LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 13/2024

CONS CASE NO. 0020/2023

In the matter between:

DEMOCRATIC CONGRESS	**1ST APPELLANT**
BASOTHO NATIONAL PARTY	**2ND APPELLANT**
POPULAR FRONT FOR DEMOCRACY	**3RD APPELLANT**

AND

LEJONE PUSELETSO	**1ST RESPONDENT**
SPEAKER OF THE NATIONAL ASSEMBLY	**2ND RESPONDENT**
CLERK OF THE NATIONAL ASSEMBLY	**3RD RESPONDENT**
THE PRIME MINISTER	**4TH RESPONDENT**
MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**7TH RESPONDENT**

CORAM: K. E MOSITO P

P.T DAMASEB AJA

P. MUSONDA AJA

M.H CHINHENGO AJA

J. VAN DER WESTHUIZEN AJA

HEARD: 25 April 2024

DELIVERED: 14 June 2024

Mosito P (Damaseb et Musonda, AJA Concurring):

Introduction

[1] I have had the benefit of reading the judgment by my Brother, Van Der Westhuizen AJA (with whom My Brother Chinhengo AJA concurred). While I commend the detailed reasoning and analysis my Brother Van Der Westhuizen AJA has provided, for the reasons which follow hereunder, I regret that I am unable to concur with the conclusion he has proposed or reached that the Ninth Amendment Act to the Constitution of Lesotho does not undermine the basic structure or violate the foundational principles of the Constitution of Lesotho.

[2] At the core of my disagreement lies a profound concern over the Amendment's impact on the democratic process and the role of the electorate in choosing their government. By excluding the Prime Minister's power to advise the King to dissolve Parliament and mandating the King's appointment of the Prime Minister based solely on the National Assembly's

choice, without public participation, the Amendment seriously undermines the principles of democracy enshrined in our Constitution.

[3] Moreover, the perceived diminution of the King's role and powers as the symbolic head of state in this democratic kingdom is a matter of grave concern. Section 1 of the Constitution unambiguously proclaims Lesotho to be a sovereign democratic kingdom, and any amendment that undermines this proclamation must be treated with utmost seriousness. I am firmly convinced that the Ninth Amendment Act has crossed a threshold requiring judicial intervention to uphold the Constitution's integrity and preserve the democratic order. With this conviction, I respectfully dissent and align myself with the view that the Ninth Amendment Act undermines the basic structure of the Constitution and should be declared unconstitutional. I have also read the opinions of my Brothers, P.T Damaseb AJA and P. Musonda AJA, and I agree with their opinions as reflected in their respective judgments. With these considerations in mind, I proceed to present my reasons.

Background

[4] In October 2023, the first respondent (as an applicant), sought an order in the following terms. First, the Ninth Amendment to section 87(5)(a) of the Constitution of Lesotho be declared unconstitutional to the extent that it violates the basic structure of the Constitution of Lesotho per section 1 of the Constitution of Lesotho 1993. Second, he asked that the passing of the vote of no confidence be deferred pending the conclusion of the reforms process in which the Parliament shall

promulgate the comprehensive provisions to regulate the passing of the vote of no confidence. Third, he asked for the costs of the suit. Fifth, he asked for further and/or alternative relief.

[5] The pleadings were subsequently closed, and the matter served before three judges of the High Court (Monapathi, Makara, and Moahloli JJJ) served before the High Court, exercising its constitutional jurisdiction. On 16 February 2024, the High Court (Monapathi and Makara JJ) granted a four-pronged order. First, it granted all the prayers save the one on costs. Second, the court proceeded to declare the amended sections 83 (4) and 87(5) unconstitutional to the extent that they violated the basic structure of the democratic constitution of Lesotho as provided in section 1 of the Constitution of Lesotho. The court declined to decide on the prayer that the passing of the vote of no confidence be deferred pending the conclusion of the reforms process in which the Parliament shall promulgate comprehensive provisions to regulate the passing of the vote of no confidence. Lastly, the court declined to grant an order as to costs. Moahloli J dissented and would have dismissed the challenge to the amendment.

[6] Dissatisfied with the above judgment, the appellants approached this Court on appeal. They advanced seven grounds, the first related to the applicant's *locus standi*. The second complaint is that the court erred in holding that a notice of motion for no confidence was ripe for adjudication and, as a result, justiciable before a court of law. The third ground was also on *locus standi*. The fourth complaint was that the Court did not interpret section 20 of the constitution as it ought to have. The

fifth ground was that the court erred in determining the issue of whether the legitimacy of the Amendment was based on the vote of no confidence. The sixth complaint was that the court erred in not holding that upon a proper interpretation of Standing Order No. 43 and the propriety of the Speaker, concluding that the principle of *sub judice* applied in this case (where there was no order of court staying proceedings of the House). Lastly, they complained that the court *a quo* erred by making conclusions of both fact and law that the import of the Ninth Amendment was to: (a), revolutionise the original scheme and its underlying philosophy to accommodate the intervention of the electorate in the event the Prime Minister advises the King to dissolve parliament; (b), the Amendment misconceptualises the Prime Minister as being the appointee of or elected by the parliamentarians exclusively and therefore removable at their behest exclusively; (c), the two-thirds majority when gauged against the simple majority on removal proves unrealistic and creates an inherent danger of many prime ministers within a few years and hence, destabilisation of the country;(d), the Amendment has removed all the interventionistic mechanisms that were provided in the original text to ascertain the legitimacy of the move to change a prime minister and by extension, government.

The facts

[7] The facts giving rise to this appeal are neither complicated nor in dispute. They are that, in May 2020, the King assented into law a private member's bill to amend the Constitution of Lesotho for the ninth time. The amendment is now styled "the Ninth Amendment to the Constitution of Lesotho". In October 2019, when the National Assembly adopted a

motion to amend the Constitution, the House was in unison – the motion was adopted unanimously. The prevailing mood amongst the members of parliament at the time was that the motion would stabilise parliament and save the country the expenditure for the now regular snap elections. This was against the backdrop of three elections between 2012 and 2017. The country went to snap elections in 2015 and 2017 because the Prime Minister advised early elections after losing the National Assembly's confidence. However, no referendum was held on the issue. It is this Amendment that forms the subject of this appeal before us.

Issues for determination

[8] The following are the key issues for determination in this appeal: First, the applicant's *locus standi* to bring the application. Second, whether the court erred in holding that a notice of motion for a no-confidence vote was ripe for adjudication and justiciable before a court of law. Third, whether the court erred in its interpretation of section 20 of the constitution concerning the no-confidence motion. Fourth, whether the court erred in determining the issue of whether the legitimacy of the Amendment was based on the vote of no confidence. Fifth, whether the court erred in not holding that, upon a proper interpretation of Standing Order No. 43 and the propriety of the Speaker's actions, the principle of *sub judice* applied in this case. Lastly, whether the court erred in its conclusions of fact and law regarding the import of the Ninth Amendment, specifically that: (a); The amendment revolutionised the original scheme and underlying philosophy to accommodate the electorate's intervention if the Prime Minister advised the King to dissolve parliament. (b),That the amendment misconstrued the Prime Minister as the appointee or the

elected of the parliamentarians exclusively and, therefore, removable at their behest exclusively; (c), When gauged against the simple majority requirement, the two-thirds majority requirement for removal proves unrealistic and creates an inherent danger of frequent changes in prime ministers, leading to the destabilisation of the country.(d), The Amendment removed all interventionist mechanisms provided in the original text to ascertain the legitimacy of the move to change a prime minister and, by extension, the government.

The law

[9] Section 1(1) of the Constitution of Lesotho provides that Lesotho shall be a sovereign democratic kingdom. The designation of Lesotho as a sovereign democratic kingdom reflects the nation's constitutional framework, which harmoniously blends the principles of sovereignty, democracy, and monarchical governance. Sovereignty, enshrined in the Constitution, affirms Lesotho's autonomy and right to self-governance, free from external interference. Democracy, a cornerstone of the Constitution, upholds the values of popular sovereignty, political pluralism, and the protection of fundamental rights and freedoms. The institution of a constitutional monarchy pays homage to Lesotho's rich cultural heritage, while the King's role is ceremonial and subject to the Constitution. This tripartite philosophy celebrates Lesotho's independence, commitment to democratic ideals, and respect for time-honoured traditions, forging a unique constitutional order that resonates with the aspirations of the Basotho people.

[10] Section 83 of the Constitution must be understood and applied against the foregoing philosophical backdrop. Even as we celebrate democracy, we must safeguard its sanctity by constitutional means. The Prime Minister's advice to dissolve Parliament is not a whimsical exercise of power but a sacred duty enshrined in Section 83(4) to preserve democratic legitimacy. When a vote of no confidence looms, threatening to undermine the people's mandate, the Prime Minister may counsel the King to dissolve Parliament per section 83(4)(b). This advice rings as a clarion call to return the question of governance to the ultimate sovereigns - the people of this kingdom.

[11] The Prime Minister's advice serves as the constitutional pressure valve, releasing the mounting tensions through the renewing waters of fresh elections. Should the Prime Minister falter in this duty, section 83(4)(b) empowers the King, acting on the counsel of the Council of State, to dissolve Parliament unbidden—a failsafe to ensure democracy's vibrancy. This delicate trinity between the Premier, Monarch, and Parliament upholds our tripartite creed: the Prime Minister's advice channels the sovereign voice, the King's role honours tradition, and Parliament's dissolution rejuvenates democracy's mandate. Continuing to operate under the framework of a Parliament that has been constitutionally dissolved might be seen as inconsistent with the principles outlined in section 1(1). For what sovereign would suffer a renegade regime? What democracy would abide a hobbled house? And what kingdom would abandon its heritage of prudent renewal? No, the path is clear when confronted with a looming vote of no confidence. The Prime Minister must advise, and the King must oblige so that this sovereign

democratic kingdom may hold fast to its constitutional cornerstone - the perpetual rebirth of democratic legitimacy through the people's sacred voice.

[12] At the apex of Lesotho's executive stands the Prime Minister, appointed by the King on the advice of the Council of State as the leader of the majority party or coalition in the National Assembly. This democratic mandate, earned through popular vote, forms the bedrock of the Prime Minister's authority. The Prime Minister shall then advise the King on the appointment of other Ministers from the elected ranks of Parliament. This Cabinet, born of the people's will, serves as the engine driving our nation's governance. However, should the Prime Minister lose the confidence of the National Assembly through a no-confidence vote, a noble path is paved. The Prime Minister may resign with dignity or counsel the King to dissolve Parliament, returning the mantle of leadership to the ultimate sovereign - the voters. Failure to walk this path permits the King, on the Council's advice, to remove the Prime Minister, realigning the executive with the legislature's democratic expression. A judicious check valuing constitutional legitimacy over personal power.

[13] The appointment of a new Prime Minister from the newly mandated majority sweeps clean the ministerial slate. For what use are ministers bereft of the people's trust? Thus, the Constitution wisely binds the fate of the Cabinet to the prime minister who appointed them. This intricate clockwork of appointment, vote, resignation, and removal enshrines a sacred principle - that our ministers must always answer to the democratic

desires of the Basotho people. For in this sovereign democratic kingdom, leadership serves at the pleasure of the sovereign populace.

[14] The Ninth Amendment deleted all three provisos to section 83(4) and replaced them with new provisos without necessarily redrafting the whole of section 83(4). The three newly introduced provisos to section 83(4) are that, firstly, the Prime Minister shall resign if the National Assembly passes a resolution of no confidence in the government.[1] Secondly, and much more problematically, the Amendment provides that "the Prime Minister shall not advise dissolution under this section unless the dissolution is supported by the resolution of two thirds majority of the members of the National Assembly".[2] This new change provides that a Prime Minister who has lost a vote of no confidence can no longer advise dissolution; his only option is resignation. However, the Amendment still suggests that if the Prime Minister can, despite having lost a vote of no confidence, secure a two-thirds majority; he can still advise dissolution. At the heart of these changes is the question of whether these changes have affected the basic structure of the Constitution.

[15] The basic structure doctrine has been developed and applied by the courts, particularly in the context of constitutional law. It essentially holds that there are certain fundamental features or principles of a country's constitution that cannot be altered or abrogated by the legislature or any other authority, even through the process of constitutional amendment. One of the seminal cases that laid the foundation for the basic structure

[1] See section 3(a) of the Ninth Amendment.
[2] See s 3(b) of the Ninth Amendment.

doctrine is the Privy Council's decision in *Bribery Commissioner v Ranasinghe*[3].

[16] In this case, the Privy Council was dealing with a constitutional amendment in Ceylon (now Sri Lanka) that sought to oust the jurisdiction of the courts in respect of certain offences. It held that while the Constitution granted the Parliament the power to amend the Constitution, this power could not be exercised in a manner that would abrogate or diminish the judicial power conferred by the Constitution.

[17] The basic structure doctrine was further developed and refined in subsequent Privy Council decisions, including *Hinds v The Queen*; and *Maharaj v Attorney General of Trinidad and Tobago*.[4] In *Hinds v The Queen*, the Privy Council held that the power of judicial review, which allows courts to strike down unconstitutional legislation, was a crucial part of the Constitution's basic structure and could not be removed or diminished by Parliament.

[18] Another appellation used for this doctrine is the doctrine of unconstitutional constitutional amendment, which highlights the paradoxical notion that even an amendment to the constitution can be deemed unconstitutional if it violates the basic structure or essential features of the constitution itself. The doctrine is also referred to as the doctrine of implied limitations on amending power, suggesting that while a constitution may grant the power to amend itself, this power is not

[3] Bribery Commissioner v Ranasinghe [1965] AC 172.
[4] *Hinds v The Queen [1977] AC 195 and Maharaj v Attorney General of Trinidad and Tobago* (No 2) [1979] AC 385.

absolute and is subject to implicit limits that protect the core principles and values enshrined in the constitution.

[19] Some legal scholars and jurists have termed it the doctrine of essential features or the doctrine of constitutional identity, emphasising that the basic structure doctrine seeks to preserve a constitution's essential characteristics and identity, which cannot be altered or compromised through the amendment process. Other appellations include the doctrine of unamendable constitutional provisions, the doctrine of constituent power limitation, and the doctrine of eternity clauses, all of which capture the idea that certain provisions or principles of a constitution are so fundamental and eternal that they cannot be amended or altered, even by the constituent power or the amending authority.

[20] The doctrine is sometimes referred to as the doctrine of inviolable constitutional principles, highlighting the notion that the basic structure doctrine protects the inviolable and sacrosanct principles upon which the constitution is founded, ensuring that these principles remain intact and immune from any attempt to dilute or undermine them through amendments.

[21] Lesotho is a former British protectorate that gained independence in 1966. The Privy Council is no longer the final court of appeal for Lesotho. However, we can still examine the relevant provisions of Lesotho's Constitution and draw upon the general principles of the basic structure doctrine as developed in Privy Council decisions from other Commonwealth jurisdictions.

[22] Section 85 of the Constitution of Lesotho provides for the amendment procedure, which requires a two-thirds majority vote in both houses of Parliament for most amendments. However, the Constitution does not explicitly mention any "basic structure" or "inviolable principles" exempt from amendment. This absence of explicit provisions regarding unamendable constitutional principles or a basic structure raises significant questions and considerations.

[23] Firstly, it is important to recognise that the basic structure doctrine does not necessarily require explicit constitutional provision to be applicable. In cases like *Bribery Commissioner v Ranasinghe (supra}* and *Hinds v The Queen (supra}*, the Privy Council derived the doctrine of implied limitations on the amending power from the overall scheme and structure of the respective constitutions, even in the absence of explicit textual provisions.

