other ceremonial functions. And the issue of judicial leadership did not arise until the appointment of President Ramodibedi. Both attend these functions and the issue of seniority and who is the head of the judiciary has arisen sharply. It is this dispute over seniority and leadership of the judiciary that has led to the crisis in judicial leadership that is the subject matter of the present Mission.

Conclusions on the Legal Context

The President of the Court of Appeal is the head of the apex court whose decisions are binding on the High Court and other lower courts. The Chief Justice is the head of the High Court and has additional administrative and ceremonial functions conferred on him by the Constitution, which are not conferred on the President of the Court of Appeal. In addition, the remuneration of the President of the Court of Appeal is governed by the Salaries Order No 1972 as amended, which governs the remuneration of the Chief Justice and other judges of the High Court and other office bearers. But the Constitution does not, however, expressly deal with the question of who is the head of the judiciary. Whether it does so implicitly is a contested issue and both the office of the President of the Court of Appeal and the office of the Chief Justice argue that the roles they have historically played in the judicial system, taken together with the powers and duties assigned to them by the Constitution, support the argument that each is the rightful head of the judiciary.³⁸

³⁸ Correspondences and statements by the Chief Justice and the President of the Court of Appeal

Historical Context for the Crisis

Understanding the crisis of judicial leadership in Lesotho requires both an understanding of Lesotho's Constitution and an understanding of how post-colonial legacies continue to impact on the structure and function of government within the Kingdom. Having considered, above, the constitutional framework which establishes the Court of Appeal as the apex court that sits on an *ad hoc* basis under the leadership of the President of the Court of Appeal, we shall now consider the context which drives the debate over who - between the President of the Court of Appeal, as the head of the apex court, or the Chief Justice as the administrative head of the High Court and who has additional administrative and ceremonial functions - is properly the head of the judiciary. The *ad hoc* nature of the Court of Appeal and administrative functions of the Chief Justice, the clash of personalities, and the order of precedence for protocol purposes, provide this context.

Ad Hoc Court of Appeal and Administration by Chief Justice

Lesotho, Botswana and Swaziland have each historically had a Court of Appeal comprised of expatriate judges who reside in their countries of origin, typically the Republic of South Africa, and who then sit on the Courts of Appeal for these Southern African countries on an *ad hoc* basis. This is a direct result of how Lesotho, Botswana, and Swaziland, were each administered by colonial officials from out of the British dominion of South Africa. The independent States of Lesotho, Botswana and Swaziland continue to rely mainly on judges from South Africa to compose the benches of their highest courts. The judges on these apex courts have not, therefore, typically been full-time within these countries' judiciaries.

As pointed out above, in Lesotho, the Court of Appeal typically sits twice per year and the Court of Appeal judges, including the President, come to Maseru only while the Court is in session. It is for this reason that the Chief Justice, as head of the High Court, has generally been seen by some as the head of the judiciary, as he sat and was present throughout the year to ensure the smooth and efficient running of the High Court and the lower courts and was thus the highest judicial official, from an administrative perspective, in Lesotho. He also attends State functions and had performed certain constitutional powers and functions, including swearing in of His Majesty The King, the Prime Minister and all the judges. In addition, he presided over the JSC.

The battle about judicial leadership in Lesotho appears to have started with the appointment of Justice Ramodibedi as the first Mosotho (a Lesotho citizen) President of the Court of Appeal in 2008. He had been appointed as the first citizen Justice of the Court of Appeal in 2002, the same year that Justice Lehohla was also appointed as Chief Justice the High Court. The place of the Court of Appeal as the apex court in Lesotho was always clear under the Constitution, but the practical reality of how that court was constituted and the reliance on the *ad hoc* assemblage of foreign judges for short periods of time had, up to the time that Justice Ramodibedi was appointed as its President, placed practical limitations on the role that the justices of the Court of Appeal, and in particular its President, could play in judicial administration.

Since about 2008 the Chief Justice and the President of the Court of Appeal have each been contending that he should be

acknowledged, ahead of the other, as the head of the judiciary. The absence of an express provision in the Constitution dealing with judicial leadership exacerbated the dispute, resulting in conflicting claims to judicial leadership by the Chief Justice and the President of the Court of Appeal.

The Clash of Personalities

The Chief Justice and Justice Steyn, the predecessor of the present President of the Court of Appeal, worked relatively well together and the issue of leadership did not arise. Both the Chief Justice and Justice Steyn confirmed this. It was accepted that each of the two senior judges has different powers and functions under the Constitution and, where they were required to cooperate with one another this was done. In addition, in Botswana, where a similar judicial hierarchy exists, the President of the Court of Appeal and the Chief Justice work well together and the issue of leadership has not arisen.³⁹

The appointment of President Ramodibedi as the first Mosotho President of the Court of Appeal in 2008 marked the beginning of the conflict. His claim to seniority and thus the leadership of the judiciary of Lesotho was fortified by both his position as the presiding judge in the apex court and the order in which government officials appear on the protocol list (order of precedence), which put him ahead of the Chief Justice. Unlike his predecessors, who were non-citizens, he has attended State functions where the issue of seniority features prominently in matters of protocol.

³⁹ It should be noted that, in Botswana, the issue of seniority is regulated by the Court of Appeal Act of 1973, which provides that the President of the Court of Appeal ranks above the Chief Justice. (Section 5(1) : "The Chief Justice shall rank and take precedence next to the President of the Court of Appeal").

The Chief Justice, who, all along, attended State functions as the most senior judge at those functions and was regarded as the head of the judiciary, was suddenly faced with another senior judge who attended State functions and asserted his claim to seniority and the leadership of the judiciary at these functions. The Chief Justice, too, was apparently not prepared to relinquish the position that he and his predecessors had held without interference in the past. Both senior judges were conscious of their powers and each believed that he was senior to the other. Both are persons with strong personalities, who have been uncompromising in their claim for the leadership of the judiciary. As most of those we interviewed put it: “there were two bulls in one kraal”. A stage was set for a fight over leadership of the judiciary, and although the conflict may be motivated by the personalities of the officeholders involved, it does raise important questions of constitutional interpretation and policy.

Each officeholder appears to have used every available opportunity to assert his leadership and each objected to any statement or conduct that he perceived as undermining his leadership over the other. The first signs of assertion of leadership by the President of the Court of Appeal were sent in 2009 when, shortly after his appointment as President, and without prior consultation, he informed the Chief Justice that judges of the High Court would no longer be invited to sit in the Court of Appeal. He took this decision notwithstanding: (a) the fact that, under the Constitution⁴⁰, and as held by the Lesotho Court of Appeal⁴¹, judges of the High Court are *ex officio* judges of the Court of Appeal, and (b) an arrangement between the Chief Justice and President Steyn – immediate predecessor to

⁴⁰ Section 123 (2) (c) of the Constitution.

⁴¹ See note 14 above.

President Ramodibedi – that judges of the High Court would be invited to sit on the Court of Appeal on a rotational basis.⁴²

At the height of the tension in December 2012, the Chief Justice did not convene the JSC to consider appointments to the Court of Appeal. When the President of the Court of Appeal decided thereafter to invite two acting judges of the High Court to sit in Court of Appeal without consulting the Chief Justice, the Chief Justice construed this as an attempt to undermine his authority and refused to permit those acting judges to sit in the Court of Appeal.

While a clash of personalities appears to be the ultimate cause of the leadership crisis, we think that it is a manifestation of the underlying problem, namely, the absence of a provision in the Constitution dealing with the issue of the head of the judiciary. This silence provided a fertile ground for the clash of personalities and has resulted in conflicting claims to leadership of the judiciary; this reportedly has been played out at every available opportunity in the public arena.

In asserting his claim to leadership, the Chief Justice relies on the nature of the functions and powers that are conferred on him by the Constitution. He maintains that these are the sort of powers and functions that are conferred upon the head of the judicial branch of government. For his part, the President of the Court of Appeal relies

⁴² The Chief Justice cited a letter of 19 April 2005 by President Steyn in which President Steyn said:

“In order to demonstrate the commitment of this Court also in its composition to be accountable to the people of the Kingdom, the Court would seek to accommodate one, or possibly two Judges of the High Court (either permanent or acting) who would join our complement at the October session on an *ad hoc* basis to sit with us in cases set down on the roll. You would advise me of the names you propose.”

on the fact that he sits in the apex court, which he maintains, makes him the *de facto* head of the judiciary. In addition, he draws attention to the official order of precedence, which puts him ahead of the Chief Justice.

In Lesotho the determination of ranking under the official protocol list appears to be accepted as synonymous with determining seniority within the judiciary and thus its leadership, although the power of the Executive to do so is disputed. A significant amount of attention has therefore been paid by both contestants to the guidance, which may be offered on the issue of the head of the judiciary by their relative ranking in the Lesotho State protocol.