[24] The Privy Council reasoned that certain fundamental features, such as judicial independence and the rule of law, are so integral to the constitutional framework that they cannot be abrogated or diminished, even though the constitution prescribes the amendment process. This reasoning can apply to Lesotho's Constitution despite the lack of explicit provisions on a basic structure or eternity clauses.

[25] However, the absence of such explicit provisions in Lesotho's Constitution presents a potential challenge in identifying and delineating the scope of the basic structure or inviolable principles. Without clear textual guidance, there is a risk of subjective interpretation and potential

disagreement over which constitutional principles or features should be considered part of the basic structure.

[26] This ambiguity could lead to inconsistent judicial interpretations, undermining the certainty and predictability essential for the rule of law. It may also open the door for potential abuse or overreach by the judiciary in defining the boundaries of the basic structure doctrine without clear constitutional guidelines.

[27] Nonetheless, certain fundamental principles, such as the separation of powers, judicial independence, and the protection of fundamental rights and freedoms, are so deeply ingrained in the constitutional framework of Lesotho that they should be considered part of the basic structure, even in the absence of explicit textual provisions. This view finds support in the broader principles of constitutionalism and the rule of law, which recognise that certain foundational principles are essential to the integrity and functioning of constitutional democracy, and cannot be subverted or undermined, even through formal amendment processes.

[28] Ultimately, in the absence of explicit constitutional provisions, the recognition and application of the basic structure doctrine in Lesotho will depend on the interpretive approach adopted by the courts. A strict textualist interpretation could potentially preclude the application of the doctrine, while a more purposive or living tree interpretation can allow for the recognition of implied limitations on the amending power based on the overall scheme and objectives of the Constitution. This complex issue requires careful balancing of competing considerations, such as the need

for constitutional stability and preservation of fundamental principles against the potential for judicial overreach and undermining of the democratic amendment process.

[29] Whether a constitution, as the supreme law of a nation, can be amended is a fundamental issue in constitutional law and has been extensively debated by legal scholars and addressed by judicial pronouncements. One of the most influential perspectives on this issue is the theory of constituent power, propounded by scholars such as Carl Schmitt in his work *'Constitutional Theory'* (Jeffrey Seitzer tr, Duke University Press 2008). Schmitt argued that the power to establish and amend a constitution resides in the constituent power, an extra-legal and extra-constitutional force that precedes and transcends the legal order. This view suggests that a constitution, as a manifestation of the constituent power, can indeed be amended or replaced by exercising that constituent power.

[30] Hans Kelsen[5] contended that a constitutional amendment must operate within the bounds set by the existing constitutional framework. The jurisprudence on this issue has also been shaped by judicial pronouncements in various jurisdictions. The Supreme Court of India, in the landmark case of *Kesavananda Bharati v State of Kerala*[6], upheld the principle of the basic structure doctrine, which holds that while the Constitution can be amended, certain essential features or the basic

[5] In his seminal work *'Pure Theory of Law'* (Max Knight tr, University of California Press 1967).
[6] *Kesavananda Bharati v State of Kerala* [1973] AIR 1461.

structure of the Constitution cannot be altered or abrogated, even by a constitutional amendment.

[31] In contrast, the Supreme Court of the United States, in the case of *United States v Sprague*[7], adopted a more restrictive approach, holding that the power to amend the Constitution is not limited by any inherent principle and that the Constitution can be amended in any manner, provided the prescribed procedures are followed.

[32] The debate over the amenability of constitutions has also been prominent in the context of the Westminster model. In the Australian case of *Egan v Willis*[8], the High Court affirmed that while the Australian Constitution can be amended, the amendments must adhere to the prescribed procedures and cannot undermine the foundational principles of responsible government and representative democracy.

[33] Similarly, the Supreme Court of Canada[9] recognised the Parliament's and provincial legislatures' power to amend the Constitution, subject to the requirements and limitations set forth in the amending formula. Thus, while there is no universal consensus, the prevailing view among legal scholars and judicial authorities appears to be that constitutions, as the supreme law of a nation, can indeed be amended, provided that the prescribed procedures are followed and that certain fundamental principles or the basic structure of the constitution are not violated.

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[7] *United States v Sprague* [1931] 282 US 716.
[8] *Egan v Willis* [1998] HCA 71.
[9] In the Patriation Reference [1981] 1 SCR 753.

[34] A crucial issue in constitutional jurisprudence is whether the constitutional validity of an amendment to a constitution, which is regarded as the supreme law, can be challenged before and tested by a court of law based on the procedure followed. One of the seminal works on this subject is *Constitutional Government and Democracy*, which explores the concept of judicial review of constitutional amendments.[10] Friedrich argues that while the power to amend a constitution is inherent in the constituent power, the amendment process should be subject to judicial scrutiny to ensure the prescribed procedures are duly followed.

[35] Thus, while Parliament has the power to amend the Constitution, the constitutional validity of such amendments can be challenged before the courts on the grounds of non-compliance with the prescribed procedure or if the amendment violates the Constitution's basic structure. Similarly, in the Australian case of *Egan v Willis (supra)*, the High Court affirmed that the constitutional validity of an amendment could be judicially reviewed to determine whether the amendment was made in accordance with the prescribed procedures and whether it undermines the foundational principles of responsible government and representative democracy.

[36] The Supreme Court of Canada[11] also recognised the power of the courts to examine the constitutional validity of amendments, particularly concerning adherence to the amending formula and the division of powers between the federal and provincial governments. However, there are also

[10] Carl J. Friedrich, "*Constitutional Government and Democracy*"(4th edn, Blaisdell Publishing Company 1968).
[11] In the Patriation Reference [1981] 1 SCR 753.

perspectives that advocate for a more limited role of judicial review in the context of constitutional amendments. In the United States, the Supreme Court, in the case of United States v Sprague[12], adopted a deferential approach, holding that the power to amend the Constitution is a political question and that the courts should not inquire into the procedures followed by Congress in proposing and ratifying amendments.

[37] Legal scholars like Vicki C. Jackson[13]contend that judicial review should encompass both procedural and substantive aspects of constitutional amendments, particularly if the amendments violate fundamental constitutional principles or human rights norms.

[38] The next question is whether an amendment to a constitution, properly adopted through the prescribed procedure, can be challenged based on the substantive contents of the amendment. One of the seminal works on this subject explores the tension between the idea of a rigid constitution and the need for constitutional change. Grimm[14] argues that while constitutions should be amendable to adapt to changing circumstances, there should be limits on the substantive content of amendments to protect the core principles and values enshrined in the constitution.

[39] This view finds support in the jurisprudence of various jurisdictions. The Supreme Court of India, in the landmark case of *Kesavananda Bharati*

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[12] *United States v Sprague* [1931] 282 US 716.

[13] Vicki C. Jackson, *Unconstitutional Constitutional Amendments*: A Window into Constitutional Theory and Transnational Constitutionalism, (2019) 33 Opinio Juris 11.

[14] Dieter Grimm, "*The Paradox of Constitutionalism*" by Dieter Grimm (Oxford University Press 2012).

v State of Kerala (supra), held that while the Parliament has the power to amend the Constitution, such amendments are subject to judicial review, and the court can strike down amendments that violate the basic structure or essential features of the Constitution. Similarly, in the case of *Minerva Mills Ltd v Union of India*[15], the Indian Supreme Court reiterated that the power of amendment cannot be used to destroy the basic structure of the Constitution, and any such amendment would be unconstitutional and void.

[40] The Supreme Court of Bangladesh, in the case of *Anwar Hossain Chowdhury v Bangladesh*[16], also upheld the doctrine of the basic structure, holding that the courts can strike down amendments that undermine the fundamental principles of the Constitution. However, some perspectives advocate for a more limited role of judicial review in scrutinising the substantive content of constitutional amendments. As indicated above, in the United States, the Supreme Court, in the case of United *States v Sprague*[17], adopted a deferential approach, holding that the power to amend the Constitution is a political question and that the courts should not inquire into the substance of the amendments if the prescribed procedures are followed.

[41] This view finds support in the work of scholars like Murphy[18] who argues that judicial review of constitutional amendments should be limited to procedural aspects and should not extend to substantive evaluation of

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[15] *Minerva Mills Ltd v Union of India* [1980] AIR 1789.
[16] *Anwar Hossain Chowdhury v Bangladesh* [1989] BLD (Spl) 1.
[17] *United States v Sprague* [1931] 282 US 716.
[18] Walter F. Murphy, *Constitutional Democracy* (Johns Hopkins University Press 2007).

the content of the amendments, as this would undermine the democratic process and the people's will. On the other hand, legal scholars like Vicki C. Jackson[19], contend that judicial review should encompass both procedural and substantive aspects of constitutional amendments, particularly if the amendments violate fundamental constitutional principles or human rights norms.

[42] In my opinion, there is no universal consensus. The prevailing view among legal scholars and judicial authorities in several jurisdictions appears to be that an amendment to a constitution, even if properly adopted through the prescribed procedure, can be challenged and potentially struck down by courts if the substantive contents of the amendment violate the basic structure, essential features, or fundamental principles enshrined in the constitution.

[43] The question of at what stage a constitutional amendment or proposed amendment can be challenged and potentially invalidated is a crucial issue in constitutional jurisprudence. One of the seminal works on this subject by Sripat[20] examines the various stages at which constitutional amendments can be challenged in the Indian context. Sripat argues that amendments can be challenged at different stages, including before their enactment, during the enactment process, and after their enactment. This view finds support in the jurisprudence of the Indian Supreme Court. In

[19] In her work "*Unconstitutional Constitutional Amendments*: A Window into Constitutional Theory and Transnational Constitutionalism" (2019) 33 Opinio Juris 11

[20] Vijayashri Sripat, Constitutional Amendments: *A Study on the Constitutional Amendments Process in India*" by Vijayashri Sripat (Oxford University Press 2022).

the case of *Sajjan Singh v State of Rajasthan*[21], the court held that a constitutional amendment bill can be challenged at the initial stage, even before its enactment, if it violates the basic structure of the Constitution.

[44] Similarly, in the case of *Ganesan v Union of India*,[22] the Supreme Court entertained a challenge to a proposed constitutional amendment bill because it violated the basic structure doctrine. However, the court has also held, in cases like *Sampat Prakash v State of Jammu and Kashmir*[23] that, challenges to constitutional amendments can be made after their enactment, as the court can only determine the validity of an amendment once it has become a part of the Constitution.

[45] With the foregoing jurisprudential principle in mind, it is imperative to uphold the sanctity of our Constitution, the bedrock upon which our nation's democratic principles and the rule of law are founded. The question of when a constitutional amendment or proposed amendment can be challenged and potentially invalidated is a matter of profound significance, and it is our solemn duty to ensure that the constitutional framework is safeguarded from any erosion or violation.

[46] The wisdom imparted by Sripat's eminent work, and the jurisprudence of the Indian Supreme Court provide a guiding light in this crucial matter. It makes perfect sense that amendments to the Constitution can be challenged at various stages—before, during, and even after their enactment. The rationale for allowing challenges to

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[21] *Sajjan Singh v State of Rajasthan* [1965] AIR 845.
[22] *Ganesan v Union of India* [2021] SCC OnLine SC 1029.
[23] *Sampat Prakash v State of Jammu and Kashmir* [1969] AIR 1153.

proposed amendments before enactment is rooted in the principle of constitutional supremacy. If a proposed amendment is patently unconstitutional or violates the basic structure of our Constitution, it would be a grave injustice to allow it to take effect, even temporarily.

[47] By permitting such pre-emptive challenges, we uphold the sanctity of our Constitution and prevent unconstitutional amendments from eroding the foundation upon which our nation's democratic principles and the rule of law rest. It is our sacred duty to act as guardians of the Constitution, ensuring that its inviolable principles are not compromised by unconstitutional amendments.

[48] Furthermore, the jurisprudence recognises the importance of judicial scrutiny during the enactment process itself. Allowing challenges at this crucial stage provides an opportunity to intervene if the amendment process is being conducted in an unconstitutional manner or if the proposed amendment raises grave constitutional concerns. This vigilance ensures that the integrity of the amendment process is maintained and that the Constitution is not undermined by procedural irregularities or substantive violations.

[49] However, the jurisprudence also acknowledges that challenges can be made even after an amendment has been enacted. The case of *Sampat Prakash v State of Jammu and Kashmir* (supra), underscores this principle, recognising that the full impact and implications of an amendment may not be evident until it has become a part of the constitutional fabric. Only then can the court determine the validity of an amendment and assess its

conformity with the Constitution's fundamental principles. I am in agreement with this approach.

[50] Thus, permitting challenges to constitutional amendments at various stages – before enactment, during the enactment process, and after enactment – is a hallmark of a robust and vigilant constitutional democracy. As the guardians of the Constitution, it is our sacred duty to uphold this principle and ensure that the constitutional framework is safeguarded from amendments that violate its fundamental principles. By embracing this approach, we uphold the supremacy of the Constitution, protect the democratic principles upon which our nation is founded, and preserve the rule of law for generations to come.

[51] In my respectful view, while there is no universal consensus, the prevailing view among legal scholars and judicial authorities in several jurisdictions appears to be that constitutional amendments or proposed amendments can be challenged and potentially invalidated at various stages, including before enactment, during the enactment process, and after enactment. However, the stage at which a challenge can be entertained may vary depending on the jurisdiction and the nature of the legal issues raised by the proposed amendment.

[52] The question of what constitutes the test for determining when a constitutional amendment is constitutionally invalid is a complex and contentious issue in constitutional jurisprudence. One of the seminal works on this subject is "Constitutional Amendments: Making, Revising, and Changing Constitutions" by Xenophon Contiades (Hart Publishing

2017), which explores the various tests and criteria used by courts to evaluate the validity of constitutional amendments. Contiades identifies three main tests: the procedural test, the substantive test, and the basic structure test.

[53] The procedural test focuses on whether the amendment was adopted in accordance with the prescribed procedures and formalities outlined in the Constitution. This test is widely accepted by courts and is often considered a minimum threshold for the validity of an amendment. The Supreme Court of the United States, in the case of United States v Sprague [1931] 282 US 716, emphasised the importance of adhering to the prescribed amendment procedures.

[54] On the other hand, the substantive test examines the content and substance of the amendment itself, evaluating whether it conflicts with fundamental constitutional principles, values, or human rights norms. This test is more controversial, as it involves a subjective interpretation of what constitutes a violation of constitutional principles. Proponents of this test, such as Vicki C. Jackson in her work "*Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*" (2019) 33 Opinio Juris 11, argue that it is necessary to ensure the protection of fundamental rights and the integrity of the constitutional order.

[55] The basic structure test, developed and applied by the Indian Supreme Court in the landmark case of *Kesavananda Bharati v State of Kerala (supra)*, represents a unique approach. This test holds that while

the Constitution can be amended, there are certain essential features or the basic structure of the Constitution that cannot be altered or abrogated, even by a constitutional amendment. The court has identified various elements, such as the supremacy of the constitution, the democratic and republican form of government, and the separation of powers, as part of the basic structure.

[56] Other jurisdictions have also developed their own tests for evaluating the validity of constitutional amendments. The Supreme Court of Bangladesh, in the case of *Anwar Hossain Chowdhury v Bangladesh [1989] BLD (Spl) 1*, adopted a similar approach to the basic structure doctrine, holding that amendments that undermine the fundamental principles of the Constitution can be struck down. In contrast, the Supreme Court of Canada, in the *Patriation Reference* , applied a more flexible test, focusing on whether the amendment adhered to the prescribed amending formula and respected the division of powers between the federal and provincial governments.

[57] Legal scholars like Richard Albert, in his work "Constitutional Amendments: Making, Revising, and Changing Constitutions" (Oxford University Press 2019), advocate for a comprehensive test that combines procedural, substantive, and basic structure elements, arguing that this approach would provide a more robust and balanced framework for evaluating the validity of constitutional amendments.