As we consider the role that the official order of precedence in State protocol has played in the judicial crisis in Lesotho, it should be noted that in our view the protocol established by Cabinet on behalf of the Executive, while providing insight into the Executive's view of each officeholder's rank within government, is not dispositive of the issue as a matter of constitutional interpretation. We do not wish to comment on whether or not it has the force of law. It may, however, point to policy considerations that should be taken into account when considering who should be the head of the judiciary, in the absence of clear constitutional or legislative guidance.

The Official Order of Precedence

The protocol list that determines the order of precedence is the only official document that deals with the issue of seniority between the Chief Justice and the President of the Court of Appeal. The legal profession is divided on the issue of which officeholder is the rightful

head of the judiciary, and that division runs through the discussion of the weight to be attached to the protocol list and the question of whether the Executive has the constitutional authority to decide on the leadership of the judiciary.

Cabinet determines the official order of precedence on protocol matters. This governs the order in which State and government officials appear in the protocol list and is commonly considered to reflect the ranking in seniority of the various government officials across all three branches of government. It is not clear where Cabinet derives the power to determine the protocol list. In the exercise of this assumed power, Cabinet decided, on 3 February 1994, that the President of the Court of Appeal should appear before the Chief Justice on the protocol list.⁴³ This decision was subsequently endorsed by Cabinet on 23 September 1997, when it approved "A Guide to Official Protocol – A Manual of Operations for Protocol Officers In Lesotho", which dealt with the order of precedence.⁴⁴ This Cabinet decision was reaffirmed in March 2009.⁴⁵ As recently as June 2012, the Department of Foreign Affairs confirmed the continued effectiveness of these earlier protocols, which ranked the President of the Court of Appeal above the Chief Justice in order of precedence.⁴⁶

The role of Cabinet in determining seniority within the judiciary is contested. As noted, above, in our view, the protocol endorsed by Cabinet is not decisive in answering the question of who, under the Constitution, heads the judiciary. Nevertheless, because of the significance that has been placed on the issue of protocol in this

⁴³ It is not clear what prompted this decision.

⁴⁴ See Minutes dated 19 June 2012 from Foreign Affairs addressed to the Registrar of the High Court.

⁴⁵ See Minutes dated 27 March 2009 from B. Leleka, Government Secretary, addressed to Foreign Affairs and International Relations.

⁴⁶ See "Chief Justice resumes battle for seniority", Sunday Express (1 October 2012).

debate, we shall consider the debate over the role that Cabinet has played in endorsing a judicial head for protocol purposes.

The Role of Cabinet in Determining the Head of the Judiciary

In September 2008, shortly after the appointment of Mr. Justice Ramodibedi as the President of the Court of Appeal, the office of the Attorney- General was requested by Cabinet to give a legal opinion and advice on the order of precedence with respect to the offices of the Chief Justice and the President of the Court of Appeal.⁴⁷ This appears to have been the early days of the dispute over the leadership of the judiciary.

The Attorney General expressed the view that “the determination of the State’s order of precedence is in the realm of the exercise of *prerogative* powers by the Executive branch of the State.”⁴⁸ He concluded that:

“The way forward regarding the dispute as to who of the two high office-bearers ranks above the other is then best left for consideration by the Executive arm of the State, principally guided by what the relevant constitutional provisions, on balance, entail, but always at large to take into consideration any relevant factor as against another. I repeat: in such circumstances, the Executive cannot be successfully challenged for having taken a particular view as opposed to another which others might feel that it

⁴⁷ See “AG, Law Society presented conflicting views on spat”, *Lesotho Times* , 27 October 2011.

⁴⁸ Legal Opinion and Advice of the Attorney General, 15 October 2008 at 1.

should have taken. We are dealing with a matter that hinges on separation of powers.”⁴⁹

The Law Society of Lesotho disagreed with this aspect of the Attorney-General’s opinion. It argued that Cabinet does not have the power to decide who is the head of the judiciary because the Constitution had already done so. The Law Society argued that “it does not lie with the Cabinet to put up a protocol list which elevates the office of the Chief Justice above that of the President of the Court of Appeal contrary to the constitutional ranking of these offices. That would be tantamount to subversion of the doctrine of separation of powers.”⁵⁰ It argued that “[i]n the judicial sphere, the highest office is that of the President of the Court of Appeal...”

Following this, on 29 March 2009, Cabinet issued a directive restating that in the state protocol, the President of the Court of Appeal is senior to the Chief Justice.

The Chief Justice has never been satisfied with the decision of Cabinet and sought the intervention of the Southern African Chief Justices Forum (SACJF) to prevail on the government of Lesotho to reverse its decision, which it refused to do. It has been reported in the Lesotho press that the Chief Justice has attempted to get the new government to alter the ranking in the protocol list decided upon by the previous government. In June 2012, the Deputy Registrar of the High Court addressed a letter to Foreign Affairs complaining about the flouting of protocol during the inauguration of the Prime Minister, held

⁴⁹ Id at 10.

⁵⁰ Response of President of the Law Society of Lesotho to the Opinion of the Attorney General, dated 14 November 2008.

in June 2012. This was largely perceived as an attempt to get the newly established coalition government to reverse the protocol ranking with respect to the Chief Justice and the President of the Court of Appeal.⁵¹

It should be noted, however, that the determination of the order of precedence by the Executive neither ended nor prevented the dispute over the leadership of the judiciary, which has continued unabated to the present day and has reached crisis levels.

In our opinion, answering the question of whether Cabinet has the power to set an order of precedence for protocol purposes is not essential to answering the question of which officeholder is the head of the judiciary in Lesotho. If the question of who heads the judiciary is an issue to be determined by the Constitution, then it follows that the protocol list, whether lawfully articulated by Cabinet or not, cannot be dispositive of this debate. It is therefore not essential to determine whether Cabinet may lawfully set the order of precedence for protocol purposes, nor is it essential to determine whether, in this instance, the order that Cabinet has articulated accurately reflects the relative ranking of the offices concerned within the hierarchy of government, because the protocol list is inconsequential to the question at hand.

There are further considerations that militate against Cabinet's determination of who is the head of the judiciary. These concerns centre on the separation of powers and judicial independence. The

⁵¹ See "Chief Justice resumes battle for seniority", *Sunday Express*, 1 October 2012, reporting that "soon after [Prime Minister Thabane]-led government came to power the Chief Justice started lobbying again" and that "two days after [Prime Minister] Thabane was sworn in as prime Minister the Chief justice resuscitated his bid to push the government to change the protocol ranking."

judiciary is a co-equal arm of government. It is undesirable and inconsistent with the principle of the separation of powers, which is essential for the independence of the judiciary⁵², that the judiciary should have its leadership determined for it by the Executive. This is especially undesirable in a country like Lesotho where a perception of political influence in the appointment of judges already exists. The statement of the President of the Law Society following the present crisis best illustrates this perception. He was quoted in one of the newspapers as having expressed the view that politicians are to blame for the crisis. He went on to say that "the appointment of the Chief Justice and the Court of Appeal President has been used to perpetuate cronyism and patronage."⁵³

Under the Constitution of the Kingdom of Lesotho,

"The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law."⁵⁴

This is underscored by the principles of international law on the principles of independence of the judiciary.

⁵² See Principle 1 of the UN Basic Principles on the Independence of the Judiciary, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by UN General Assembly resolutions 40/43 of 29 November 1985 and 40/146 of 13 December 1985; Section A (4) (a) and (g) of the Principles and Guidelines on the Right to A Fair Trial and Legal Assistance in Africa; Principles I and IV(d) of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government; See also Section A of the International Bar Association Minimum Standards of Judicial Independence, adopted in 1982; Principle 4 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, as amended .

⁵³ "Politician are to blame for the mess in judiciary", *Lesotho Times* , 31 January 2013.

⁵⁴ Section 118(2).

Under Principle 1 of the UN Basic Principles on the Independence of the Judiciary:

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

And under Section A(4) (a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa:

“The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities”.

If the judiciary is to exercise its judicial functions without fear or favour, if it is to be truly independent, it must exist outside the control or the influence of the other branches of government; it must also be perceived to be outside of such control and influence.

In our view the solution to the ongoing crisis does not lie in Executive decisions that may easily be altered in future. As we discuss further, below, it lies in the clarifying who is the leader of the judiciary in the law, preferably, the Constitution.

We turn next to consider the key episodes in the conflict.

The Key Episodes in the Conflict

The quest for supremacy by the two judicial officers has raged on since 2008, and like a volcano, it erupted and emitted lava intermittently, finally exploding into the public domain at various times. According to the media, the battle for leadership between these two senior judges first became public in mid-2010. The extent to which the battle for leadership has escalated is best illustrated by two episodes that made headlines in the media in Lesotho and captured the attention of the public. The first episode relates to a fight over a senior position on an official convoy during celebration of the King's birthday in July 2012 and the second episode is the cancellation of the January 2013 special session of the Court of Appeal.