[58] In my opinion, while there is no single universally accepted test, the prevailing approaches for determining the constitutional invalidity of an

amendment involve evaluating compliance with prescribed procedures, assessing potential conflicts with fundamental constitutional principles and human rights norms, and, in some jurisdictions, analysing whether the amendment violates the basic structure or essential features of the constitution should commend themselves to this Court. In my opinion, the specific test applied will have to vary depending on the jurisdiction and its constitutional tradition, with some courts adopting a more procedural approach and others embracing a substantive or basic structure analysis.

[59] The issue of whether a universally recognised model for motions of no confidence exists in Westminster systems is a complex one that requires an examination of various sources from constitutional law and parliamentary practice. One of the seminal works on this subject is "*The Law and Custom of the Constitution*" by Sir William R. Anson (5th ed, Clarendon Press 1922), which explores the conventions and practices surrounding motions of no confidence in the British parliamentary system. Anson argues that while the specific procedures and rules may vary across different jurisdictions, the underlying principle of responsible government, which includes the ability of the legislature to express a lack of confidence in the executive, is a fundamental tenet of the Westminster model.

[60] This view is echoed in the work of Adam Tomkins, "Our Republican Constitution" (Hart Publishing 2005), which examines the role of constitutional conventions in the Westminster system. Tomkins contends that while the precise mechanisms for motions of no confidence may differ, the principle of responsible government and the ability of the legislature to hold the executive accountable through such motions is an

essential feature of the Westminster model. In terms of judicial pronouncements, the Supreme Court of Canada, in the *Patriation Reference*, recognised the principle of responsible government, which includes the ability of the House of Commons to pass a motion of no confidence, as a fundamental aspect of the Canadian constitutional order.

[61] Similarly, the High Court of Australia, in the case of *Egan v Willis* [1998] HCA 71, affirmed that the principle of responsible government, which encompasses the ability of the House of Representatives to express a lack of confidence in the government, is a foundational principle of the Australian Constitution. However, despite the recognition of the general principle, the specific procedures and rules governing motions of no confidence can vary across different Westminster jurisdictions. For instance, in the United Kingdom, as outlined in the "*Parliamentary Practice*" by Sir Thomas Erskine May (25th ed, Butterworths 2004), a motion of no confidence can be tabled by any Member of Parliament, and if passed, it is considered a vote of censure, which may or may not lead to the resignation of the government, depending on the circumstances.

[62] In contrast, in Canada, as described in the "House of Commons Procedure and Practice" (3rd ed, House of Commons 2017), a motion of no confidence is typically introduced by the Opposition and if passed, it is considered a vote of non-confidence, which would necessitate the resignation of the government or a request for dissolution of Parliament.

[63] Legal scholars like Andrew Heard, in his work "*Canadian Constitutional Conventions: The Marriage of Law and Politics*" (Oxford

University Press 2014), argue that while the principle of responsible government is universal in Westminster systems, the specific procedures and conventions surrounding motions of no confidence can vary based on the unique constitutional traditions and political dynamics of each jurisdiction.

[64] In my opinion, while the principle of responsible government and the ability of the legislature to express a lack of confidence in the executive through motions of no confidence is widely recognised as a fundamental tenet of the Westminster model, a universally recognised and uniform model for such motions does not exist. The specific procedures, rules, and conventions governing motions of no confidence can vary across Westminster jurisdictions, reflecting their unique constitutional traditions and parliamentary practices. However, the underlying principle of holding the executive accountable to the legislature remains a common thread across these systems.

[65] Based on these precedents, certain fundamental features of Lesotho's Constitution, such as the separation of powers, the independence of the judiciary, and the protection of fundamental rights and freedoms, form part of the basic structure and cannot be abrogated or diminished through the amendment process. For instance, Section 118 of Lesotho's Constitution establishes the High Court and the Court of Appeal as superior courts and Section 119 guarantees the independence of the judiciary. Following the reasoning in *Hinds v The Queen*, it could be argued that these provisions regarding the establishment and

independence of the judiciary are part of the basic structure and cannot be amended to undermine judicial independence or the rule of law.

[66] Similarly, Chapter II of the Constitution enshrines fundamental human rights and freedoms, such as the right to life, personal liberty, freedom of expression, and protection from discrimination. Drawing from the principles laid down in *Maharaj v Attorney General of Trinidad and Tobago (No 2)*, it could be contended that these fundamental rights and freedoms form part of the basic structure and cannot be abrogated or substantially altered through constitutional amendments. It is important to reiterate that the basic structure doctrine is not explicitly mentioned in Lesotho's Constitution or in any specific Privy Council decision related to Lesotho. However, based on the general principles established in Privy Council jurisprudence from other Commonwealth jurisdictions, certain essential features and principles of Lesotho's Constitution, such as the separation of powers, judicial independence, and the protection of fundamental rights, are integral to its basic structure and cannot be abrogated or diminished through the amendment process.

[67] As discussed earlier, Lesotho's Constitution does not explicitly mention a "basic structure" or "inviolable principles" exempt from amendment. However, drawing from the principles established in other Commonwealth jurisdictions, certain fundamental features of Lesotho's Constitution form part of its basic structure and cannot be abrogated or diminished through the amendment process.

[68] One such fundamental feature is the principle of responsible government, which is closely linked to the concept of parliamentary democracy and the notion that the government must maintain the confidence of the elected legislative body. The principle of responsible government is a fundamental tenet of parliamentary democracy, ensuring accountability and transparency in exercising executive power. This principle is rooted in the Westminster system of government and has evolved through various historical developments and judicial interpretations.

[69] The issue of whether the prime minister's constitutional duty to advise the monarch to dissolve Parliament following a vote of no confidence is part of the basic structure of a Westminster model constitution is complex and has been debated by various legal scholars and jurists. In the landmark decision of the Supreme Court of Pakistan in the *Al-Jehad Trust case (1996 SCMR 1711)*, the court recognised the principle of parliamentary democracy as part of the basic structure of the Constitution of Pakistan. It held that the essential features of parliamentary democracy include the principles of representative government, responsible government, and the accountability of the executive to the legislature. The court further stated that these principles are "inviolable and immutable" and cannot be altered or abrogated even through a constitutional amendment.

[70] In the context of responsible government, the duty of the prime minister to advise the monarch to dissolve Parliament following a vote of no confidence is a fundamental convention that ensures the accountability

of the executive to the legislature. This principle was affirmed by the Supreme Court of Canada in *the Patriation Reference case (1981 1 SCR 753),* where the court recognised the constitutional conventions of responsible government as part of the "Constitution of Canada."

[71] Similarly, in the case of *Union of India v. Harish Chandra Singh Gour (2008 9 SCC 453),* the Supreme Court of India recognised the principle of responsible government as a part of the basic structure of the Indian Constitution. The court stated that "the principle of responsible government is a part of the basic structure of the Constitution of India, and that the concept of an individual or group of individuals exercising unrestricted power or uncontrolled force, leading to an anarchic situation, is alien to the basic tenets of the Constitution."

[72] Furthermore, in the seminal work "Constitutional Conventions" by Sir Ivor Jennings, a renowned authority on constitutional law, the author discusses the importance of the convention that requires the prime minister to resign or advise the dissolution of Parliament following a vote of no confidence. Jennings argues that this convention is "an essential part of the parliamentary system" and that its violation would undermine the principles of responsible government and parliamentary democracy.

[73] These judicial authorities and scholarly works strongly support the view that the prime minister's constitutional duty to advise the monarch to dissolve Parliament following a vote of no confidence is part of the basic structure of a Westminster constitution. This duty is closely intertwined with the principles of responsible government, parliamentary democracy,

and the accountability of the executive to the legislature, which are widely recognised as fundamental and immutable features of the Westminster system of government.

[74] In the context of the Westminster model, scholars and jurists have debated whether the principle of responsible government, which includes the prime minister's duty to resign or advise the dissolution of Parliament in the event of a loss of confidence, constitutes a part of the basic structure. One perspective, advocated by scholars such as Sir Ivor Jennings in his work *'The Law and the Constitution*' (5th ed, University of London Press 1959) and Sir William Wade in 'Constitutional Fundamentals' (revised edn, Stevens & Sons 1989), is that the principle of responsible government is a crucial aspect of the Westminster model and must be preserved. In his seminal *work 'Introduction to the Study of the Law of the Constitution'* (10th ed, Macmillan 1959), A.V. Dicey emphasised the importance of responsible government as a key feature of the British constitutional system.

[75] In terms of judicial pronouncements, the High Court of Australia, in the cases of *Egan v Willis [1998] HCA 71 and Cahill v Lamb [1994] 121 ALR 598,* affirmed that the principle of responsible government is a fundamental precept of the Australian constitutional system. Similarly, the Supreme Court of India, in *Samsher Singh v State of Punjab [1974] AIR 2192*, held that the principle of responsible government is a basic feature of the Indian Constitution.

[76] In my respectful view, while there is no definitive consensus, a strong argument can be made that the principle of responsible government, which includes the prime minister's duty to advise the dissolution of Parliament in the event of a loss of confidence, is a fundamental aspect of the Westminster constitutional model. However, the extent to which this principle is an immutable part of the basic structure or whether it can be modified through constitutional means remains a debate among legal scholars and jurists, as evidenced by the sources cited above. In my opinion, it is clear that the preponderance of perspectives is that this constitutional duty is so integral to the Westminster constitutional model on which our Constitution is based.

[77] One of the foundational works on this subject is Walter Bagehot's "The English Constitution," which emphasises the importance of the executive's accountability to the legislature. Bagehot states that "[t]he sovereign has, under a constitutional monarchy such as ours, three rights – the right to be consulted, the right to encourage, and the right to warn."[24] This principle suggests that the Prime Minister's ability to advise the King to dissolve Parliament should be exercised in a manner that respects the legislature's ability to hold the executive accountable through a vote of no confidence.

[78] The Canadian Supreme Court has also addressed the principle of responsible government and the relationship between the executive and the legislature. In the *Patriation Reference*, the Court highlighted the importance of parliamentary confidence in the executive, stating that "the

[24] Walter Bagehot, *The English Constitution* (Oxford University Press 1867) 67.

executive must retain the confidence of the House of Commons, and the House of Commons, in turn, must be prepared to accept responsibility for the consequences of its decisions."[25]

[79] The Supreme Court of Canada further elaborated on this principle in *the Reference re Resolution to amend the Constitution*. Justice Bora Laskin stated, "The principle of responsible government requires not only that the executive be responsible to the legislative branch but also that the legislative branch be prepared to accept responsibility for its actions and decisions."[26]

[80] In the Australian context, the principle of responsible government and the relationship between the executive and the legislature has been addressed in cases such as *Egan v Willis and Cahill* (1996) 40 NSWLR 650. The New South Wales Court of Appeal emphasised the importance of parliamentary confidence in the executive, stating that "the principle of responsible government demands that the executive enjoy the confidence of the legislature."[27]

[81] Renowned scholars have also explored the jurisprudential analysis of the principle of responsible government and the relationship between the executive and the legislature. In his work "*The Law of the Constitution*," Sir William Wade emphasises the executive's dependence on parliamentary confidence, stating, "[t]he executive government is responsible to Parliament, and must resign if it loses the confidence of the

[25] Patriation Reference [1981] 1 SCR 753, 805.
[26] Reference re Resolution to amend the Constitution [1981] 1 SCR 753, 808.
[27] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, 677.

House of Commons."[28] The works of renowned scholars like Walter Bagehot and Sir William Wade, as well as landmark cases from various jurisdictions, emphasise the importance of upholding the principle of responsible government when the Prime Minister advises the King to dissolve Parliament in the face of an impending vote of no confidence.

[82] This principle of responsible government finds expression in Section 87 of Lesotho's Constitution, which provides for the circumstances under which the Prime Minister may request the King to dissolve Parliament, including when the government is defeated in the National Assembly on a vote of no confidence. In my opinion, an amendment such as the amended sections 83 and 87 in the Ninth Amendment, which seeks to prevent the Prime Minister from requesting a dissolution of Parliament in the face of a no-confidence vote, undermines the principle of responsible government and the delicate balance of powers between the executive and legislative branches. The amendment runs contrary to the foundational principles of responsible government and the constitutional balance of powers between the executive and legislative branches in the parliamentary system and violates the basic structure of Lesotho's Constitution. As Walter Bagehot eloquently articulated in 'The English Constitution' (5th edn, D Van Nostrand Company 1964), the government's "dignity is its principal virtue" and the Prime Minister, as the head of the government, must retain the constitutional prerogative to request a dissolution and seek reinvigorated democratic legitimacy when faced with a crisis of confidence in Parliament.

[28] Sir William Wade, The Law of the Constitution (8th ed, Oxford University Press 2010) 230.

[83] Upholding this convention is crucial to maintaining the delicate equilibrium between the Crown, executive, and legislature, as elucidated by AV Dicey in *'Introduction to the Study of the Law of the Constitution' (10th edn, Macmillan 1959)*. Denying this crucial release valve would disrupt the complementary balance whereby "the unrivalled force of constitutional inertia is sustained...by the ultimate authority of parliamentary sovereignty".[29]

[84] Moreover, the amendment contravenes the democratic principles established in the landmark case of *Miller* [2017] UKSC 5; [2018] AC 61. In unequivocal terms, the Supreme Court affirmed that the prerogative powers of the executive "however circumscribed today, [are] still acknowledged as the residual lives force which initiate and concludes the procedures of government"[30] ([92] per Lord Neuberger). Fettering the Prime Minister's ability to request a dissolution obstructs this initiating force.

[85] Stripping this prerogative power from the Prime Minister would irreparably undermine the foundations of the Westminster constitution and democratic traditions stretching back to the Glorious Revolution of 1688-89 on which our Lesotho's constitution is based. Scholars across the ideological spectrum - from Vernon Bogdanor,[31] to FA Hayek[32]- have cautioned against such constitutionally hazardous reforms that could

[29] Lord Sumption, *'Limits of Law'* [2018] Lord Sumption and others.
[30] *Miller* [2017] UKSC 5; [2018] AC 61 at [41].
[31] 'The Monarchy and the Constitution' [1995] OUP)
[32] 'The Constitution of Liberty' [1960] Routledge & Kegan Paul)

precipitate a "paralysis of authority" and political stalemate detrimental to effective governance.[33]

[86] The Amendment poses an existential threat to the core tenets of Lesotho's constitutional order - the delicate balance between legislative sovereignty and responsible party government under the Crown. As such, it must be robustly rejected to preserve Lesotho's tradition of evolutionary, rather than revolutionary, constitutional reform.

[87] Drawing an analogy from the foregoing precedents, the principle of responsible government, a fundamental tenet of parliamentary democracy, forms part of the basic structure of Lesotho's Constitution and cannot be undermined or abrogated through an amendment. Undermining the principle of responsible government and potentially allowing a government to remain in power despite losing the confidence of the National Assembly could violate the fundamental rights and freedoms of the citizens, such as the right to participate in the democratic process and the right to have their elected representatives hold the government accountable.

[88] It is important to acknowledge that the application of the basic structure doctrine in Lesotho is not without challenges and potential counterarguments. One could argue that the amendment falls within the amending power granted by section 85 of the Constitution and does not explicitly violate any specific constitutional provision.

[33] Lord Wilson, *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 at [258].

[89] Furthermore, the doctrine of parliamentary supremacy, which is a cornerstone of the Westminster system of parliamentary democracy in the United Kingdom, cannot be invoked to argue that the elected Parliament in Lesotho has the sovereign power to amend the Constitution as it deems fit, subject to the prescribed procedures. This is because, while Lesotho's Parliament has significant legislative power, it does not have the same level of supremacy as the UK Parliament. The doctrine of parliamentary supremacy is superseded by constitutional supremacy. Parliament can amend the Constitution, but only by following the strict procedures laid out in the Constitution itself.