The Incident at the Celebration of the King's Birthday

The King celebrated his birthday on 17 July 2012 at Mohale's Hoek. The main event was held in the stadium and lunch was served at a separate venue. An incident involving the motor vehicles of the Chief Justice and the President of the Court of Appeal occurred as the State officials and other dignitaries were leaving the stadium for lunch. The two motor vehicles were vying for a position immediately behind that of the Prime Minister in the convoy of motor vehicles as a mark of seniority over the other.

The position that an individual occupies in the convoy is determined by seniority. Precisely what happened is the subject of conflicting accounts. But what is undisputed is that the driver of one motor vehicle overtook the other motor vehicle so that his motor vehicle was positioned immediately behind the Prime Minister's motor vehicle in the convoy. It is also undisputed that the overtaking motor vehicle executed a dangerous maneuver that almost resulted in two

bystanders being run over by the motor vehicle. The responsibility for this incident is the subject of dispute.

According to the President of the Court of Appeal, when it was time for officials to depart, the more senior officials departed first and, as according to the protocol list the President of the Court of Appeal is ahead of the Chief Justice, the President of the Court of Appeal departed first. As the convoy of motor vehicles was proceeding to the next venue, the Chief Justice allegedly instructed his driver to overtake the President's motor vehicle. The Chief Justice's motor vehicle allegedly made a dangerous maneuver and almost ran over bystanders.

According to the Chief Justice, the President of the Court of Appeal's motor vehicle was parked in front of his motor vehicle. As he was sitting in his vehicle ready to leave, he noticed the President of the Court of Appeal's wife was still getting into her husband's motor vehicle. The Chief Justice considered it safe and appropriate to instruct his driver to drive past. It was at that point that the President of the Court of Appeal allegedly instructed his driver to pass the Chief Justice's motor vehicle.

Each denied the version by the other and they blamed each other for this incident.

We are not able to establish precisely what happened and who between the President and the Chief Justice was responsible for this incident. It is, however, not necessary for us to resolve the irreconcilable conflict between the two versions. What is not in dispute

is the fact that the incident occurred and that it was a manifestation of the ongoing battle for seniority and leadership of the judiciary. State officials and other dignitaries, as well as members of the public, witnessed the incident. This incident was reported in the media.

Cancellation of the January 2013 Session of the Court of Appeal

The President of the Court of Appeal decided to convene a special session of the Court of Appeal that was due to sit in January 2013. There were six cases that were set down for that session. The South African judges who normally constitute the Court of Appeal, together with the President, were not available to attend the session. Faced with that difficulty, the President of the Court of Appeal turned to the High Court Judges, who are, by law, *ex officio* judges of the Court of Appeal. He did not invite permanent judges of the High Court but instead he invited two acting judges of the High Court to sit on the Court of Appeal, namely, Acting Judge Teele and Acting Judge Mosito.

In a letter of 15 November 2012 to the Chief Justice on which both the proposed acting judges were copied, the President wrote:

"This is humbly to inform you that I have decided to use the following Judges in the January 2013 session of the Court of Appeal:

- (1) The Honourable Mr. Acting Justice Teele;
- (2) The Honourable Mr. Acting Justice Mosito.

By copies hereof the concerned parties are hereby informed in order to make appropriate adjustments."⁵⁵

⁵⁵ Letter of the President of the Court of Appeal addressed to the Chief Justice dated 15 November 2012.

The Chief Justice replied on 21 November 2012. In his reply letter, the Chief Justice objected to being “informed” of the decision of the President of the Court of Appeal. The Chief Justice’s objection must be understood in the light of an arrangement between him and the predecessor to President Ramodibedi in terms of which the Chief Justice would propose to the President of the Court of Appeal names of High Court Judges that should be invited to serve in the Court of Appeal, an arrangement that the Chief Justice had previously drawn to the attention of President Ramodibedi. After accusing the President of the Court of Appeal of not paying attention to his previous letters, he wrote:

“This being the case I am not going to allow the two Judges you have made so bold as to say...‘inform’ me that you have decided to use them i.e. Judges Teele and Mosito for the January 2013 session. It is not acceptable to have my authority as Chief Justice of Lesotho undermined by the extraneous ways you manifestly seem determined to pursue without any let-up in sight.

I told you earlier that His Majesty’s Judges are entitled to serve in the Court of Appeal on a rotational basis according as agreed between me and your predecessor.

What I object to in your ‘informing’ me is the implication that I should do your bidding by bowing and scraping. I demur at being used as a rubber-stamp. I am seriously adverse to that.”⁵⁶

⁵⁶ Letter of the Chief Justice addressed to the President of the Court of Appeal dated 21 November 2012.

The President of the Court of Appeal sought the intervention of the Prime Minister “to reverse [the] decision [of the Chief Justice] refusing to allow the Acting Justices in question to do the Court of Appeal Session in January 2013...” It is not clear whether the Prime Minister responded to this request. But barely five days before the start of the January session, the Chief Justice wrote to each of the judges invited to sit on the appeal court saying:

“For reasons I wish not to disclose in this letter you are notified that you do not have my permission to sit in the contemplated coming Court of Appeal session scheduled for 21st to 25th January 2013.”⁵⁷

As a result of this letter from the Chief Justice, the proposed acting judges felt that they could not make themselves available to sit for the January 2013 session. Acting Judge Teele subsequently resigned as an acting judge of the High Court.

And as a consequence of the stance taken by the Chief Justice, the Court of Appeal did not hold its January 2013 session. On the first day on which the Court was due to sit, the President of the Court of Appeal issued a public statement decrying the fact that this “is the first time a Chief Justice has blocked Judges from sitting in the Court of Appeal notwithstanding their legitimate call for national duty and wasted costs to litigants.” He seized this opportunity to assert his leadership of the judiciary, by drawing attention to the provisions of section 123(2) of the Constitution and reminded everyone that “all judges in this country, including the Chief Justice himself, fall squarely

⁵⁷ Letter of the Chief Justice addressed to Acting Judge M Teele dated 16 January 2013.

under the President” and pointed out that “strictly speaking, therefore the President does not need the Chief Justice’s permission to use High Court Judges in the Court of Appeal.”⁵⁸

Against this background, and in the light of international standards, we now turn to consider the impact of the battle for leadership on the relationship between the two most senior judges in Lesotho, the administration of justice, the independence of the judiciary and the image of the judiciary.

Current Relationship between the Chief Justice and the President of the Court of Appeal

The relationship between the Chief Justice and the President of the Court of Appeal has deteriorated to the point that they do not visit each other’s chambers, even though their courts are located in the same precinct and are less than one hundred meters apart. The only occasion when the President of the Court of Appeal would go to the chambers of the Chief Justice is for the swearing in of an appeal court judge. Both frankly admitted that the relationship between them had reached a point where it was impossible for them to work with one another. As the correspondence between the judges show, they never sit down either to discuss matters affecting their respective offices such as inviting High Court judges to sit in the Court of Appeal or to work out their differences.

The language and the tone of the correspondence between the two senior judges, as well as the statements they have made concerning each other vividly capture the extent to which the

⁵⁸ Statement by the President of the Court of Appeal issued on 21 January 2013.

relationship between them has deteriorated. It will be sufficient to refer to one or two letters to illustrate this point.

In a letter dated 11 February 2009, the President decided, without prior consultation with the Chief Justice “to...inform [the Chief Justice] that it will no longer be necessary to use the High Court Judges for the Court of Appeal session until further notice.” The letter made no exception to the Chief Justice.⁵⁹ This decision was made notwithstanding section 123(2) (c) of the Constitution which provides that “the Chief Justice and the *puisne* judges of the High Court [are] *ex officio*” judges of the Court of Appeal.

This decision elicited an angry reaction from the Chief Justice as his letter of 13 February 2009 indicates. He objected strongly to the “exclusion of High Court Judges from service in the Court of Appeal”⁶⁰ and described the President of the Court of Appeal’s decision in a reply dated 13 February 2009 as “baseless” and “indefensible”.⁶¹ He further described as “totally irrelevant, the outwardly plausible but inwardly baseless notion that the exclusion of High Court Judges would free their time up for tackling the backlog there”. In addition, the Chief Justice drew attention to prior cooperation between himself and the former President of the Court of Appeal and arrangements they had made in terms of which the Chief Justice would indicate one or two judges of the High Court who could be invited to sit on the Court of Appeal either permanently or as *ex officio* judges. He also pointed out that “this policy commitment is not something either of us can

⁵⁹ Letter of the President of the Court of Appeal addressed to the Chief Justice dated 11 February 2009.

⁶⁰ Letter of the Chief Justice addressed to the President of the Court of Appeal dated 13 February 2009.