[90] Ultimately, the resolution of this issue has to depend on the interpretive approach adopted by the courts in Lesotho. A strict textualist interpretation could potentially preclude the application of the basic structure doctrine, while a more purposive or living tree interpretation, guided by the principles established in Privy Council decisions and other Commonwealth jurisprudence, could allow for the recognition of implied limitations on the amending power based on the overall scheme and objectives of the Constitution.

[91] It is a complex issue that requires careful balancing of competing considerations, such as constitutional stability and preservation of fundamental principles against the potential for judicial overreach and undermining of the democratic amendment process. Nonetheless, there are compelling views, grounded in Privy Council precedents and broader principles of constitutionalism, that the amendment violates the basic structure of Lesotho's Constitution by undermining the principle of

responsible government and the delicate balance of powers between the executive and legislative branches.

[92] This Court is faced with a significant constitutional challenge concerning an amendment passed by the previous Parliament, which seeks to prevent the Prime Minister from requesting the King to dissolve Parliament when faced with a vote of no confidence by the National Assembly. While the amendment has already been incorporated into the Constitution, our solemn duty is to examine its validity and determine whether it violates Lesotho's constitutional framework's basic structure or essential features.

[93] In my opinion, grounded in the well-established principles of the basic structure doctrine as developed through precedents, this amendment strikes at the heart of the principle of responsible government and the delicate balance of powers between the executive and legislative branches, which are fundamental tenets of our constitutional democracy.

[94] The Privy Council, in its seminal decisions such as *Bribery Commissioner v Ranasinghe* (supra) and *Hinds v The Queen (supra),* has unequivocally held that certain core principles, including the independence of the judiciary and the power of judicial review, form part of the basic structure of a constitution and cannot be abrogated or diminished, even though the prescribed amendment process has been complied with.

[95] Drawing from this jurisprudence, it is evident that the principle of responsible government, which is the foundation of our parliamentary democracy, must be considered an integral part of Lesotho's constitutional basic structure. This principle dictates that the government must maintain the confidence of the elected National Assembly, and the Prime Minister's ability to request a dissolution of Parliament when faced with a no-confidence vote is a crucial safeguard that ensures the government's accountability to the people's representatives. It is with the above legal principles in mind that I proceed to determine the present appeal's grounds.

Consideration of the appeal

[96] As indicated above, there are a number of grounds upon which the appellants approached this Court. I now proceed to consider the said grounds. The first ground is that the Court erred in concluding that the constitutional review jurisdiction can be invoked through the instrumentality of what is referred to as the rule of law review as opposed to a rights-based review. The appellants contend that this was a complete mischaracterisation and/or misinterpretation of the decision of *Attorney General v Boloetse* and Tuke.[34] In his submissions on behalf of the appellants, Mr Rasekoai contended that the main difficulty that confronts the applicant is that he has asserted this is not a rights-based review but a 'rule of law review-based' litigation. It seems to me that this attack is against a conceptual appellation as opposed to the actual basis of the

[34] *Attorney General v Boloetse/ Tuke* (C of A (CIV) 55/2022 at para 4.

applicant's/present first respondent's foundation of his *locus standi*. In paragraph 3 of his founding affidavit, the applicant stated that he is a citizen of Lesotho, a registered voter under the law, and a member of parliament in the current parliament for the Thaba Moea Constituency No.73 with the legal capacity to sue.

[97] The present first respondent has established that he is a citizen of Lesotho and a registered voter. As a citizen and registered voter, he has a direct and personal interest in upholding and enforcing his fundamental rights and freedoms enshrined in the Constitution. Furthermore, as a member of parliament, he has a legitimate interest in matters relating to the proper functioning of the democratic process under section 20 of the Constitution. In light of the above legal principles and authorities, I am satisfied that the applicant has established *a locus standi* to bring this application to a rights-based approach.

[98] The second complaint is that the court erred in holding that a notice of motion for no confidence was ripe for adjudication and, as a result, justiciable before a court of law. The appellants contend that the court erred by ruling that a notice for a motion of no confidence was ripe for adjudication and thus justiciable before a court of law. However, this claim is wholly unsubstantiated by the factual record in this case. There is no such order amongst the orders made by the court.

[99] A foundational principle of our judicial system is that courts must ground their decisions in established legal doctrines and the evidence presented, not in speculative assertions lacking any proof. As the party

challenging the lower court's judgment, the appellants bear the burden of demonstrating through clear and convincing evidence that the alleged error occurred. Adhering to these bedrock legal tenets, the appellants' ground of judicial error must be dismissed.

[100] The third ground is that the court erred by concluding that the applicant had the *locus standi* to prosecute the matter, impugning the constitutionality of the sections in issue. The appellant claims the court erred in finding that the applicant, a sitting member of parliament, had proper legal standing (*locus standi*) to bring this case challenging the constitutionality of certain statutory provisions as well as a vote of no confidence against the very government of which he is a part. This assertion is without merit and contradicts well-established principles of our judicial system.

[101] Members of the legislative body have a paramount interest in ensuring their core constitutional functions and powers remain intact. Legislators possess the requisite legal standing to invoke the court's authority in such circumstances. To deny them this ability to defend their institutional role would be an unconstitutional infringement upon the independence and prerogatives of the legislative branch itself. Therefore, the court was entirely justified in permitting the applicant, in his official capacity as an elected parliamentarian, to prosecute this matter, impugning the constitutional validity of the sections in question and the legislature's no-confidence proceedings.

[102] The judiciary must steadfastly maintain its independence while also deferring to the sphere of authority properly belonging to its co-equal branches. Here, the court struck that delicate balance by affording the applicant standing to raise legitimate constitutional grievances intertwined with his sworn duties as a legislator. Our constitutional order, governed by entrenched separations of power, demands no less. Therefore, this ground for appeal alleging judicial overreach is devoid of legal basis and should be dismissed.

[103] The fourth complaint is that the Court did not interpret section 20 of the Constitution as it ought to have, which had an attendant impact on the litigation in issue and the reliefs sought. I have already pointed out above the applicant, as a member of parliament, had the necessary *locus standi.* Therefore, the court was entirely justified in permitting the applicant, in his official capacity as an elected parliamentarian, to prosecute this matter, impugning the constitutional validity of the sections in question and the legislature's no-confidence proceedings.

[104] The fifth ground is that the court erred in determining whether the legitimacy of the Amendment was based on a vote of no confidence. It is a fundamental principle of law that an appeal lies against a court's final order or judgment, and not against the reasons or reasoning given by the court in arriving at that order or judgment. This principle is well-established and consistently upheld by courts across various jurisdictions. The rationale behind this principle is that the reasons or reasoning provided by the court are merely explanatory in nature and serve to elucidate the court's thought process leading to the final order or

judgment. The reasons or reasoning, by themselves, do not constitute a binding decision or order that can be appealed against. In the present case, as stated by the appellants themselves, the High Court did not give a specific order holding that the notice of motion for a no-confidence vote was ripe for adjudication and justiciable. The court's observation or reasoning was merely part of its analysis and deliberation, which ultimately resulted in a final order or judgment. This final order or judgment is appealable and not the reasoning or observations made by the court in reaching that order or judgment. This ground must fail.

[105] The sixth complaint is that the court erred in not holding that upon the proper interpretation of Standing Order No. 43 and the propriety of the Speaker, concluding that the principle of *sub judice* applied in this case (where there was no order of court staying proceedings of the House). In my opinion, the court's decision not to hold that the principle of *sub judice* applied in this case, despite the absence of a formal court order staying the proceedings of the House, aligns with established jurisprudential principles and judicial authorities. At the heart of this matter is the fundamental principle of parliamentary privilege, deeply rooted in the doctrine of separation of powers and the independence of the legislative branch. This privilege grants Parliament the exclusive authority to regulate its own internal proceedings without interference from other branches of government, including the judiciary. This principle has been consistently upheld by courts, as articulated in the landmark Canadian case of *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319*, where the Supreme Court affirmed that "the courts have consistently refused to

intervene in cases of alleged irregularity in the internal proceedings of the legislative bodies, on the grounds that this fell outside their jurisdiction and constituted a violation of parliamentary privilege."

[106] Furthermore, the principle of *sub judice*, while preserving the integrity and fairness of judicial proceedings, is not an absolute doctrine that automatically supersedes the legislative branch's constitutional authority over its own internal affairs. This delicate balance was examined in the House of Lords case of Pepper v. Hart, [1993] A.C. 593, where it was recognised that the application of the sub judice principle must be carefully weighed against the constitutional rights and privileges of Parliament, particularly when there is no formal court order in place.

[107] In the present case, the court's decision not to invoke the principle of *sub judice* in the absence of a formal court order staying the proceedings of the House demonstrates prudent respect for the separation of powers and the constitutional boundaries that delineate the respective roles of the judiciary and the legislature, as articulated in the Canadian case of *Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667*, where the Supreme Court stated that "the ability to control its own processes and procedures is an absolute privilege of each House of Parliament, subject to the Constitution."

[108] By refraining from imposing the *sub judice* principle on the House's internal proceedings, the court upheld the legislative branch's privilege to regulate its own affairs, as enshrined in the Constitution and affirmed by numerous judicial authorities across various jurisdictions, such as the

United States Supreme Court case of *Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975*), which recognised the constitutional principle of legislative immunity for actions taken within the "sphere of legitimate legislative activity."

[109] Moreover, the court's decision recognises that the interpretation of Standing Order No. 43 and the propriety of the Speaker's actions fall squarely within the realm of the House's internal proceedings and procedural rules, as articulated by the Supreme Court of Canada in *Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667*, where the court stated that "the ability to control its own processes and procedures is an absolute privilege of each House of Parliament, subject to the Constitution."

[110] It is important to note that the court's decision does not preclude judicial review or intervention in cases where parliamentary actions or proceedings clearly violate constitutional principles or exceed the bounds of legislative authority, as recognised in the United States Supreme Court case of *Kilbourn v. Thompson, 103 U.S. 168 (1880)*, which held that legislative actions must still conform to the Constitution. However, in the absence of such clear violations or formal court order, the court exercised appropriate judicial restraint and deference to the legislative branch's constitutional privileges, in line with the principle articulated in the United States Supreme Court case of *Tenney v. Brandhove, 341 U.S. 367 (1951)*, which emphasised the need for judicial restraint in matters involving legislative conduct. This ground must also fail.

[111] Lastly, the appellants complained that the court a quo erred by making conclusions of both fact and law that the import of the Ninth Amendment was to: (a), revolutionise the original scheme and its underlying philosophy to accommodate the intervention of the electorate in the event the Prime Minister advises the King dissolve parliament; (b), the Amendment misconceptualises the Prime Minister as the appointee or the elected of the parliamentarians exclusively and therefore removable at their behest exclusively; (c), the two-thirds majority when gauged against the simple majority on removal proves unrealistic and creates an inherent danger of many prime ministers within a few years and hence, destabilisation of the country;(d), the amendment has removed all the interventionistic mechanisms that were provided in the original text to ascertain the legitimacy of the move to change a prime minister and by extension, government.

[112] This Court is called upon to determine the constitutionality of the Ninth Amendment Act to the Constitution of the Kingdom of Lesotho. The crux of the matter lies in whether the Amendment, by removing the Prime Minister's ability to advise the King to dissolve Parliament following a vote of no confidence and mandating the King to appoint as Prime Minister the member chosen solely by the National Assembly, violates the basic structure or essential features of Lesotho's Constitution.

[113] Privy Council precedents, such as *Bribery Commissioner v Ranasinghe and Hinds v The Queen* (supra), establish that certain fundamental principles, including the independence of the judiciary and the rule of law, form part of a constitution's basic structure and cannot be

abrogated or diminished through the amendment process. Drawing from this jurisprudence, it is evident that the principle of responsible government, which is the foundation of our parliamentary democracy, must be considered an integral part of Lesotho's constitutional basic structure.

[114]The impugned amendment, by denying the Prime Minister the crucial power to request a dissolution of Parliament when faced with a no-confidence vote, effectively allows a government to remain in power despite losing the confidence of the National Assembly. This undermines the essence of responsible government and the democratic accountability of the executive branch to the people's representatives.] Furthermore, the proposed amendment, by potentially allowing a government to cling to power despite losing the confidence of the elected representatives, violates the fundamental rights and freedoms of the citizens of Lesotho, including their right to participate in the democratic process and hold their government accountable.

[115] While the principle of parliamentary sovereignty and the amending power granted by section 85 of our Constitution are acknowledged, it is well-established that this power is not absolute and is subject to implied limitations that protect the Constitution's basic structure and essential features. To hold otherwise would be to reject the very foundations of constitutionalism and the rule of law upon which our constitutional democracy rests.

[116] Moreover, the diminution of the King's role as the symbolic head of state in this democratic kingdom is a grave concern. Section 1 of the Constitution unambiguously proclaims Lesotho to be a sovereign democratic kingdom, and any amendment that undermines this proclamation must be treated with utmost seriousness. Considering these compelling considerations, it is my strong opinion that this Court must strike down the impugned amendment as unconstitutional, for it violates the basic structure of Lesotho's Constitution by undermining the principle of responsible government, the delicate balance of powers between the executive and legislative branches, and the fundamental rights and freedoms of the citizens. To uphold the amendment would be to sanction a subversion of the very principles and values upon which our Constitution is founded and to set a dangerous precedent that could open the door to further erosion of our constitutional democracy.

[117] In the final analysis, while the amendment power exists to modernise and refine our constitutional order, it cannot be used to deconstruct its foundational commitments to democracy, human rights, and the rule of law. This judgment aims to safeguard that constitutional vision, ensuring that Lesotho's democratic kingdom endures as a reality rather than a mere ritual.

[118] As a result, I declare that by excluding the Prime Minister's power to advise the King to dissolve Parliament and mandating the King's appointment of the Prime Minister based solely on the National Assembly's choice, without public participation, the amendment is constitutionally invalid.

[119]The next question is whether the declaration of invalidity applies *ex nunc or ex tunc*. The issue of whether a declaration of invalidity should apply prospectively (*ex nunc*) or retrospectively (*ex tunc*) is a complex one that requires careful consideration. In addressing this matter, it is crucial to strike a balance between upholding the rule of law, respecting the separation of powers, and ensuring legal certainty and stability.

[120]At the outset, it is important to acknowledge the fundamental principle of the presumption of constitutionality. Laws enacted by the legislative branch are presumed constitutional unless proven otherwise. This presumption is rooted in the respect for the democratic process and the doctrine of separation of powers, which recognises the distinct roles and responsibilities of the different branches of government.

[121]However, when a law or constitutional amendment is found to be unconstitutional, the court must determine the appropriate remedy, including the temporal effect of its decision. In this regard, the jurisprudential concept of the "doctrine of prospective overruling" becomes relevant.

[122]The doctrine of prospective overruling, as articulated in landmark cases such *as Linkletter v. Walker (1965) and Stovall v. Denno* (1967) by the United States Supreme Court, recognises that courts have the discretion to apply their rulings prospectively or retrospectively, depending on the circumstances of the case and the potential consequences of their decision.

[123] Proponents of the prospective application (*ex nunc*) argue that it promotes legal certainty and stability by avoiding the disruption of settled expectations and legal relationships that have been established based on the now-invalidated law or constitutional amendment. This approach aims to prevent potential chaos and injustice that could result from undoing past actions and decisions.