⁶¹ Letter of the Chief Justice addressed to the President of the Court of Appeal dated 13 February 2009.

arbitrarily and unilaterally detract from without prior full discussion”.⁶²

In another exchange, in December 2012, the President of the Court of Appeal addressed a letter to the Prime Minister complaining about “the unsavoury manner in which Chief Justice M. L. Lehohla is conducting himself towards the Court of Appeal”, accusing the Chief Justice of being “determined to cripple the Court [of Appeal]”, and urging the Prime Minister to “intervene as a matter of urgency” as without such intervention, “the Nation will soon be placed in extreme jeopardy”. The relevant parts of the letter read as follows:

“On 15 November 2012, I wrote to the Chief Justice informing him of my decision as President of the Court of Appeal to use Acting Justices Teele and Mosito respectively in the January 2013 Session of the Court of Appeal...That letter elicited an insolent letter from the Chief Justice dated 21 November 2012...As you can see, the letter is not only in bad taste but flouts protocol, to put it mildly. Incidentally, this is not the first time the Chief Justice has addressed insolent letters to me. He simply has no respect for his Seniors. But what is of further concern is the fact that he seems determined to push for all his High Court Judges to sit in the Court of Appeal regardless of merit. This is plainly unreasonable having regard to the poor standard of the Judges who have been handpicked by the Chief Justice without regard to merit. Your Excellency, the Court of Appeal is a Court of excellence. As the highest Court in the country it cannot afford to be otherwise. I

⁶² Id.

therefore humbly seek your support to protect the integrity of the Court.

Your Excellency, it is an undisputed fact that the Court of Appeal is the only Court in Lesotho which is dispensing excellent delivery of justice. We do not have a backlog of cases. The same cannot be said of the High Court that is directionless under the Chief Justice. It seems that the Chief Justice is targeting the Court of Appeal so that it, too, can be labeled a failure like the High Court.

....

In the previous regime, the Chief Justice basked in the knowledge that his younger brother was the Deputy Prime Minister. It is for that reason that for ten (10) years now since his appointment as Chief Justice he has not taken contested matters. He cannot point out to a single judgment of his in all those years. He will tell you that he does administrative work but all the Chief Justices in the whole world do both administrative and judicial work. After all, Chief Justice Lehohla is not the first Chief Justice of Lesotho. All his predecessors took contested matters. Similarly, his obsession with seniority defies logic since none of his predecessors objected to the President ranking ahead of them...

Your Excellency, all indications are that the Chief Justice is now typically positioning himself to be considered the darling of the new Government. He tells everybody who cares to listen that he is a close friend of your Excellency. It is probably for that reason that he had the courage to bring the Judiciary into disrepute when he behaved in a

manner that he did during the King's Birthday celebrations in Mphahlele's Hoek on 17 July 2012, to the embarrassment of His Majesty, His Government and the whole nation."⁶³

It is patently clear from this correspondence that the breakdown of the relationship had reached crisis levels by the end of 2012. This is common knowledge in Lesotho. Indeed, most of the stakeholders interviewed by the mission team expressed the view that the relationship between the Chief Justice and the President of the Court of Appeal has broken down irretrievably. Both the Chief Justice and the President of the Court of Appeal, who told us that it is no longer possible for them to work together in the future, confirmed this. The breakdown in the relationship has had a negative impact on the administration of justice, the image of the judiciary, and its independence.

Impact of the Conflict on Lesotho's Judiciary

"20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law." Human Rights Committee General Comment 32, para 20.

⁶³ Letter of the President of the Court of Appeal addressed to the Prime Minister dated 5 December 2012.

Compromising the Effectiveness of the Administration of Justice

The effectiveness of the justice system was the first casualty of the battle for leadership. That one of the judges who had been invited to sit on the Court of Appeal resigned his acting appointment to the High Court as a result of the controversy surrounding the January 2013 special session of the Court of Appeal is evidence of this. That the January 2013 special session of the Court of Appeal was then cancelled is further damning evidence of the negative impact the crisis has had on the administration of justice in Lesotho. Cancelling the January 2013 session denied the affected litigants the opportunity to be heard in court and have their disputes resolved without undue delay⁶⁴, and will have inevitably resulted in increased costs of litigation for them to shoulder as their legal counsel must prepare for each hearing.

Compromising Public Confidence in the Judiciary

The public watched helplessly as the two most senior judges became embroiled in a rancorous battle for leadership of the judiciary. They witnessed the relationship between the two most senior judges deteriorate in an increasingly public and frequently reported series of contentious encounters, eventually resulting in a breakdown of the system to the point where the Court of Appeal could not hold its January session. Most importantly, the public witnessed the failure of the judiciary to avert the crisis on its own and at the same time failing to address issues of the backlog and other inefficiencies in the system.

While there is no specific evidence showing the extent to which the image and dignity of the judiciary was wounded by this crisis, and we may not know for some time how the credibility of the system in

⁶⁴ See notes 17, 21-22 above.

Lesotho has been challenged in the long term by this power struggle, we think it difficult to fathom how the image of the judiciary could have remained untarnished in these circumstances. We consider that, cumulatively, all the events that culminated in the crisis must have had a negative impact on the image and dignity of the judiciary in the eyes of the public. The cancellation of the session of the Court of Appeal not only undermined access to justice, but it also undermined public confidence in the judiciary.

In our opinion, the public is not likely to have confidence in a judiciary that is led and behaves in this manner.

Compromising the Independence of the Judiciary

The battle for leadership between the President of the Court of Appeal and the Chief Justice has also resulted in threats to the independence of the judiciary. It is significant, that as the dispute escalated there were calls by the President of the Court of Appeal, the Law Society and the media for the Executive to intervene. When the Chief Justice refused to permit the two acting High Court Judges to sit for the January 2013 session of the Court of Appeal, for example, the President of the Court of Appeal urged the Prime Minister to intervene and called upon him to “get the Chief Justice to reverse his decision.”⁶⁵ When the Chief Justice did not, then, convene the JSC to consider the appointment of permanent judges to the Court of Appeal during February 2013, the President of the Court of Appeal sought the intervention of the Minister of Justice and Correctional Services.⁶⁶

⁶⁵ Letter of the President of the Court of Appeal addressed to the Prime Minister dated 5 December 2012.

⁶⁶ Letter of the President dated 14 February 2013.

It is most unfortunate that there were calls for the Executive to intervene.

There is always a danger in inviting the Executive to intervene in matters falling within the purview of the judiciary. This may well create the perception that the judiciary is dependent on the Executive. In addition, this undermines the principle of separation of powers and the independence of the judiciary, which requires not only independence in fact but requires that the judiciary as an institution and individual judges must also be seen to be independent.⁶⁷

It is undesirable that the Executive should be invited to intrude into the domain of the judiciary; this is inconsistent with the principle of separation of powers, on which the independence of the judiciary and the rule of law depend. In addition, "a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."⁶⁸

Of course calls for the Executive to intervene must be understood in the light of the provisions of the Constitution that confers on the Prime Minister the power to request the King to convene a tribunal to investigate any alleged misconduct by the Chief Justice or the President of the Court of Appeal.⁶⁹ In these circumstances, it may well be that, given the context of the crisis in

⁶⁷ See, e.g., Human Rights Committee General Comment 32, UN Doc. CCPR/C/GC/32 (2007), paragraph 19.

⁶⁸ Paragraph 19 of General Comment No 32.

⁶⁹ Section 121(5) (in the case of the Chief Justice) and section 125(5) (in the case of the President of the Court of Appeal).

Lesotho, that a call for Executive intervention may have been considered as the only way forward.⁷⁰ Nevertheless, a judiciary that fails to resolve its internal issues and instead relies on the Executive to do so creates the perception that it is not independent and that undermines its independence. The judiciary as an institution and a co-equal branch of government⁷¹ should be equipped with its own mechanisms for resolving its own internal problems.

Other Issues Affecting the Administration of Justice

During the course of the mission team's interviews with various stakeholders in the justice system, it became clear that the crisis of leadership in Lesotho's judiciary has also had the effect of allowing critical issues affecting the administration of justice in Lesotho to fester. As noted in the introduction to this report, we do not propose to cover these issues in a comprehensive manner but instead point to them as indicators of the severity of the ongoing crisis and its impact on the administration of justice in Lesotho. Additionally, we would endorse calls by the Law Society and other stakeholders for the issues set out below to be comprehensively investigated and addressed.

Proper administration of justice is a function of prompt delivery of judgments by a diligent and competent judiciary that has adequate resources to operate efficiently and that is held accountable by an independent body.

⁷⁰ According to Paragraph 4(a) the IBA Minimum Standards on Judicial Independence, it is not inconsistent with international standards for the Executive to initiate disciplinary proceedings against a judge, but the power to remove a judge from office must vest in a body that is independent of the Executive.

⁷¹ See Principle I of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government.