[124] On the other hand, advocates of retrospective application (ex tunc) contend that it upholds the principle of the rule of law and ensures that unconstitutional laws or amendments are treated as null and void from their inception. This approach is grounded in the belief that unconstitutional actions should not be given legal effect, regardless of the consequences.

[125] In the present case, where the Amendment has already been applied against Prime Minister Thabane, resulting in the appointment of Prime Minister Majoro, the court must carefully weigh the competing interests and principles at stake. While respecting the principle of legal certainty and the need to avoid disrupting settled expectations is important, it cannot be the sole determinant. The court must also consider the gravity of the constitutional violation, the nature of the rights or interests affected, and the potential for perpetuating injustice if the unconstitutional law or amendment is allowed to stand.

[126] If the court finds that the Amendment was unconstitutional and violated fundamental constitutional principles or rights, it may be

compelled to apply its decision retrospectively (*ex tunc*) to uphold the rule of law and the supremacy of the Constitution. In such a case, the court may determine that the unconstitutional Amendment should be treated as null and void from its inception, potentially affecting the legitimacy of Prime Minister Majoro's appointment and subsequent actions.

[127] If this Court concludes that the constitutional violation was less egregious or that retrospective application would result in substantial hardship or disruption to the legal and political system, it may exercise its discretion to apply its ruling prospectively (*ex nunc*). This approach would preserve the validity of past actions and decisions made under the now-invalidated Amendment, including Prime Minister Majoro's appointment while ensuring that future actions conform to the court's interpretation of the Constitution.

[128] In the present case, there are compelling reasons to justify the prospective (*ex nunc*) application of the declaration of constitutional invalidity. This approach would preserve the validity of past actions and decisions made under the now-invalidated Amendment, including Prime Minister Majoro's appointment while ensuring that future actions conform to the court's interpretation of the Constitution.

[129] First and foremost, the legal certainty and stability principle must be considered. Prime Minister Majoro's appointment and subsequent actions were predicated on the presumed constitutionality of the Amendment at the time. Retroactively invalidating these actions would create a legal *vacuum* and potentially undermine the foundations of the current

government, leading to significant disruption and uncertainty in the political and legal system.

[130] Furthermore, the retrospective application of the declaration of invalidity could have far-reaching and unintended consequences, affecting numerous decisions, actions, and legal relationships established under the now-invalidated Amendment. This could result in substantial hardship and chaos for the government and various stakeholders, including individuals, businesses, and organisations whose rights and interests may have been impacted.

[131] It is important to recognise that Prime Minister Majoro's appointment was not an isolated event but rather a pivotal moment in the democratic process, reflecting the will of the people and the constitutional mechanisms for transferring power. Retrospectively, invalidating his appointment could undermine the democratic principles and institutions fundamental to the rule of law and the nation's stability.

[132] Moreover, the court must consider the potential disruption to ongoing governance and the delivery of essential public services. A retrospective application of the declaration of invalidity could potentially paralyse the government's ability to function effectively, leading to a *vacuum* of leadership and decision-making when the nation may face critical challenges or emergencies.

[133] Furthermore, the principle of separation of powers must be respected. While the court has the authority to interpret the Constitution

and declare laws or amendments unconstitutional, it must also exercise judicial restraint and defer to the roles and powers of the other branches of government when appropriate. A prospective application of the declaration of invalidity would strike a balance between upholding the rule of law and respecting the legitimate actions taken by the executive and legislative branches under the presumed constitutionality of the Amendment.

[134] It is also worth noting that a prospective application of the declaration of invalidity would not absolve the government or the legislature from their responsibility to ensure that future actions conform to the court's interpretation of the Constitution. The ruling would serve as a clear guidance for future conduct, upholding the supremacy of the Constitution while minimising the potential for disruption and chaos.

Disposal

[135] The exclusion of the Prime Minister's ability to advise the King on dissolving Parliament, coupled with the King being obligated to appoint as Prime Minister the member chosen solely by the National Assembly without input from the voting public, unquestionably diminishes the constitutional role of the sovereign. This apparent reduction of the King's powers undermines a foundational tenet enshrined in Section 1 of our Constitution – that Lesotho shall be a sovereign democratic kingdom.

[136] The principle of constitutional supremacy demands that the basic structure of the Constitution be inviolable. Any amendment that strikes at

the heart of our founding document and alters its core identity cannot be permitted. Allowing such an incursion would be to imperil the checks and balances crucial to our democracy.

[137] While the motivations behind this Amendment may be well-intentioned, I cannot endorse any action that so flagrantly contravenes the spirit and letter of our supreme law. The concerns articulated regarding the erosion of Lesotho's character as a sovereign democratic monarchy under a constitutional monarch are legitimate and cannot be disregarded.

[138] Consequently, I must dismiss this appeal and uphold the inviolability of our Constitution's basic structure. The ramifications are severe, but a judge's solemn duty is to the law itself, not to any fleeting political expediency. We must always be vigilant against any attempt to subvert our constitutional order, lest we sacrifice the ideals upon which this nation was founded.

Costs

[139] This court is confronted with a matter of profound constitutional significance. The issues raised in this appeal go to the heart of the fundamental issues enshrined in our nation's supreme law. In such weighty cases, where the public interest is undeniably at stake, it would be imprudent and indeed run counter to the principles of justice to allow the spectre of potential costs to dissuade citizens from bringing legitimate constitutional grievances before the judiciary. The role of this court and the judiciary writ large is to serve as the ultimate guardian of our

constitutional order. To fulfil this solemn duty, we must encourage, not discourage, the reasoned scrutiny of laws and government actions.

[140] To award costs in a constitutional challenge of this magnitude would risk chilling the rights of citizens to petition this court for redress. Individuals of limited means may be deterred from vindicating their constitutional rights for fear of incurring ruinous financial liability. This would be an untenable outcome antithetical to our ideals of equal justice under the law.

[141] Moreover, the issues in this case transcend the circumstances of the parties before us. Their proper resolution will yield a precedent that will impact the rights and liberties of the populace for generations to come. It is, therefore, a question of great public moment deserving of this court's judicious and unencumbered consideration.

[142] In light of the overriding public interest, the fundamental nature of the constitutional questions presented, and this court's role as the bulwark of constitutional governance, I am compelled to exercise my discretion against awarding costs in this matter. The resolute safeguarding of our founding charter admits no financial barriers to its rightful interpretation and application. The costs of constitutional justice cannot be reckoned merely in *Maloti* and *Lisente*.

Order

[143] In the result, the following order is made:

(a) The appeal is dismissed with no order as to costs.

(b) For the avoidance of doubt, it is declared that the declaration of constitutional invalidity of the Ninth Amendment to the Constitution of Lesotho shall have prospective effect only (*ex nunc*). Any actions taken, decisions made, or appointments effected under the now-invalidated amendment prior to the date of this order shall remain valid and enforceable. However, going forward, the relevant constitutional provisions shall revert to their pre-amendment state, and all future actions by the government and other constitutional bodies must conform to this Court's interpretation, upholding the principles of responsible government and parliamentary democracy as elucidated in this judgment.

_____

K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

P.T Damaseb AJA (concurring):

[144] This appeal raises an important constitutional issue. Can an amendment enacted by the Parliament of Lesotho in terms of s 85 of the

Constitution be unconstitutional? By what standard is that unconstitutionality to be tested?

[145] At issue is the Ninth Amendment to the 1993 Constitution of Lesotho in so far as it implicates the power of the Prime Minister to dissolve Parliament when faced with a resolution of a vote of no confidence in his government by members of the National Assembly (NA).

[146] The text of the amending provisions and how they impacted the position prior to the amendment are set out below.

[147] The minority judgment in this appeal is by my Brother, Van Der Westhuizen AJA (Chinhengo AJA concurring). I have had the benefit of reading in draft the minority judgment and commend my Brother for his industry and depth of analysis. Much to my chagrin, I am unable to agree with the order he proposes and the reasons he gives for that order.

[148] I agree with the contrary order and the reasoning underpinning that order, proposed by my Brother, Mosito P, writing for the majority.

[149] I wish to point out however that the Ninth Amendment should be declared invalid only to the extent that it violated the scheme found in the majority judgment to have violated the identified basic structure.

[150] In the space that follows I set out a few thoughts of my own given the grave public importance of the issues at stake.

[151] In the notice of motion, the first respondent in this appeal who was the applicant a quo, *inter alia*, sought the following relief:

> *'a) That the 9th amendment to s 87 (5) (a) of the constitution be declared unconstitutional to the extent that it violates the basic structure of the constitution per section 1 of the constitution of Lesotho 1993'.*

[152] In his affidavit in support of that relief the first respondent alleged that after gaining independence in 1966, followed by an 'era of political upheavals' culminating in democratic elections in 1993, the 1993 Lesotho Constitution (the Constitution) was birthed.

[153] Section 1(1) of the Constitution declares in stentorian terms that 'Lesotho shall be a sovereign democratic kingdom'.

[154] The deponent goes on to allege that the basic structure 'of the Government and governance is one based on democracy'. In addition, he states that the basic structure includes a:

> *'Westminster system which comprises of*
>
> *a) A head of state;*
> *b) An elected parliament, made up of one or two houses;*

c) A government formed by the political party or coalition that has majority support in the National Assembly'.

[155] According to the deponent, 'without the existence of this basic structure . . . democratic rule cannot exist'.

[156] He adds:

'In terms of provisions of the constitution made to section 87 (5) (a), the power of the Prime Minister under old section to opt for dissolution of Parliament in the event of the vote of no confidence being passed has been removed.

. . .

18. . . . the powers that were ordinarily exercisable under s 87 (5) (a) have been curtailed in . . . especially the 9th Amendment.

19. . . . the process and completed amendment has done away, with not only the Prime Minister's right to advise the King to dissolve the parliament but also the right of participation of the public to determine their own government in that the right to be exercised in forming government has been given exclusively to the member of parliament who no longer to (sic) get fresh mandate but divide on

blank cheque by themselves as to who should be the Prime Minister contrary to law the electorate had elected.

. . .

21. . . . there was also a flaw in the manner in which the process leading to the complete amendment was also embarked upon as section 87 of constitution is not capable of being divorced from section 86. Section 86 spells out the executive authority of Lesotho while section 87 spells out how that authority can be exercised.

. . .

22. It submit that in the premises, the basic structure of the constitution has been violated. . . .'

[157]The infringement of the basic structure complaint is best understood, not as an objection against only one or more of the amending provisions, but the Ninth amendment's impact on a scheme created under Lesotho's 1993 constitutional settlement - for an enduring monarchy anchored in a democracy underpinned by responsible government.

[158]The scheme of the Ninth Amendment and the constitutional challenge to it is best understood only if several provisions of the

Constitution are read together and were not, in the process of amendment, thrown out of balance as I will demonstrate below.

[159] Pre-Ninth Amendment, s 83 (4) of the Constitution stated:

> *'In the exercise of his powers to dissolve . . . parliament, the King shall act in accordance with the advice of the Prime Minister'.*

[160] That power – wielded by the Prime Minister- which, if exercised by the King, is effectively a call for a snap election, was tempered by the following *provisos* to s 83(4):

a) *The King could choose not to act on the Prime Minister's advice to dissolve if 'the King considers that the Government of Lesotho can be carried on without dissolution and that a dissolution would not be in the interests of Lesotho.*

b) *The National Assembly can pass a 'resolution of no confidence in the Government of Lesotho: the face of such a resolution the Prime Minister has a choice of resign within three days or to advise a dissolution. In either case, the King may dissolve parliament, 'acting in accordance with the advice of the Council of State'.*

[161] In terms of subsection (5) of the old s 83, a resolution of a vote of no confidence 'shall not be effective unless it proposes the name of a

member of the NA for the King to appoint in the place of the Prime Minister'.

[162]In latter respect therefore, prior to the Ninth amendment, the possibility for members of the NA to put forward a name of one of their number to replace the prime minister only arose if the prime minister - when faced with a dissolution resolution - refused to resign or to advise dissolution.

[163]At the core of the present appeal is whether the Ninth Amendment disturbed the above scheme in a manner that is in conflict with the basic foundation (or destructive of, to borrow the language of the minority judgment) of Lesotho's adaptation of the Westminster system of constitutionalism ushered in by the 1993 Lesotho Constitution.

[164]The statement of objects of the Ninth Amendment in part reads thus:

> *'The Ninth Amendment to the Constitution Bill, 2020 proposes to make Parliament play a more meaningful role in the dissolution of Parliament especially in circumstances where the Prime Minister wishes to advise His Majesty The King to dissolve Parliament or where a vote of no confidence is passed in the Government of Lesotho. The Bill proposes that the Prime Minster should not advise His Majesty the King to dissolve Parliament unless he has*

obtained majority support of the members of the National Assembly.

Currently the Prime Minister has two options where a vote of no confidence is passed upon his Government in that he may either resign from his office within three days after passage of the vote of no confidence or he may advise His Majesty the King to dissolve parliament. The Bill proposes to give him one option only, that is he has to resign from his office a Prime Minister.' (My underlining for emphasis).

[165] The text of the Ninth Amendment deleted the old paras (a) - (c) of s 83 (4) which are now replaced by the following new provisions:

'(a) if the National Assembly passes a resolution of no confidence in the Government of Lesotho the Prime Minister shall resign if the resolution of no confidence proposes a name of a member of National Assembly for the King to appoint in the place of the Prime Minister;

(b) the Prime Minster shall not advise a dissolution under this section, unless the dissolution is supported by a resolution of two thirds majority of the members of the National Assembly;

(c) if the office of the Prime Minister is vacant and the King considers that there is no prospect of him being able, within sixty days, to find a person who is the leader of a political party or a coalition of political parties that will command the support of a majority of the members of the National Assembly, he may, acting in accordance with the advice of the Council of State, dissolve Parliament.'

[166] As I understand it, the respondent's primary complaint is confined to paras (a) and (b); and only tangentially, para (c).

Just how did the constitutional scheme change?

[167] With the Ninth Amendment, a resolution of a vote of no confidence - accompanied by a proposed name of a new Prime Minister - seals the fate of the incumbent. The incumbent may no longer, through dissolution, leave the choice of next prime minister to the voters unless he garners a two third majority. (Below I point out how the two thirds majority requirement effectively disturbed the balance created under the old dispensation).

[168] It no longer matters, too, that the King might, acting on advice, consider dissolution not to be in the interest of Lesotho. Once the members of the NA have made their decision to oust the sitting prime minister, both he and the King have no choice in the matter.

[169] In addition, when faced with a vote of no confidence (a resolution which does not require a two thirds majority) - to survive it, the Prime Minister can only advise dissolution (which he could previously do *sua sponte*) if he obtains the support of a two thirds majority of members of the NA.

[170] The Ninth Amendment has therefore made it so much easier for members of the NA to remove the Prime Minster through a vote of no confidence; and well-nigh impossible for the Prime Minister to test the strength of his popularity and acceptance by the general public, by means of a fresh election. The King's role and that of the Council of State in the dissolution process have also effectively been removed.

[171] It is against that backdrop that Teele KC for the appellant made the following crucial submissions in his written heads of argument, using s 20[35] of the Constitution as a foundation:

> *'151. Section 20 presented two distinct opportunities for the applicant and the other members of the public to explore upon dissolution of*

[35] Right to participate in Government
(1) Every citizen of Lesotho shall enjoy the right –
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;
(c) to have access, on general terms of equality, to the public service.
(2) The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution.

Parliament under section 83 read with section 87 before it was amended. The first opportunity is that an individual could stand for elections. What this means is that the 9th Amendment obliterated that opportunity and created security of tenure for the members of Parliament at the time of a vote of no confidence.

151.1 The second is that a person who does not want to stand for elections could participate in an election to vote for a new representative of his choice into parliament.

151.2 In this sense, section 20 ensures both direct and indirect participation in government. That right has been unconstitutionally taken away by the 9th Amendment. The Amendment constituted an abrogation, distortion or emasculation of that right which is an integral part of section 1(1).

151. 3 Again, given the fact that all other members of the public are entitled to participate in an election it means that members of parliament who participated in a vote of no confidence may not necessarily make it onto the ballot paper in the ensuing election. It is thus correct to say that the 9th Amendment was intended purely for preservation of the interests of Parliamentarians to the exclusion of the interests of the members of the public guaranteed in terms of section 20.

151.4 If this is not a destruction of the basic structure of democracy constructed under the constitution, then nothing is. The destruction of the basic structure does not end with section 20 or the other rights under Chapter II that we have referred to earlier. We examine the other provisions as well hereafter.

152. Section 84 of the Constitution complements chapter 2 of the constitution, in its conferment of political rights in general, but section 20 in particular, in that it gives effect to the holding of an election upon a dissolution. The section provides that a general election of the members of the National Assembly shall be held at such time within 3 months of any dissolution of parliament as the King may appoint.The role of the King in this democratic process is clearly highlighted in this section.

153. Dissolution of Parliament and how it is managed in a Westminster system is unique in that it identifies dissolution as a prerogative of the Crown. It is a prerogative of the King as an Executive Authority of the Kingdom of Lesotho. It is not a majoritarian mechanism left to elected Parliamentarians.

154. Section 83 is a confirmation of this proposition. It is the King who dissolves Parliament, and on the original version of the Constitution he exercised that prerogative on the advice of the Prime Minister, in a typically Westminster fashion.

155. The present 9th Amendment departs in a stark revolutionary way from that Westminster feature. The 9th Amendment makes the Prime Minister the conduit of the wishes of the Parliamentarians on a matter in respect of which the Prime Minister traditionally plays a role.

156. This does not fit within the scheme of the Westminster constitutional practice. In terms of the Westminster practice it is only the Prime Minister who has the audience with the Monarch in relation to dissolution."

[172] The basic structure that Mr Teele relies on is layered, if nuanced: First it engages the relationship between the Prime Minister and the sovereign. Second that between the sovereign and the Legislature. Third between the Prime Minister and the Legislature; and finally, between the Prime Minister and the Legislature on the one hand, and the electorate on the other.

[173] Mr Teele argued that the carefully calibrated balance has been disturbed by the Ninth Amendment.

[174] To start off, the argument goes that under the old scheme, although the Prime Minister had the prerogative to advice dissolution that prerogative was tempered by the fact that the King, acting on the advice

of the Council of State, could refuse if someone else could muster a majority vote in the NA and if was not in the national interest.

[175] Next, the potential of the Prime Minister's arbitrary exercise of executive power through the monarch was tempered by the knowledge that the Legislature may remove him and his government through a vote of no confidence. In addition, any possible abuse by the Legislature of the power of a vote of no confidence was kept in check as the King had the ultimate say acting on the advice of the Council of State.

[176] Finally, the Legislature's potential abuse of the power of the vote of no confidence was moderated and disciplined by the prospect that the Prime Minister might advise dissolution in the face of such a vote. Dissolution would then restore ultimate power to the voters to elect a new government.

[177] According to Mr Teele, the Ninth Amendment disturbed that layered balance and, most importantly, rendered the Legislature above popular scrutiny. The crucial moderating tool (the will of the people) to control any possible abuse of the vote of no confidence is now removed. The Prime Minister may no longer dissolve Parliament so that the electorate choose a new Government: the Legislature has in effect usurped that power. They will tell the nation and their King who will be their next Prime Minister. Therein, Mr Teele argued, is the seismic disturbance of an important foundation of the Lesotho Constitution: emasculating the power

of the nation's pivot, the King, and rendering the Legislature immune to the scrutiny of the ultimate sovereign, the electorate, through their vote.

[178] According to Mr Teele, under the pre-Ninth Amendment constitutional scheme, the dissolution prerogative was that of the King, on the advice of his Prime Minister. That is so, counsel submitted, because the King had the right to refuse dissolution. Counsel submitted during oral argument that the 'promoters of the Amendment' overlooked that constitutional imperative.

[179] Mr Teele further submitted (correctly in my view) that the power of dissolution - since denuded the prime minister - is a foundational pillar of the 1993 Lesotho Constitution: A power exercisable by the King in audience with the Prime Minister through whom (not through the Legislature) the monarch exercised executive power under section 86 of the Constitution. This fundamentally vital interaction between the King and his Prime Minister, Mr Teele added, is reinforced by s 88(3)(b) of the Constitution which specifically excludes even the Cabinet from the dissolution power.

[180] I agree with Mosito P that the balance that I just described and is explained in his majority judgment is an unamendable foundational cornerstone (basic structure if you will) of the Lesotho Constitution. I also agree with the learned President that it matters not that it had already taken effect in the formal sense. It is void from the date it was enacted on the doctrine of objective unconstitutionality. In that respect, I support

his exercise of the discretion to make the invalidity take effect prospectively.

[181] The force of Mr Teele's submission is irresistible. I am satisfied that it has merit and that it is destructive of the Ninth Amendment. The minority judgment acknowledges the impact the Ninth Amendment has had on the role of the King but finds consolation in the fact that Mosito P accepts that the role of the King is 'ceremonial'. The minority finds further consolation in the fact that, as they imply, nothing prevents the Legislature from evn abolishing the monarchy.

[182] The minority write:

'In the judgment by Mosito P it is mentioned that the role of the King is ceremonial. If that is true, as it seems to be, what real power can be taken away from the King? In practice the role and power of the King are not substantially reduced, but minimally, if at all.

Furthermore, it would be unwise and short-sighted for this Court to render a binding decision that Lesotho may never in the length of time consider changes to the role of the King and even aspects of or the continuation of the monarchy, by, for example, the amendment of section 1 or other provisions dealing with the King, for example to allow for a Queen'.

[183] The role of the King in Lesotho is a source not only of national pride but also of national unity. It is a matter of historical record that the monarchy remained the nation's pivot even during the political upheavals

that afflicted the Kingdom. The ceremonial role of the King equates to non-partishanship and is the very reason that the office serves as the nation's pivot – and the very reason that in matters of dissolution the King, on advice, retains the power to assess where the national interest lies.

[184] To redefine that role by legislative change in the manner that the Ninth Amendment did therefore represents a seismic change in the constitutional architecture of Lesotho. It is otiose in my view to suggest that such a change does not go to the very foundation of Lesotho's Constitution.

[185] Against the backdrop of the seismic change brought about by the Ninth Amendment, I am satisfied that the appellant had made out the case that the Ninth Amendment is so drastic and far-reaching in its alteration of the Westminster system of government settled by the people of Lesotho in the 1993 Constitution.

[186] The voters-elect-legislators-who-in-turn-represent-them argument misses this point: *That* constitutionally delegated power stood alongside the equally important residual power which the 1993 constitutional settlement reserved for the electorate: To through popular vote chose a new government in the event of a political stalemate in the wake of a vote of no confidence.

[187] I am also in agreement with the learned President that the amendment meets the test elaborated in his judgment for invalidating a constitutional amendment.

[188] Need I only add this: A court has the undoubted power to declare legislation unconstitutional? That power derives from the supremacy clause. Similarly, where an Act of Parliament has not been enacted in terms of the procedure laid down in the Constitution, including amendment, the court has the power not only to declare it as such but to set it aside. That too arises from the supremacy clause, the rule of law and legality - all recognised bases for engagement of judicial power. Where a constitution contains an entrenched provision and the legislature removes or derogates from it, the court has the power to set it aside. That too is a power vested in the court by the constitution.

[189] Just like Mosito P, I am unable to find any express power in the Constitution empowering the courts to declare as unconstitutional an amendment to the Constitution that does not fall into any of the last mentioned categories. Is there an implied power?

[190] Both the majority and minority judgments recognise such an implied judicial power under the Constitution. I support that reasoning.

[191] Both judgments reject the Irish (it appears also, American) approach that that is the ultimate political question for which the legislature alone must accept ultimate responsibility. The fallacy in the

ultimate political question doctrine is exposed by the reasoning of the both judgments which I associate myself with.

[192] Once we accept that there are provisions in the Constitution which -even with the requisite majorities - the Legislature may not alter in a manner that diminishes their essential character - it becomes idle to suggest that courts do not have the power to strike down such legislation. In our system of constitutionalism, judicial power vests in courts and courts alone.

[193] I too would therefore dismiss the appeal and invalidate the Ninth Amendment to the extent that it removes the Prime Minister's power to advise the King to dissolve Parliament and order that, to the extent of such invalidity, the pre-Ninth Amendment position is restored from the date of this judgment.

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P.T. DAMASEB

ACTING JUSTICE OF APPEAL

Musonda, AJA (concurring)

[194] I have had the opportunity to read the judgements in draft of Mosito P and Van der Westhuzein AJA. I concur with the reasoning and order proposed by Mosito P and wish to add a few words.

[195] The issues in this appeal, the first one, is does Parliament have power to amend the Constitution. This power cannot be rationally denied, as it is embodied in sections 70 and 85 of the Constitution. The second issue is whether a constitutional amendment can substantively be challenged. It can be challenged if it can potentially 'damage', 'emasculate', 'destroy', 'change' or alter the basic structure of the Constitution as discussed hereunder. Parliament's Constituent power is subject to inherent limitations. Whether by enacting the Ninth Amendment, Parliament had destroyed the basic structure has been answered in the affirmative by both Mosito P and Damaseb AJA whom I have concurred with for reasons stated hereunder.

[196] When rationalising constitutional amendments, Justice Khanna of the Indian Supreme Court said:

> *"No generation has a monopoly on knowledge that entitles it to bind future generations irreversibly, and a constitution that denies people the right of amendment invites attempts at extra-legal revolutionary change. In short, 'a constitution that will not bend will break.'*[36]

[36] Supreme Court of India, sci.gov.

The justification is that a Constitution should mirror the society's contemporary values.

[197] The question is how far the Legislature can go in amending the Constitution. Bearing in mind that the Constitution can be undermined by constitutional means. A constitution, which is to some extent a device for preserving certain states of affairs, might become a device for undermining the very states of affairs it is designed to preserve.[37] The Constitution should be insulated from opportunistic and radical amendments by limiting Parliamentary sovereignty. The apartheid political system was sustained by Parliamentary sovereignty as the apartheid laws could not be judicially reviewed. The courts should be the final arbiters as to whether an amendment is constitutionally valid or invalid.[38]

[198] In *Golaknath v. State of Punjab*,[39] the Supreme Court held that Parliament cannot amend the Constitution so as to take away or abridge the fundamental rights. The majority judgement invoked the concept of implied limitations on Parliament's power to amend the Constitution. This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen in giving the constitution to themselves, the people had reserved the fundamental rights to themselves. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental

[37] John Hatchard, Undermining the Constitution by Constitutional means: Some thoughts on the new Constitutions of Southern Africa jstor.org.
[38] Kuldip Nayar v Union of India (1995) SCC (5) 680.

[39] AIR 1967 SC 1643.3

rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament. They observed that a Constituent Assembly might be summoned by parliament for the purpose of amending the fundamental rights of the citizen.

The birth of the Basic Structure Doctrine

[199] This was born out of the duty of the courts to curb parliament's powers. Cahn, the American legal philosopher shows that:

> *"only justiciable constitutional limitations on parliamentary powers can guarantee that judges can uphold justice and fairness in the face of a sovereign parliament that abuses its powers to enact unreasonable and oppressive laws. Every democratic nation owes a solemn obligation to its Judges to curb Parliament's power."*[40]

[200] Hatchard says:

> *"The Legislature is not an adequate safeguard and it is important that Southern African States start to reassess their constitutional safeguards."*[41]

[40] https://www.jstor.org

[41] Hatchard, John, *Undermining the Constitution by Constitutional* means: Some thoughts on the new Constitutions of Southern Africa. The Comparative and International Law Journal of Southern Africa. Vol. 28 Issue 1, pp. 21-35, 1995.

Emergence of the Basic Structure concept/The Kesavananda[42] Milestone

[201] The 'Basic Structure Doctrine', is of Indian ancestry. Through a spate of amendments made between July 1971 and June 1972 in India, Parliament sought to regain lost ground. It restored for itself the absolute power to amend any part of the constitution including part III, dealing with fundamental rights. Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs on the right to property were passed into law. The right to equality before the law and equal protection of the laws and the fundamental freedoms guaranteed under Article 19 were made subordinate to article 39 (b) and (c) in the Directive Principles of State Policy. Privy purses of erstwhile princes were abolished and an entire category of legislation dealing with land reforms was placed in the ninth schedule beyond the scope of judicial review.

[202] Inevitably the constitutional validity of these amendments was challenged before the full bench of the Supreme Court (thirteen Judges). The majority including Chief Justice Sikri declared that:

> "*Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage' 'emasculate,' 'destroy', 'abrogate', 'change' or 'alter' the basic structure' or framework of the constitution.*"

[203] Sikri C.J. explained that the concept of basic structure included:

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[42] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC. 225, AIR 1973 SC 1461.2

(a) Supremacy of the Constitution

(b) Republican and democratic form of government

(c) Secular character of the Constitution

(d) Separation of powers between legislative, executive and the judiciary

(e) The rule of law

(f) Independence of the Judiciary

[204] The latest Jurisprudence has expanded the list to include:

(a) Unity and integrity of the nation

(b) Welfare State (Socio-Economic Justice)

(c) Judicial Review

(d) Freedom and Dignity of the Individual

(e) Parliamentary system

(f) Harmony and balance between fundamental Rights and Directive Principles

(g) Principle of Equality

(h) Free and Fair elections

(i) Independence of the Judiciary

(j) Limited power to amend the Constitution

(k) Effective access to Justice

(l) Principles (or essence) underlying fundamental rights.[43]

[43] NEXT IAS Content Team, nextias.com, February 27, 2024.

[205] The basic structure doctrine was reaffirmed in *Minerva Mills Ltd*[44] and *Waman Rao*:[45]

> *'The Supreme Court ruled that parliament has the authority to change the Constitution without jeopardising the fundamental structure concept. The section that limited judicial review was knocked down by the court'.*

[206] The Supreme Court made important clarifications on the application of the fundamental structure concept in the *Minerva Mills case*. The court found that the Constitution limits Parliament's ability to modify the Constitution. As a result, the Parliament cannot use its limited authority to grant itself infinite authority. Furthermore, a majority of the court decided that Parliament's ability to alter is not the same as its power to destroy. There is no equivalence between a permissible Constitutional amendment and the one that emasculates the Constitution.

[207] One certainty that emerged out of this tussle between Parliament and the Judiciary is that all laws and Constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence, Parliament's power to amend the constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all constitutional amendments.

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[44] Minerva Mills Ltd & Ors v Union of India & Ors on 31 July, 1980, July 31, 1980 (AIR 1980 SC 1789.

[45] Waman Rao and Ors v Union of India (Uoi) and Ors. On 13 November, 1980.

[208] Most of the cases on basic structure doctrine dealt with fundamental rights and freedoms, which Prempeh calls Juridical Constitutionalism or Judicial enforcement of human rights. The doctrine of separation of powers is characterised as 'structural constitutionalism,' which deals with horizontal dispersion of power among the three organs of state,[46] Sikri C.J. in *Kesavananda supra* characterised the doctrine of separation of powers as a feature of the basic structure and indeed, many decisions on the subject have regarded it as an 'eminent feature'.

The Ninth Amendment Effect

[209] Section 82(1) was amended:

> *(a) In paragraph (a), by deleting the words 'twelve months' and substituting the words 'two' fourteen days and substituting the words 'thirty days'.*

This amendment is not substantive, as it is a question of figures.