Backlog and Delays in the Justice System

In the course of our conversations with stakeholders, a repeated complaint was that of a huge backlog of cases in the High Court and delays in the delivery of judgments. Interviewees revealed endless postponements of cases resulting in some cases taking almost fifteen years to be finalised and others taking almost twenty years to reach a judge for a hearing. This situation undermines the rule of law, the right to a fair trial, and is inconsistent with the rights of all parties to legal proceedings to a determination of their rights and obligations without undue delay, enshrined, *inter alia*, in Section A(2)(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.⁷²

As far back as 2009, the Law Society set up a commission to investigate the State of the judiciary, including investigating “any possible corrupt, unprofessional, unethical and [other] practices that may have crept into the judiciary.”⁷³ In 2009, the Parliamentary Portfolio Committee on Public Safety, Justice and Law Cluster conducted an investigation into the backlog of cases in courts. It was reported that this investigation revealed that the huge backlog of cases was a result of officials who did not do their work and that those involved in the justice system did not agree on the causes of the backlog and tend to blame one another.⁷⁴ We did not have sight of this report. At the meeting with the judges, they attributed the backlog to inadequate resources and facilities as well as pressure of work.

⁷² The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa were adopted by the African Commission on Human and Peoples’ Rights. Section A sets out General Principles Applicable to All Legal Proceedings. See also, Principle IV (d) of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government in 2003.

⁷³ See “Chief Justice under fire”, *Lesotho Times*, 4 June 2009.

⁷⁴ “Courts Backlog: Lazy judges blamed”, *Lesotho Times*, 10 February 2010.

International standards require States to ensure that the judiciary and the courts are provided with adequate human and financial resources. This is a guarantee of the independence of the judiciary. For example Section A(4)(v) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides that “States shall endow judicial bodies with adequate resources for the performance of its their functions. The judiciary shall be consulted regarding the preparation of the budget and its implementation. ”

In addition, international standards, such as The Bangalore Principles on Judicial Conduct, specify that judicial competence and diligence, are prerequisites to the due performance of judicial office, and thus require that judges perform all judicial duties efficiently, fairly and with reasonable promptness.⁷⁵

Regrettably, allegations of backlog and delays in the delivery of judgments persist. It is this backlog that was cited by the President of the Court of Appeal as one of the reasons why judges of the High Court were no longer to be invited to sit in the Court of Appeal, a decision that has contributed to the crisis in the judiciary. Delays in the administration of justice deny litigants access to justice and undermine confidence in the justice system and unless addressed may result in people taking the law into their own hands and thus undermining the rule of law. The old adage that justice delayed is justice denied applies to situations like this.

⁷⁵ Principle 6 and 6.5 of the Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, supplementing the UN Basic Principles on the Independence of the Judiciary; see Also Principle IV(d) of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government.

Discipline within the Judiciary

There is a certain standard of behavior that is expected of a judicial officer, whether in public or private life. This is reflected both by standards at national level and in international standards on the independence of the judiciary.

At the national level, a Code of Judicial Ethics generally regulates judicial behaviour. The Chief Justice drew to our attention the Code of Judicial Ethics that is modeled along the Bangalore Principles of Judicial Conduct. This is commendable. However, the extent to which this code has been disseminated throughout Lesotho's judiciary as well as the extent to which it is actually enforced is not clear. Stakeholders raised repeated concerns about the behaviour of some of the judges of the High Court in public, including one incident where a drunken judge allegedly danced on a bonnet of a motor vehicle in public shouting that judges are corrupt. There are other allegations of judges misbehaving in public, however we do not intend to set them out here.

When we raised with the Chief Justice the behaviour of one of the High court judges who was alleged to have conducted himself in a manner unbecoming of a judge at a State function, the Chief Justice told us that he drew his attention to the Code of Ethics and furnished him with a copy of it.

Fostering a culture of accountability among judges is a vital step towards ensuring the overall integrity of the judiciary. And developing codes of judicial conduct can provide an important means of fostering judicial accountability since they serve as both a guide to and a measure of judicial conduct. While the judiciary needs to be independent of any outside influence, judicial independence cannot be

equated to ill-discipline or lack of decorum. Indeed, judicial independence is founded on public trust and, to maintain that trust, judges must uphold the highest standard of integrity and be accountable to those standards.

The Bangalore Principles of Judicial Conduct require that judges “exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.” Their behaviour must be “above reproach in the view of a reasonable observer” and “reaffirm the people’s faith in the integrity of the judiciary”.⁷⁶ To these ends, international standards, including UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles on Judicial Conduct and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, require that judges conduct themselves in a manner which is consistent with preservation of the dignity of their office and the impartiality and independence of the judiciary.⁷⁷

Another useful summary of the standard of behaviour to be expected from a judge was given by the Supreme Court of Canada, which said:

“The public will therefore demand virtually irreproachable

⁷⁶ Principles 1.4 and 3.1-3.2 of the Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, supplementing the UN Basic Principles on the Independence of the Judiciary.

⁷⁷ Principle 8 of the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Principle 4.2 of the Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity; Section A(4)(s) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples’ Rights; Principle 40 of the International Bar Association Minimum Standards of Judicial Conduct.

conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.”⁷⁸

Where therefore a judge is suspected of failing to behave like a judge or being in breach of the judicial code of conduct, fair measures must be taken by a competent, independent and impartial body to investigate the suspected breach in the course of a fair proceeding and deal with the situation appropriately in accordance with the law or rules of court and established standards of judicial conduct. A number of international and regional instruments set out standards for dealing with judicial misconduct⁷⁹

A disciplined judiciary that upholds, and is held to a high standard of ethics, is crucial to the proper administration of justice. It ensures that judges do their work and deliver judgments timeously and that they do not behave in a manner that is calculated to bring the judiciary and the administration of justice into disrepute.⁸⁰ We would venture to suggest that adherence to these standards of judicial

⁷⁸ *Therrien v Canada (Ministry of Justice) and another* [2001] 2 SCR 3. This decision was cited with approval by the Privy Council in *The hearing on the report of the Chief Justice of Gibraltar* referral under section 4 of the Judicial Committee Act 1833 [2009] UKPC 43 Privy Council No 0016 of 2009, advice delivered on 2 November 2009.

⁷⁹ Principles 17-20 of the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Section A(4)(q) and (r) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples’ Rights; Principle VII (b) of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government; Articles 27-31 of the Minimum Standards of Judicial Conduct, adopted by the International Bar Association.

⁸⁰ See notes 66. And 69-71, above.

conduct would have prevented the crisis that resulted from the battle for leadership. Indeed it is doubtful whether the battle for leadership would have occurred in the first place had the judges concerned held themselves to the highest standards of judicial ethics.

Prompt action must be taken against behaviour that is likely to bring the judiciary into disrepute, in a manner that is consistent with international standards. The public is entitled to have steps taken against those who are entrusted with the administration of justice if their conduct falls below that expected of them. This is necessary to maintain public confidence in the judiciary. As stated in the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government judicial independence and accountability “underpin public confidence in the judicial system”.⁸¹ The importance of judicial accountability is also addressed in international standards⁸², and by the provisions of the Constitution of the Kingdom of Lesotho, which deal with the investigation of judges and their removal from office for misbehaviour, section 121 (the Chief Justice and judges of the High Court) and section 125 (the President of the Court of Appeal and judges of the Court of Appeal).

It is in this spirit that we believe that serious consideration should be given to ensuring that there is an independent, impartial, thorough and fair investigation into the question of whether the conduct of one or both of the two judges justifies an inquiry under sections 121 and/or 125 of the Constitution. In the context of such investigation, each should have adequate time and facilities to prepare

⁸¹ Principle VII(b) of the Commonwealth Principles Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government , endorsed by the Commonwealth Heads of Government.

⁸² ID and note 79, above.

and present his case, the right to be represented and have the decision reviewed by an independent, impartial judicial body.⁸³ This may be deemed necessary if public confidence in the judiciary is to be restored and maintained.

It has since been reported in the media that the Chief Justice has taken leave pending his early retirement in August this year. No reasons were furnished for his early retirement. His early retirement will no doubt be taken into consideration in deciding whether or not to pursue an investigation with respect to him under the provisions of the Constitution.

The Structure of the Judicial Service Commission

The President of the Court of Appeal is not a member of the JSC and need only be consulted when appointments to the Court of Appeal are being made. He has to rely on the Chief Justice to convene the JSC, and if the Chief Justice does not do so, others, including the President of the Court of Appeal appear powerless under the Constitution to compel a meeting of the JSC.⁸⁴ This was illustrated by the events of December 2012 and February 2013, when the President called upon the Executive to intervene on his behalf when the Chief

⁸³ Principles 17-20 of the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Section A(4)(q) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights; Articles 27-31 of the Minimum Standards of Judicial Conduct, adopted by the International Bar Association; Principle VII (b) of the Commonwealth Principles Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government.

⁸⁴ Sections 132 and 133 of the Constitution deal with the establishment of the JSC and the appointment of judges. These sections do not prescribe mandatory meetings of the JSC and are silent as to how judges are to be appointed in the event that the Chairman does not convene a meeting of the JSC to fill vacancies on the bench.

Justice declined, as Chairman of the JSC, to convene a meeting of the JSC and to fill the open vacancies on the Court of Appeal.