Prorogation and Dissolution of Parliament

[210] Section 83(4) paragraphs (a), (b) and (c) were deleted and substituted with the following:

> *(a) 'If the National Assembly passes a resolution of no confidence in the Government of Lesotho the Prime Minister shall resign if the*

[46] Prempeh, H. Kwasi, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, Tulane Law Review, Vol 80 No. 4, 2006, Senton Hall Public Law Research Paper

resolution of no confidence proposes a name of a member of the National Assembly for the King to appoint in the place of the Prime Minister;

(b) The Prime Minister shall not advise a dissolution under this section, unless the dissolution is supported by a resolution of two thirds majority of the members of the National Assembly;

(c)If the Office of the Prime Minister is vacant and the King considers that there is no prospect of him being able, within sixty days, to find a person who is the leader of a political party or a coalition of political parties that will command the support of a majority of the members of the National Assembly, he may, acting in accordance with the advice of the Council of State, dissolve parliament'.

[211] Section 83(5) was deleted and substituted with the following:-

'5 Where the Office of the Prime Minister is vacant, there shall be a caretaker Government which shall be headed by the Deputy Prime Minister acting as Prime Minister.

6 The Caretaker Government shall serve prior to the dissolution under subsection 4(c), until the holding of the next general election.

7 The powers of the Prime Minister or Deputy Prime Minister as a caretaker Government are limited in their function, serving only to maintain the status quo.'

[212] Section 87(5) (a) was deleted and substituted with the following –

(a) If a resolution of no confidence is passed by the National Assembly in the Government of Lesotho and the Prime Minister does not within three days thereafter resign from his office'.

[213] There was an insertion of a new section:

90 A (1) notwithstanding the provisions of section 87(1) and (2) the King shall, upon the death, retirement or resignation of the Prime Minister, appoint a member of the National Assembly who appears to be the leader of the Political party or coalition of Political Parties that commands the majority of the members of the National Assembly, as the Prime Minister on the advice of the Speaker.

(2) Where there is no member who appears to be leader of a political party or coalition of political parties that commands the majority of the members of the National Assembly in terms of subsection (1) the provisions of section 83(4)(c) shall apply.

(3) The provisions of subsection (1) shall not apply where the Prime Minister dies, retires, resigns within three months before a dissolution of parliament under section 83(2)

The Tenor of the Ninth Amendment

[214] The Amendment of section 82(1) is not substantive. It is a question of reducing and increasing time in which parliament reconvenes.

[215] The deletion of section 83 (4) (a)(b)(c) and substitution of new (a)(b) and (c) paragraphs have had the following effect:

(a) The power of the King to refuse to dissolve Parliament on advice of the Council of State, if not in the interest of Lesotho was divested from His Majesty;

(b) The Prime Minister can only advise the King to dissolve Parliament, if two thirds majority has been garnered; and

(c) The time in which to feel a vacancy of Prime Minister before dissolution should be within sixty days.

[216] Section 83(5) was deleted, in substitution thereof. The new 83(5) provided for the Deputy Prime Minister to act as Prime Minister of the caretaker government. (6) The caretaker government to serve prior to dissolution until the next general election (7) The Prime Minister and Deputy of the caretaker government to maintain the *status quo*.

[217] Section 87(5) amendment deleted 87(5) (a), which divests the Prime Minister of authority to advise the King on a dissolution of Parliament.

[218] A new section 90A deals with death, retirement or resignation of the Prime Minister, the King shall appoint a Prime Minister on the advice of the Speaker. The ninth Amendment invests the head of the Legislature with an eminent role to play in the appointment of the Prime Minister, a member of another organ of State, if no suitable candidate, then the King dissolves Parliament. However, if three months is remaining before dissolution, the provision in section 1 does not apply.

The character and Nature of the Amendment

[219] The amendment reconfigured the power map or the Constitutional structure. The King was divested of power under the pre-amended section 83(4)(a) to refuse to dissolve Parliament in accordance with the advice of the Council of State if in his opinion that would not be in the interests of Lesotho. This power was invested in the Parliament.

[220] The King is apolitical and a symbol of stability and a more fit entity to objectively assess whether it is a democratic imperative that Parliament be dissolved than the National Assembly, which has interest whether Parliament is dissolved or not. The King has constituent power in that regard, as he is the custodian of the soul of the Basotho nation.

[221] Section 87(5)(a) was deleted and the new section (a) the Prime Minister's power to advise a dissolution was removed. In case of death, retirement or resignation of the Prime Minister, the Speaker under the Ninth Amendment plays an advisory role.

[222] The objects and reasons of the ninth Amendment were stated thus:

> *"The ninth Amendment to the Constitution Bill, 2020 proposes to make Parliament play a more meaningful role in the dissolution of Parliament especially in circumstance where the Prime Minister wishes to advise His Majesty the King to dissolve Parliament or where a vote of no confidence is passed in the government of Lesotho. The Bill proposes that the Prime Minister should not advise His Majesty the King to dissolve Parliament unless he has obtained majority support of the members of the National Assembly."*

[223] It is patently clear that the Legislature was desirous to denude the Head of State (The King) and Head of Government (The Prime Minister) of the Powers and functions allocated to them under the 1993 Constitution and arrogate such powers to itself by altering the Constitutional structure. This was an assault on the 'doctrine of separation of powers', which anchors constitutional democracy. The doctrine of separation of powers and a responsible government are eminent features of the basic structure doctrine. The responsible government concept is of Westminster genealogy. It is absent in the United States and France, where Cabinet and the Lesgislature are each elected separately. This system has more separation of powers than a system with responsible government. It is for that reason why the United States courts will be slow to declare a procedurally compliant constitutional amendment, as violative of the Basic Structure Doctrine 53 The Ninth Amendment therefore should come to this court with a sense of constitutional invalidity.

[224] In sum, the superiority of constitutional law is intrinsically linked to the idea of popular sovereignty and the illegitimacy of parliamentary sovereignty. The people had given the King power, which the legislature through the Ninth Amendment took away.

Rationale of Summary

[225] The purpose of the Doctrine of Basic Structure is that it:

(a) Maintains Supremacy of the Constitution;
(b) Upholds Constitutional morality;
(c) Preserves Constitutional integrity – the doctrine strikes a balance between the need for constitutional flexibility and the imperative of maintaining the fundamental integrity and stability of the Constitutional order;
(d) Prevents authoritarianism – this doctrine acts as a bulwark against authoritarianism tendencies to dismantle democratic institutions or undermine Constitutional norms;
(e) Ensures stability and consistency – the doctrine prevents frequent and radical changes to the Constitution that could disrupt governance thereby contributing to the stability and consistency of the legal system.
(f) Protects Democracy – by protecting values as 'basic features' of the Constitution.
(g) Protects fundamental Rights – by preserving these fundamental rights from infringement through Constitutional

amendments, this doctrine safeguards individual liberties and promotes social justice.

(h) Promotes Judicial Review – this doctrine empowers the Judiciary to review constitutional amendments while enhancing its role as a guardian of the Constitution and promoting the rule of law.

[226] The doctrine of Basic Structure, as a hallmark of Indian judicial innovation, ensures that the foundational principles of the Constitution remain intact while the Constitution keeps on evolving through amendments. In navigating the complex interplay between change and continuity, the doctrine remains untouched.

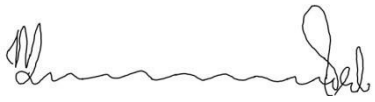
Conclusion

[227] One certainty that emerges out of this tussle between Parliament and the Judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Courts. In essence Parliament's power to amend the Constitution is not absolute and the Apex Court is the final arbiter over and interpreter of all constitutional amendments. The Legislative power is intended to perfect imperfections in the constitution and not to make or remake the constitution.

[228] The Amendment divests power from the King and the Council of State who are apolitical and neutral. The National Assembly arrogates that power to itself. The Ninth Amendment is devoid of constitutional morality

and consequently offends the 'Basic Structure Doctrine' and has to be invalidated.

[229] In view of the above, I agree with Mosito P, that the appeal be dismissed, with no order as to costs.



P MUSONDA
ACTING JUSTICE OF APPEAL

DISSENTING JUDGMENT

Van der Westhuizen, AJA (Chinhengo, AJA concurring):

Introduction

[230] Can a supreme constitution be unconstitutional? This question reminds one of another, sometimes mischievously posed to stimulate critical thinking: Is the Almighty indeed all-mighty?

[231] Can an Almighty Supreme Being, in which millions world-wide believe, make an object that is too heavy for her/him/them/it to pick up?

Frivolous as this question might *prima facie* appear, it does illustrate the inherent circular logical dilemma of working with concepts like omnipotence, sovereignty and supremacy. If the Almighty cannot make something too heavy to pick up, there is something it cannot do. Thus, it is not all-mighty, or omnipotent. If the object made cannot be picked up, the same applies.

[232] The United Kingdom Parliament is regarded as sovereign. Following the agreed and prescribed legislative procedure, it can make any law it wishes to. Likewise, it can repeal, replace, or amend any of its own laws. Through its own legislation it granted independence to its many colonies. Can it repeal the legislation with which it granted independence to India, Canada, Australia, Kenya and, for that matter, the Kingdom of Lesotho?

[233] The practical consequences of such a step and the law of the presumed sovereign state at stake render it unnecessary to consider the question seriously. What, however, if serious instability in a former colony drives it's sovereign legislature to approach the British Parliament to revoke its independence and govern it as a colony, with whatever benefits colonial status may hold? Could the UK Parliament do so on its own volition, without the agreement of the former colony? Does it mean that as long as the coloniser is sovereign, the former colonies are never fully sovereign?

[234] The not entirely dissimilar questions raised by this appeal against a judgment of the High Court of Lesotho (delivered on 16 February 2024)

relate to the notion of *supremacy* of the Constitution, nowadays widely accepted in constitutional democracies, as well as *sovereignty.*

[235] Section 1(1) of the Constitution of Lesotho states:

> *"Lesotho shall be a sovereign democratic kingdom."*
>
> Section 2 emphatically deals with constitutional supremacy:
>
> *"This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."*

[236] The constitutions of other states in Southern Africa, as well as elsewhere, contain similar provisions. For example, section 2 of the Constitution of South Africa explicitly requires not only other law, but also conduct, to comply with the Constitution:

> *"The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

[237] Constitutional supremacy is also explicitly stated in sections/articles 2 of the Kenyan,1(3) of the Zambian and 2 of the Zimbabwean Constitutions.

[238] Section 52(1) of the Constitution of Canada contains wording similar to the Lesotho Constitution:

> *"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."*

[239] A constitution with legitimacy plays a much larger role in a society than providing a framework for governance and serving as a yardstick for legislation, common law and executive action. Explicitly, or by implication, it often contains values that the society believes in, or at least strives towards.[47] It may also reflect much of a society's history, especially past struggles, defeats, victories and mistakes. Thus, it is often, symbolically and even poetically, referred to as the birth certificate of a nation; a nation's autobiography; the nation's compass; the mirror in which a nation can see itself; and a window into a nation's sole.

[240] At the core of the constitution of a constitutional democracy, like the Constitution of Lesotho, is the principle, practice and ideal of democracy.

[241] For these and other reasons, a constitution must provide maximum legal, political and societal certainty, stability and consistency. It should

[47] E.g. section 1 of the South African Constitution sets out foundational values, such as human dignity, non-racialism and non-sexism. The Constitution of the Federal Republic of Germany contains similar provisions.

not be changed willy-nilly, or because of the mere political will of a party or personality, or a popular trend at a particular time.

[242] Yet, societies and their needs change over time, like the world and life itself. The ancient Greek philosopher, Herakleitos, said that one never steps into the same flowing river more than once. Therefore, it must be possible to amend a constitution.

[243] However, world history has shown that the very freedom that democracy gives, cherishes and protects can be used for profoundly undemocratic purposes. A democracy can democratically destroy itself. Following constitutional prescriptions, a constitution can be gutted. In Germany Adolf Hitler came to power in 1933 as a result of democratic procedures; and thereafter resorted to dictatorship.

[244] This brings to the fore the question whether a constitutional amendment can be tested against the constitution itself, found to be constitutionally wanting and declared by a court of law to be unconstitutional and invalid. If so, when? What if it seeks to amend or abolish the very constitutional provision in terms of which it is regarded as unconstitutional, or even the provision prescribing the procedure to be followed for amendment? This logical dilemma lies at the centre of this matter.

Factual background

[245] The relevant facts of this case are simple and narrated in the majority judgment of the High Court. The Kingdom of Lesotho gained

independence from the United Kingdom in1966. After a period of political instability, including a military coup in 1986 and coups amongst generals, democratic elections were held in 1993. In the same year the Constitution of Lesotho was adopted and published.

[246] Lesotho is a democracy, where the government is elected in regular general elections. Like other British colonies, Lesotho inherited the Westminster parliamentary system. Thus, it has a head of state, two houses of Parliament (the National Assembly and the Senate) and an executive authority headed by the head of state and, in effect, the Prime Minister. It differs from the democratic republics in the same region, like Kenya, Malawi, Zambia, Zimbabwe, Namibia and South Africa, by being a monarchy. The head of state is the King.

[247] Separation of powers prevails in Lesotho. The King, Parliament, the Executive and the Judiciary are dealt with in different chapters (V, VI, VIII and XI) of the Constitution. Judicial independence is constitutionally secured and demanded by section 118(2).

[248] The Ninth Amendment of the Constitution Act, 20 of 2020 (the Ninth Amendment; the amendment), brought about the changes indicated below. It was allegedly triggered by litigation concerning the King acceding to the advice of the Prime Minister in 2017. They specifically relate to the contents and consequences of a vote of no confidence passed in the National Assembly. For the purposes of this judgment, I assume, as stated in the judgment of my brother, Mosito P,[48] that the motion was

[48] Para [7]

passed unanimously by the National Assembly. (This is dealt with again below (in [50]).

[249] It must be noted that Lesotho at this time is in the process of embarking on a grand and over-all Constitutional Reforms Project, perceived by many as the only means to solve the country's political problems. This is supposed to culminate in the Tenth Constitutional Amendment Act.

The old; the new; and the difference

The old

[250] Before the Ninth Amendment, the relevant parts of section 83 of the Constitution, under the heading *"Prorogation and dissolution of Parliament",* read:

> *"(4) In the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister:*
>
> *Provided that –*
>
> *(a) if the Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho, he may, acting in accordance with*

the advice of the Council of State, refuse to dissolve Parliament;

(b) if the National Assembly passes a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution the King may, acting in accordance with the advice of the Council of State, dissolve Parliament; and

(c)if the office of Prime Minister is vacant and the King considers that there is no prospect of his being able within a reasonable time to find a person who is the leader of a political party or a coalition of political parties that will command the support of a majority of the members of the National Assembly, he may, acting in accordance with the advice of the Council of State, dissolve Parliament.

(5) A resolution of no confidence in the Government of Lesotho shall not be effective for the purposes of subsection 4(b) unless it proposes the name of a member of the National Assembly to appoint in the place of the Prime Minister."

[251] Under the heading *"Ministers of Government of Lesotho"* section 87(5) stated:

"The King may, acting in accordance with the advice of the Council of State, remove the Prime Minister from office –

(a) if a resolution of no confidence in the Government of Lesotho is passed by the National Assembly and the Prime Minister does not within three days thereafter, either resign from his office or advise a dissolution of Parliament; . . ."

The new

[252] Then the Ninth Amendment was passed. Under the same above-quoted heading, section 3 states:

"The Constitution is amended in section 83 in subsection (4) –

(a) by deleting paragraphs (a), (b) and (c) and substituting the following:

'(a) if the National Assembly passes a resolution of no confidence in the Government of Lesotho the Prime Minister shall resign if the resolution of no confidence proposes a name of a member of the National Assembly for the King to appoint in the place of the Prime Minister.