There is also a concern about the representativeness of the JSC. It is desirable that the JSC be broadly representative of the major stakeholders in the administration of justice and that it functions in a transparent manner. It should generally include representatives from the judiciary, the Executive, the legislature, the legal profession, law teachers and civil society. The JSC should be responsible for making recommendations on all judicial appointments, including the head of the judiciary.⁸⁵ Such recommendations must be based on merit, taking into account the individual's qualifications in law, training and integrity. They should also take appropriate steps to ensure the attainment of gender equality and the removal of other factors of discrimination.⁸⁶

Furthermore the process for appointment must be transparent and safeguard the independence and impartiality of the judiciary.⁸⁷ This is necessary if allegations of cronyism, patronage, and political influence in the appointment of judicial officers, especially senior judges, are to be avoided. A JSC that functions in a transparent

⁸⁵ According to paragraph 3(a) of the IBA Minimum Standards of Judicial Independence, the participation of the Executive and the Legislature in the appointment and promotion of judges is not inconsistent with judicial independence provided the appointment and promotion of judges vest in an independent body in which members of the judiciary and the legal profession form a majority.

⁸⁶ Principle 10 of the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Section A(4)(i)-(k) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights; Article IV (a) of the Commonwealth Principles Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government; Article 10 of the Minimum Standards of Judicial Conduct, adopted by the International Bar Association.

⁸⁷ Section A(4)(h) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights.

manner will address problems relating to convening it as we saw when the appointment of appeal court judges was in issue. It is beyond the scope of this report to consider how the JSC in Lesotho may be restructured and reformed to be more representative, transparent and effective, however, there are a number of models in the Southern African region that Lesotho could consider in reforming the structure of the JSC.

However, to conform to international standards “the mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office” and “must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.”⁸⁸ In addition, the JSC “should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.”⁸⁹

Issues Relating to the Ad Hoc Nature of the Court of Appeal

Some have expressed concern that, since its independence in 1966, Lesotho has only had one Mosotho appointed permanently to the Court of Appeal, namely, President Ramodibedi. While many people that we spoke to, spoke highly of the South African judges who sit on the Court of Appeal, most expressed the view that every attempt should be made to indigenize the Lesotho’s apex court. This raises the question of the availability of members of the legal

⁸⁸ Principle 12, Beijing Statement of Principles on the Independence of the Judiciary (the Beijing Principles).

⁸⁹ Principle 15, Beijing Principles.

profession with the required skill and competence to discharge the duties of the highest appellate court, and cannot be separated from the concerns that have been expressed about the quality of High Court appointments. This is an issue that requires investigation. The Chief Justice alluded to it in one of his letters to the President of the Court of Appeal, when he expressed his dissatisfaction with the decision by the President of the Court of Appeal not to make permanent appointments to the Court of Appeal from the High Court as had been the approach of his predecessor.⁹⁰

Another issue that is linked to the above is the concern about the recruitment of judges of the Court of Appeal. The history of the appointment of judges of the Court of Appeal is considerably more opaque than appointments to the lower courts, since judges are recruited from outside Lesotho on an *ad hoc* basis. Some have described the process as arbitrary, alleging that the vetting and appointment process amounts to “a friend advising a friend about a friend.”⁹¹ This must be seen in the context of the call for the Court of Appeal to be indigenized and the implementation of international standards for selection of judges referred to above.

A further issue that has been raised in relation to the Court of Appeal concerns the desirability or otherwise of establishing an appeal court that is not *ad hoc*. As pointed out previously, the Court of Appeal is an *ad hoc* court that sits twice a year and its justices, including the President, earn a sitting allowance. There are divergent views on this issue. The justices of appeal interviewed by the mission

⁹⁰ See note 60 above.

⁹¹ Rachel Ellett, “Politics of Judicial Independence In Lesotho” (undated report of Freedom House, Southern Africa).

team expressed the view that the workload of the Court of Appeal is relatively light and does not justify the establishment of a permanent appeal court. On the other hand, the Law Society President expressed the view that there is an urgent need for the Court of Appeal “to be transformed into a permanent court with permanent judges in order to facilitate the smooth and expeditious administration of justice.”⁹²

The question, here, seems to be not only whether the caseload of the Court of Appeal mandates the establishment of a permanent apex court, but also whether there is the need, from an administrative standpoint, to have an apex court and President that can effectively oversee the lower courts. To this must be added the issue of the availability of local members of the legal profession, with the requisite knowledge, qualifications, training, skills and integrity, who are competent to sit on the highest appellate court in the country. The issue of whether there is a need for a permanent Court of Appeal will become crucial if the office of the leader and/or head of the judiciary (as prescribed by clarified amended provisions of the Constitution) is to be located in the Court of Appeal. The issue of the desirability of establishing a permanent Court of Appeal has financial implications as well as implications for the availability of sufficient appellate work to occupy appellate judges full-time throughout the year. The feasibility of establishing such a court must be investigated.

We think that the challenge facing the judiciary in Lesotho in this regard is twofold: first, how to empower the sitting judges with adequate skills to perform both trial court work as well as appellate court work so that they can be considered for the Appeal Court; and,

⁹² Letter of 23 January 2013 from the President of the Law Society to the Prime Minister

second, how to increase the pool from which suitably qualified judges can be appointed. Addressing these twin problems would require further investigation into the adequacy of resources allocated for the judiciary including: (a) the adequacy or otherwise of the remuneration and other conditions of service of judges so as to attract skilled members of the legal profession, including lawyers from private practice; and, (b) appropriate and focused judicial education that can empower sitting judges with skills necessary to discharge their judicial functions efficiently.

Establishment of a pool from which to appoint judicial officers

As pointed out earlier, there are concerns about the quality of some of the appointments to the High Court. It was alleged that appointments to the High Court come largely from the ranks of magistrates and registrars. Some have attributed the poor quality of justice in the High Court to this fact.⁹³ We were also told that skilled lawyers from private practice are reluctant to accept appointment to the bench because of poor pay for High Court judges. While it will not always be possible for public sector salaries to match the private sector, every attempt must be made to have a salary package that is attractive to skilled lawyers.⁹⁴ Obviously service in the judiciary should never be financially driven and should be driven by the desire to render a service to the nation, but at the same time the remuneration received by judges should not be prohibitively low to the exclusion of talented and suitably qualified jurists.

⁹³ However, it is not uncommon in other jurisdictions to appoint judges from the ranks of magistrates and registrars. This is the position, for example, in Tanzania, Kenya and Uganda.

⁹⁴ See Articles 14 of the Minimum Standards of Judicial Independence, adopted by the International Bar Association, requiring judicial salaries and pensions to be adequate, secured by law-15 and regularly adjusted to account for price increases, independent of Executive control; Principle IV(b)-(c) of the Commonwealth Principles Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government..

Strengthening of Ethics within the Legal Profession

The legal profession has a central role to play in supplying the pool from which to appoint judicial officers. This requires a disciplined, properly structured and trained legal profession that is dedicated to rendering quality service to the public. It must maintain a high standard of ethics. And the public must be protected from legal practitioners who behave in an unprofessional manner. The public should have recourse to an independent and impartial disciplinary body that will investigate complaints of misconduct against legal representatives.⁹⁵ In addition, the legal profession should be subject to a code of ethics to regulate its conduct.⁹⁶ This is crucial if the public is to have confidence in the legal profession and in the administration of justice. One of the judges of appeal drew our attention to a case where a legal practitioner who previously represented one party in litigation changed sides to represent the opposing party. Conduct of this nature needs to be addressed through training as well as through the formalization of a code of ethics that is independently, impartially, fairly and consistently, enforced.

The Steps that must be taken to Address the Conflict

We are of the view that (a) consideration should be given as to whether the conduct of the Chief Justice and the President of the Court of Appeal should be independently, impartially and thoroughly investigated, and whether they should be held to account for any conduct in breach of the Code of Ethics and international standards, in fair proceedings which respect their rights, including as set out in

⁹⁵ Principle 28 of the UN Basic Principles on the Role of Lawyers, adopted by the UN Congress on the Prevention of Crime and Treatment of Offenders, 1990.

⁹⁶ Principle 26 of the UN Basic Principles on the Role of Lawyers, adopted by the UN Congress on the Prevention of Crime and Treatment of Offenders, 1990

international standards; and (b) the question of judicial leadership must be clarified, preferably in the Constitution.

Accountability for the Crisis

It is not necessary to attempt to apportion blame for the judicial crisis in Lesotho. Nor is it appropriate for us to make any finding on the conduct of the two judges, in view of the fact that their conduct may still be the subject of an investigation under the provisions of the Constitution. That said, judges, in particular those who are in leadership positions, who are entrusted with the responsibility to administer justice to all and to protect the independence, impartiality and integrity of the judiciary as well as its image, must be held to the highest standard of accountability. They must be able to work out or put their differences aside in order to discharge their constitutional responsibility. They should not allow their idiosyncrasies to override their constitutional duties. Judges are the servants of justice and the people; it is not, and cannot be the other way round.

Throughout this raging conflict, the two senior judges reportedly did not attempt to sit down to work out their differences in the public interest. Yet their respective offices are within a stone's throw away from each other and are in the same precinct. Both were very candid when asked about the possibility of working together – they both told us that it is impossible for them to work together in the future. It is indeed a matter of deepest regret that the two judges, who are required by the Constitution to work harmoniously together, have reached the conclusion that they simply cannot do that.

The judiciary does not exist in isolation; it is an institution that serves society by independently, impartially and competently

maintaining the rule of law. To be effective, the judiciary requires the faith and the respect of the community it serves. That faith and respect is critical to the administration of justice. And in any democracy, the enforcement of court orders ultimately depends upon public cooperation; the level of cooperation depends on widely held perception about the independence and impartiality of the judges. Ensuring the accountability of judges is another vital aspect of maintaining public confidence in the judiciary. Judges, who are responsible for the protection of human rights and the rule of law, must be accountable for their actions, and claims of misconduct must be investigated in the course of fair proceedings by an independent and impartial tribunal. When judges engage in conduct that falls foul of accepted standards of judicial conduct set out in the law, the Constitution and international standards, they should be appropriately sanctioned.

The Constitution provides mechanisms for holding judges accountable in the form of sections 121 (in the case of the Chief Justice and High Court judges) and 125 (in the case of the President of the Court of Appeal and Court of Appeal judges).⁹⁷ The judiciary as an institution must be able to take corrective measures where one of its members engages in conduct that might be viewed as unbecoming of a judge. Even if the current crisis has its origin in the lack of clarity of the Constitution to state who is the head of the judiciary, we

⁹⁷ While the provisions of the Constitution of Lesotho dealing with discipline of judges do not expressly provide for an independent review of the decision of the tribunal, as required by the international standards, we believe that the other provisions of the Constitution address this, in particular those dealing with the jurisdiction of the High Court to review decisions of quasi-judicial tribunals (section 119(1) and the appellate jurisdiction of the Court of Appeal (section 47(1)). We therefore believe that the procedures set out in the Constitution do conform to international standards, including Principle 20 of the UN Basic Principles on the Independence of the Judiciary and Section A(4)(q) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, because there is provision for an independent review of the decision of the tribunal.

nevertheless believe that the conduct that precipitated the crisis must still be addressed under the provisions of the Constitution and in a manner that respects international standards.⁹⁸

But that alone is no guarantee that the crisis of this nature will not recur in future, particularly in light of the legal and historical context, which we have described above, as providing the foundation upon which the current clash of personalities was built. We think that future disputes over the leadership of the judiciary may only be averted by explicitly addressing the issue of judicial leadership, in an instrument that has the force of law, preferably in the Constitution.

Addressing Judicial Leadership in the Constitution

We believe that it is preferable that the Constitution should address the question of the leadership of the judiciary. We are of the view that the fundamental law of a country – the Constitution – must address a question that is so fundamental, and which concerns the head of the judicial arm of government, a co-equal branch of government. It is not a matter that should be left for the Executive to decide.

We accept that the fact that the Constitution does not currently expressly address the issue of judicial leadership does not mean it does not do so implicitly. The leadership structure of the judiciary may be indicated in the Constitution with reference to the hierarchy of the courts as well as the powers and functions that are conferred upon each. That said, it is apparent from the arguments made by both offices in support of their claims to judicial leadership that there is a dispute as to whether or not the Constitution clearly implies who heads the judiciary either way.

⁹⁸ See note 79, above.

On the one hand, supporters of the argument that the Chief Justice is the rightful head of the judiciary point to the historical role of that office in overseeing the administration of the court system in the absence of a permanent Court of Appeal and full-time, Mosotho President. At a policy level, some have drawn parallels to other countries such as the United Kingdom, where the Lord Chief Justice is the head of the judiciary and yet he or she does not sit on the highest court, the newly established UK Supreme Court, which is presided over by its President. Some have argued that, by tradition, a Chief Justice is the head of the judiciary and that this is evidenced by the powers and functions conferred on him or her, such as swearing in the head of the Kingdom and the Prime Minister, duties which, for comity, are traditionally reserved for the head of the judicial branch of government.

On the other hand, the argument can be made that the head of the judiciary should also be the judge who presides in the apex court. Supporters of the argument that the Constitution favours the President of the Court of Appeal to head the judiciary point to the President of the Court of Appeal's role as the country's most senior jurist. They point out that the Court of Appeal is the final arbiter on the law and the Constitution and is located at the apex of the judicial hierarchy; if the Chief Justice is unavailable, a judge of appeal or a judge of the High Court can serve in the position but if the President of the Court of Appeal is not available, only another judge of the apex court can step in. They maintain that this reinforces the hierarchy of the Court of Appeal over the High Court and, by extension, points in favour of the President as the country's most senior jurist also being the head of its judiciary.

While there is much to be said in favour of each view, the debate will likely continue until it is finally determined. The High Court has already held, in an *obiter dictum* that the Chief Justice is the head of the judiciary.⁹⁹ This decision does not appear to have been followed and the issue has yet to be considered by the Court of Appeal. It is undesirable that the High Court and the Court of Appeal should be put to the agony of having to decide who between the heads of their respective courts is the head of the judiciary, a matter in which both courts have an interest. Nor do we think that it is appropriate for us to attempt a definitive interpretation of the Constitution and provide a view on who is the head of the judicial branch of government in Lesotho.

We think that the people of Lesotho must speak to this issue, preferably by amending the Constitution so that it explicitly says who is the head of the judiciary. This will end the debate on judicial leadership and prevent future disputes on the issue.

Indeed, with some exceptions, the modern trend in most constitutions is to explicitly State who is the head of the judicial branch of government. Within the continent of Africa, the constitutions of countries such as Ghana¹⁰⁰, Nigeria, Uganda,¹⁰¹ Tanzania¹⁰², The

⁹⁹ *Judicial Officers' Association of Lesotho and Another v The Right Honourable The Prime Minister Pakalithi N O and Others* (CONS/C/3/2005)[2006] LSHC 32 (4 July 2006) at paragraphs 131-132.

¹⁰⁰ Section 125(4) of the Constitution of 1992 (note that the Constitution provides that the Chief Justice is both the "Head of the Judiciary" and its administrative head, "responsible for the administration and supervision of the Judiciary", which may indicate an awareness on the part of the drafters that there is a conceptual divide between the roles of chief jurists and chief administrator in the justice system).

¹⁰¹ Section 133(1) of the Constitution of 1995 (like Ghana, Uganda specifies that the Chief Justice is the head of the judiciary and is responsible for the "administration and supervision of all courts in Uganda").

¹⁰² Section 118(2) of the Constitution of 1977.

Gambia,¹⁰³ Kenya,¹⁰⁴ South Africa,¹⁰⁵ Swaziland¹⁰⁶, Zambia and Zimbabwe¹⁰⁷, explicitly state that the “Chief Justice” is the head of the judiciary. They all sit in the apex court. In the UK, where there is no written constitution, legislation expressly states that the Lord Chief Justice is the head of the judiciary.

A survey of the constitutions of these countries shows that the general trend is to: (i) designate the “Chief Justice” as the head of the judiciary; (ii) provide that the Chief Justice presides in the apex court (with the exception of the United Kingdom, as noted above); and (iii) address the question of judicial leadership in the Constitution, with the exception of the UK which has no written Constitution. The apex courts are variously named High Court (Australia), the Supreme Court (most common law jurisdictions), the Court of Appeal (Tanzania and Botswana) and Final Court of Appeal (Singapore).

That said, however, it is not uncommon to designate a Chief Justice as the head of the judiciary although the Chief Justice does not sit in the apex court. In the UK, for example, the Lord Chief Justice is the head of the judiciary and yet he does not preside in the recently established Supreme Court, which is the apex court.¹⁰⁸ While in the UK the head of the judiciary is determined by legislation, this must be understood in the light of the fact that the UK does not have a written constitution. In Botswana, where a judicial hierarchy situation similar

¹⁰³ Section 121(1) of the Constitution of 1997 (also providing that the Chief Justice “shall be the head of the Judiciary” and is “responsible for the administration and supervision of the courts”).

¹⁰⁴ Section 161(2) of the Constitution of 2010.

¹⁰⁵ Section 165(6) of the Constitution.

¹⁰⁶ Section 139(5) of the Constitution of 2005 (also providing that the Chief Justice is “the head of the Judiciary and is responsible for the administration and supervision of the Judiciary”).

¹⁰⁷ Section 79A of the Constitution of 1979.

to Lesotho prevails, neither the Constitution nor legislation expressly addresses the issue of the head of the judiciary. Legislation addresses the issue of ranking for protocol purposes and provides that the Chief Justice shall rank and take precedence next to the President.

In other jurisdictions the role of the Chief Justice as the head of the judiciary is not explicitly addressed in a constitution but has evolved over time through tradition and is largely implied from the provisions of the Constitution as well as from the fact that the Chief Justice presides at the apex court. In US, for example, the role of the Chief Justice as the head of a co-equal branch of government, is only implied from Article 1, Section 3 of the Constitution of 1789, which stipulates that the Chief Justice shall preside over the impeachment trial of a sitting President, however other than this one clause in the Constitution it is otherwise silent on the role of the Chief Justice. In addition, the Chief Justice presides at the apex court.

The Lesotho situation is fundamentally different. The Chief Justice does not preside at the apex court. Any *de facto* recognition of the Chief Justice as the head of the judiciary that may previously have existed prior to the appointment of Justice Ramodibedi as the President of the Court of Appeal is immediately undermined by the Cabinet's decision on the order of precedence in the official protocol list, which recognises the President of the Court of Appeal as ranking above the Chief Justice, and by the fact that the President of the Court of Appeal presides at the apex court. We believe that it is in the interest of the Kingdom of Lesotho to now explicitly address the issue of leadership of the judiciary, preferably in the Constitution. In addition, The Kingdom must take a policy decision whether the Chief

Justice will be the head of the judiciary but remain in the High Court or whether the head of the judiciary should be the justice who presides at the apex court, the Court of Appeal and the titles of these judges be changed accordingly.

Generally, in our view the head of the apex court should lead the judiciary of a country and should bear the title of Chief Justice. The head of the High Court should bear the title of Judge-President. The Kingdom of Lesotho may also wish to rename the Court of Appeal to be the Supreme Court while retaining the High Court and subordinate court structures. We believe that if the title of Chief Justice is given to the head of the judiciary and the head of the judiciary bearing this title presides in the apex court, this will prevent any future disputes concerning leadership in the judiciary. Each of these steps would require a constitutional amendment. The procedure to be followed in effecting such amendments will be determined by the nature and the extent of the amendment. An amendment that affects the entrenched clauses of the Constitution will require the special procedure set out in the Constitution.

In addition, it is important to bear in mind that where a court is abolished or restructured, international law and standards require that all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure.¹⁰⁹ Members of the court for whom no alternative position can be found must be fully compensated. The abolition of the court of which a judge is a member should not be accepted as a reason or an occasion for the removal of a judge.¹¹⁰

¹⁰⁹ Principle 29 of the Beijing Principles.

¹¹⁰ Id

We should add that there is nothing preventing the Kingdom from enacting legislation dealing with who is the head of the judiciary, provided that such legislation does not interfere with the entrenched clauses and does not amount to a circumvention of the entrenched clauses. In considering the appropriate course to follow, close attention should be paid to the effect of the legislation on the entrenched clauses and to whether there are other constitutional amendments that are necessary in the light of the matters raised in the report. That said, however, we believe that ordinarily, the issue of who is the head of the judicial branch of government must be addressed in the Constitution.

Concluding Remarks

Before setting out our recommendations we wish to set out some key considerations that are relevant in addressing some of the issues referred to this report. We would urge the Kingdom of Lesotho, when reflecting on the appropriate steps to take in resolving the present crisis and other issues affecting the judiciary, to bear in mind these considerations, which are based on international law and standards on the independence of the judiciary.¹¹¹

The judiciary is an important institution in every society. Its importance must be seen against the right of everyone to a fair and

¹¹¹ See generally UN Basic Principles on the Independence of the Judiciary, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by UN General Assembly resolutions 40/43 of 29 November 1985 and 40/146 of 13 December 1985; Principles and Guidelines on the Right to A Fair Trial and Legal Assistance in Africa; Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government; International Bar Association Minimum Standards of Judicial Independence, adopted in 1982; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, as amended.

public hearing by a competent, independent and impartial tribunal established by law that is guaranteed by Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights. An independent judiciary is indispensable to the implementation of this right. The maintenance of the independence of the judiciary is essential to the proper performance of its functions in a free society founded on the rule of law. An independent, impartial, honest and competent judiciary is essential to the rule of law, it is crucial to engendering public confidence and is vital to dispensing justice. It is therefore important that the independence of the judiciary be guaranteed and enshrined in the Constitution or the law.

For their part, Judges must uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities. Judicial accountability and judicial independence underpin public confidence in the judiciary as one of the three pillars upon which responsible government rest.¹¹² Judges should be disciplined in accordance with a fair procedure, which must be administered fairly.¹¹³ When it is proposed to discipline a judge, the reasons for the proposed disciplinary action must be in accordance with international standards on the independence of judges and carefully examined in order to determine whether formal proceedings should be commenced.¹¹⁴ And the process must contain sufficient

¹¹² Principle VII (b) of the Commonwealth Principles Principles on the Accountability of and the Relationship Between the Three Branches of Government.

¹¹³ Id and Principles 17, 19-20 of the UN Basic Principles on the Independence of the Judiciary, Section A (4)(q-r) of the Principles and Guidelines of the Right to a Fair Trial and Legal Assistance in Africa.

¹¹⁴ Principle 18 of the UN Basic Principles on the Independence of the Judiciary ; Paragraph 20 of Human Rights Committee General Comment 32; Section A (4)(n) and (p) of the Principles and Guidelines of the Right to a Fair Trial and Legal Assistance in Africa; Principle 25 of the Beijing Principles.

safeguards to ensure fairness and, in the case of a tribunal, the decision must be subject to review.

To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed. In addition, as set out in the Key Recommendations below, the body that is responsible for the selection of judges, such as the JSC, should include representatives of the higher judiciary and the independent legal profession to ensure that judicial competence, integrity and independence are maintained. And in the selection of judges, “appropriate consideration should be given to the need for progressive attainment of gender equity and removal of other historical factors of discrimination.”¹¹⁵

While the interaction between the judiciary and the Executive is at times unavoidable, Executive powers should not be exercised in a manner that is likely to compromise or have the appearance of compromising the independence of the judiciary. And while Executive powers may affect judges in their office, their remuneration or conditions or their resources, these powers must not be used so as to threaten or bring pressure upon a particular judge or judges. Judges must receive adequate remuneration and be given appropriate terms and conditions of service, which should not generally be altered to their disadvantage during their term of office.

¹¹⁵ Principle IV (a) of the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government.

The judiciary should be provided with the adequate resources necessary to enable it to operate efficiently without any undue constraint. Even in the context of economic constraints, it is nevertheless essential for the maintenance of the rule of law and the protection of human rights that the needs of the judiciary be accorded a high level of priority in the allocation of resources.¹¹⁶ To facilitate this Courts should prepare their own budget, or, where another competent authority prepares the budget, this should be done in consultation with the judiciary. To this extent, the principal responsibility for court administration, must vest in the judiciary.

And finally, we would emphasize that under international law, the requirement of competence, independence and impartiality, enshrined, *inter alia*, in Article 14 of the UN International Covenant on Civil and Political Rights, is an absolute right and is not subject to any exception.¹¹⁷ Paragraph 19 of the Human Rights Committee General Comment No. 32 elaborates on judicial independence and states:

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of

¹¹⁶ Principle 40 Beijing Principles.

¹¹⁷ . Paragraph 19 of Human Rights Committee General Comment No. 32.

political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

Against this background, and in the light of our conclusions as to the constitutional and historical basis for the judicial crisis, we make the recommendations that are set out below.

Key Recommendations

1. The Constitution should be amended to address expressly the question of the head of the judicial branch of government;
2. The Constitution be amended to specify that head of the judiciary bears the title Chief Justice;
3. The Constitution be amended to specify that the head of the judicial branch (titled the Chief Justice) must preside at the apex court;
4. The Constitution be amended to specify that the head of the High Court should bear the title President of the High Court;
5. Consideration should be given to restructuring the Judicial Service

Commission so as to ensure that the major stakeholders in the justice system are represented in it. These should at least include, *inter alia*, the Chief Justice, the Judge President, representatives from the Executive and the legislature, the Law Society, legal academics and civil society. Given its powers in the processes of appointment of judges and judicial accountability the majority of this body should, however, be members of the judiciary. In addition, consideration should be given to additional powers, if any, that should to be given to the restructured Judicial Service Commission;

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

Conclusion

We wish to conclude this report by emphasizing our belief in the indispensability of an independent and stable judiciary in any democracy. An independent and impartial judiciary is the guardian of the rule of law and the Constitution, which is the “supreme law of

Lesotho". The Constitution declares that "if any law is inconsistent with [it]...that other law shall, to the extent of the inconsistency, be void."¹¹⁸ For this reason, the Constitution provides that:

"The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law."¹¹⁹

We therefore believe that it is in the interests of the Kingdom of Lesotho to have a stable independent judiciary that can fulfill its mandate under the Constitution. Every attempt must be made to address the problems afflicting the judiciary and its administration of justice. The first steps will entail ensuring that the most senior judicial officials are accountable to the Constitution from which their powers derive, and finding ways to reform the legal framework governing the administration of justice so as to restore the integrity that may have been damaged by the judicial crisis that has given rise to this mission. Adequate human and financial resources need to be availed to the judicial arm to enable it to fulfill its constitutional role.

¹¹⁸ Section 2.

¹¹⁹ Section 118(2).

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