(b) the Prime Minister shall not advise a dissolution under this section, unless the dissolution is supported by a resolution of two thirds majority of the National Assembly;

(c)if the office of the Prime Minister is vacant and the King considers that there is no prospect of him being able, within sixty days, to find a person who is the leader of a political party or a coalition of political parties that will command the support of a majority of the members of the National Assembly, he may, acting in accordance with the advice of the Council of State, dissolve Parliament.' "

[253]The above version was published in the Lesotho *Government Gazette* in 2020.[49] It differs slightly, for example in numbering, from the version quoted in the majority judgment of the High Court. The High Court majority judgment also does not quote the amendment of section 87(5).

[254]Also under the heading *"Ministers of Government of Lesotho"* section 4 of the Ninth Amendment Act states:

"The Constitution is amended in section 87(5) by deleting paragraph (a) and substituting the following –

'(a) if a resolution of no confidence is passed by the National Assembly in the Government of Lesotho and the Prime Minister does not within three days thereafter resign from his office' "

[49] Vol 65 Friday 8 May 2020 No 4.

The difference

[255] The core difference between the pre- and the post-amendment position is the following: If, under the old sections 83(4)(b) and 87(5), a motion of no confidence in the Government is passed by the National Assembly, the Prime Minister, within three days, had to either resign, or advise the King to dissolve Parliament. If the Prime Minister did not do one of these two things, the King had the power to dissolve Parliament, with the advice of the Council of State. Dissolution of Parliament necessitates a general election.

[256] The amendment provides for the motion of no confidence to include a proposal as to who the next Prime Minister must be, "*for the King to appoint".* If the motion is passed, the Prime Minister must resign. She or he no longer has the power to advise the King to dissolve Parliament, unless the National Assembly supports dissolution of the Assembly with a two-thirds majority.

The aftermath

[257] In 2020 a motion of no confidence in Prime Minister TM Thabane was passed, based on the amended proceedings. He resigned and was replaced by Prime Minister M Majoro.

[258] On 13 October 2023 a hand-written motion of no confidence was filed in the National Assembly. It was tabled to be proceeded with on 16 October 2023. In the founding affidavit the applicant before the High Court submitted that *"it is this very motion that is subject matter of the*

present proceedings" (sic). Due to developments in these proceedings in the High Court and Parliament, it was put on hold. It is not necessary, in this judgment, to deal with the motion of no confidence.

The High Court

[259] So, the first respondent in this appeal headed to the High Court as the applicant. The main point of attack, according to the Founding Affidavit, was that –

> *"the completed amendment has done away with not only the Prime Minister's rights to advise the King to dissolve the parliament but also the right of participation of the public to determine their own government in that the right to be exercised in forming government has been given exclusively to the members of parliament who no longer to get fresh mandate but decide on blank cheque by themselves as to who should be the Prime minister contrary to how the electorate had elected." (sic)*

[260] The applicant's view was therefore that *"there is infraction to the basic structure of the constitution provided for in section 1 of the constitution . . . In the premises, the basic structure of the constitution has been violated and that calls for the pronouncement per the order sought in the notice of motion." (sic)*

[261] It was furthermore submitted by the applicant that –

"there was a flaw in the manner in which the process leading to the complete amendment was also embarked upon as section 87 of constitution is not capable of being divorced from section 86. Section 86 spells out the executive authority of Lesotho while section 87 spells out how that authority can be exercised." (sic)

[262] In the Notice of Motion the applicant sought an order that –

"a) . . . the 9th amendment to section 87(5)(a) of the constitution be declared unconstitutional to the extent that it violates the basic structure of the constitution per section 1 of the Constitution of Lesotho 1993.

b) . . . the process of the passing of the vote of no confidence in parliament be deferred pending the conclusion of the reforms process in terms of which the Parliament shall promulgate the comprehensive provisions to regulate the passing of vote no confidence.(sic)

c) . . . respondents pay costs of suit.

d) . . . "

[263] Following extended reasoning in a lengthy judgment, Makara J (with the concurrence of Monapathi J) concluded that the Ninth Amendment, *"for the reasons already elaborately stated, undermined the basic*

structure of the democratic constitution of Lesotho". Earlier in the judgment he stated that –

> *"the future of the Prime-Minister cannot legitimately be left solely in the hands of the members of Parliament as though they owe the man".*

He added:

> *"This would radiate the impression that one holds the office of the Prime Minister at the pleasure of the parliamentarians only to the exclusion of the electorate irrespective of the constitutional right of every citizen to participate in public affairs."*

[264] The judgment expressed the view that the amendment was *"revolutionary".* Makara J furthermore stated:

> *"It would be remiss for the Court not to acknowledge that it is cultural amongst the Basotho to hold consultative sessions to resolve national issues*".

but pointed out:

"This is normally conducted through the community and national pitsos."

[265] Moahloli J dissented. He criticised the width and formulation of the applicant's prayers. The question, according to him, is whether the amendments are unconstitutional –

*"to the extent that they **violate the basic structure** of the Constitution set out in Section 1 thereof. That is to say, whether these amendments radically **change and destroy the basic structure of the Kingdom of Lesotho** as 'a sovereign democratic kingdom' [as declared in section 1(1)"* (emphasis added).

[266] Moahloli J also stated:

"Every constitution has an implicit unamenable core that cannot be amended through the delegated amendment power. Judicial review is a mechanism for enforcing this limitation."

[267] These interesting formulations are returned to below.

[268] The minority judgment made ample use of academic authority, such as the writings of Ronald Dixon and David Landau[50], Yaniv Roznai[51] and Richard Albert[52] and Karabo Mohau[53]. It refers to the apparent growing trend to make constitutional amendments more difficult and the stifling of change that this may cause.

[269] The High Court's order to a considerable extent mirrors the wording of the prayers in the Notice of Motion:

> *"1. The 9th amendment to section 87(5)(a) of the Constitution is declared unconstitutional to the extent that it violates the basic structure of the democratic Constitution of Lesotho as provided in Section 1 of the Constitution of Lesotho 1993.*
>
> *2. Section 84(4) and 87(5) is equally declared unconstitutional to the extent that it violates the basic structure of the democratic Constitution of Lesotho 1993.*
>
> *3. The Court declines to decide on the prayer by the Applicant that the process of the passing vote of no confidence in parliament be deferred pending the conclusion of the reforms process in terms of which the Parliament shall promulgate the passing of vote of no confidence.*

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[50] "Transitional constitutionalism and a limited doctrine of unconstitutional amendment" *I. CON* (2015) Vol 13 No 3 306

[51] *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 2017 Oxford University Press 6

[52] *Constitutional Amendments: Making, Breaking and Changing Constitutions* 2019 Oxford University Press 217

[53] Authors "*Constitutionalism and Constitutional Amendment in Lesotho*: A case for substantive limitations" *Lesotho Law Journal* (2014) Vol 21 Special Edition 32

4. There is no order on costs because this is a constitutional matter."

Appeal

[270] The appellants approached this Court on appeal. Their Grounds of Appeal mentioned several points on which the High Court allegedly erred and misdirected itself. These include that the High Court majority misinterpreted recent case law regarding "rule of law review" and "rights based review"; wrongly found that the application was ripe for hearing on the motion of no confidence; erroneously concluded that the applicant had standing; failed to interpret properly and contextually the import of section 20 of the Constitution; determined "non-pleaded issues" before it: and failed to address Standing Order No 43.

[271] According to the appellants, the High Court also reached incorrect conclusions on issues of law and fact. The Court found that the amendment "'*revolutionised' the original scheme and its underlying philosophy*". It *"mis-conceptualise(d) the PRIME MINISTER as the appointee or the electee of the parliamentarians exclusively and therefore removable at their behest exclusively".* The High Court wrongly concluded that *"(t)he two-thirds majority when gauged against the simple majority on removal proves unrealistic and creates an inherent danger of many prime ministers within a few years and hence destabilisation of a country",* according to the Grounds of Appeal. The final ground mentions the High Court's allegedly erroneous conclusion that the amendment *"has removed all the interventionist mechanisms that were provided in the original text*

to ascertain the legitimacy of the move to change a PRIME MINISTER and by extension government".

[272] In response to questions from the bench during the hearing of oral argument in this Court, counsel agreed that the wording of the High Court's order was open to criticism and would have to be reformulated, if the appeal is dismissed. For example, the phrase "*to the extent that it violates the basic structure*" of the Constitution, does not specify the extent to which the amendment violates the basic structure. Those bound by and required to act in accordance with the order would have to interrogate, anew, the meaning of the basic structure concept and the extent to which it was violated.

Questions

[273] The following questions require answers, to be answered below:

(a) Can a constitution as supreme law be amended?

(b) If so, can the constitutional validity of an amendment be challenged before and tested by a court of law, based on the procedure followed?

(c) Was the correct amendment procedure followed in this case?

(d) Can an amendment, properly adopted through the prescribed procedure, be challenged, based on the substantive contents of the amendment?

(e) If a constitutional amendment or proposed amendment can be challenged and invalidated, at what stage can this happen?

(f) What is the test for when a constitutional amendment is constitutionally invalid?

(g) Does a universally recognised model for motions of no confidence exist in Westminster systems?

Discussion of questions

Amendment possible?

[274] As already indicated, constitutions can be amended. Arguably the most widely known and indeed famous part of the Constitution of the United States of America is the Bill of Rights, consisting of ten amendments. Since its adoption in 1996, the South African Constitution has been amended by 18 amendment Acts. Section 74 of the Constitution provides for constitutional amendments and prescribes the procedure to be followed. Articles 31 and 32 of the Namibian Constitution deal with constitutional amendments.

[275] Section 52(3) of the Canadian Constitution stipulates that amendment to the Constitution shall be made only in accordance with the authority contained in the Constitution of Canada. Sections 38 to 49 prescribe the procedure to be followed. These are but a few examples.

[276] Chapter VII of the Constitution of Lesotho provides for "alteration" of the Constitution. In one long and detailed provision, section 85, it stipulates the procedure to be followed.

[277] Section 85(2) states:

> *"A bill for an Act of Parliament under this section shall not be passed by Parliament unless it is supported at the final voting in the National Assembly by the votes of the majority of all the members of the Assembly and, having been sent to the Senate, has become a bill that, apart from this section, may be presented to the King for his assent under subsection 80(1) or (3) as the case may be, of this Constitution."*

[278] Section 85(3) then proceeds to say that a bill to alter certain provisions (stated in (3)(a) and (b)) shall not be submitted to the King for his assent unless the bill, between two and six months after its passage by Parliament, is approved by the majority in what seems to be a referendum ("*the vote of the electors qualified to vote in the election of the members of the National Assembly").* If the bill does not alter any of

the provisions in (3)(a) and is supported by a two-thirds majority of each house of Parliament, a referendum is not necessary.

Procedural challenge

[279] Seeing that the procedure for alteration of the Constitution is set out in the Constitution, it follows that the process through which any purported amendment is achieved can be tested in a court of law. The legislature is bound by the Constitution. Courts have to apply and guard over the Constitution. This includes testing the constitutional validity of the bill or Act of Parliament against constitutional requirements. Even if the amendment represents "the will of the people", the "people" must follow constitutionally prescribed procedures, through their elected representatives. In the *Matatiele Municipality* case[54] the South African Constitutional Court found that *"the part of the Constitution Twelfth Amendment of 2005 which transfers …the local municipality of Matatiele, . . . from the province of KwaZulu-Natal to the province of the Eastern Cape was … adopted in a manner that is inconsistent with the Constitution".*

Procedure in this case

[54] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (6) SA 477 (CC)

[280] In this matter the procedure by which the amendment was passed by Parliament is not challenged, except for the first respondent's above-mentioned submission that section 87 could not be "divorced from" section 86. The significance of an amendment to section 87(5) for section 86 is not clear though.

[281] Section 85(3) requires a referendum before the amendment is presented to the King for his assent, if a clause listed in subsection (b) is amended, unless it is passed by a two-thirds majority.

[282] Section 83 appears in that list. No referendum took place. As mentioned above, the amendment was passed unanimously, according to the judgment of Mosito P. Should this not have been the case, and a two-thirds majority was furthermore also not achieved, the adoption of the Ninth Amendment Act would be fundamentally flawed, resulting in certain constitutional invalidity. This judgment proceeds on the assumption that the National Assembly decided unanimously, or at least with a two-thirds majority, also because the procedure was not challenged.

Substantive challenge

[283] A rigid and strong emphasis on parliamentary sovereignty moved the Supreme Court of Ireland, for example, to take the view that no amendments can be unconstitutional, in *Finn v Attorney General*.[55] An impressive body of literature has been published worldwide on the issue

[55] [1983] IR154

of so-called "unconstitutional constitutions".[56] It is not universally agreed, but widely accepted, that a constitutional amendment can indeed be constitutionally scrutinised, tested and found wanting, not only procedurally, but because of its contents. The High Court majority judgment refers to the Indian case of *Kesavananda Bharati v The State of Kerala and Another.*[57] The Canadian Supreme Court acknowledged this as well in *Reference re Senate Reform*[58]*,* again referred to below in this judgment.

At what stage? Proposed constitutional amendment, or amended constitution?

[284] A constitutional amendment mostly, if not always, happens by way of a Bill, which becomes an Act of Parliament. For example, under the heading *"Bills amending the Constitution",* section 74 of the South African Constitution repeatedly deals with "*a Bill passed by . . . the National Assembly . . . and . . . the National Council of Provinces . . . ".*

[56] Some of these publications are referred to by the minority judgment in the High Court (see footnote 8 above). See furthermore especially Gary Jeffrey Jacobsohn "An unconstitutional constitution? A comparative perspective" *International Journal of Constitutional Law* Vol4 Issue 3 July 2006 460; and Dieter Grimm (former justice of the Federal Constitutional Court of Germany) *The Paradox of Constitutionalism* Oxford University Press

[57] [1973] AIR 1461

[58] [2014] 1 SCR 704. For my knowledge of this case, as well as other valuable information on the Canadian situation, I owe gratitude to Professor Radhakrishnan Persaud, a leading expert on the advisory role of the Canadian Supreme Court on intergovernmental conflict resolution and constitutional amendment, of Glendon College and York University. Some of the information comes from his forthcoming book on reference cases and constitutional amendment entitled *Judicial Advice as Law*, to be published by Northrose Publications, Whitby, Ontario.

[285] Section 85(2) of the Lesotho Constitution ([46] to [47] above) clearly deals with alteration of the Constitution by way of a "bill for an Act of Parliament". In subsection (3) the term *bill* repeatedly occurs.

[286] Once an amendment properly passes all its prescribed phases, it becomes part and parcel of the constitution. In Canada Section 52(2) of the Constitution Act 1982 states this explicitly by defining the phrase *"Constitution of Canada"* as follows:

> *"The Constitution of Canada includes*
>
> *(a) the Canada Act 1982, including this Act;*
> *(b) the Acts and orders referred to in the schedule; and*
> *(c) any amendment to any Act or order referred to in (a) or (b)."*

[287] Clearly an amendment bill may be challenged and declared unconstitutional by a court of law, if the constitution provides for this possibility, for example by way of a reference case in Canada, or otherwise. However, does this apply to the eventual fully-fledged Act as well? Of course an Act of Parliament may be challenged and declared to be constitutionally invalid. That is what constitutional supremacy means.

[288] But, in the case of a constitutional amendment the contents of the Act become a part of the constitution itself. The Act, previously a Bill, ceases to exist independently from the constitution. Whereas a proposed amendment can clearly be tested and found to be unconstitutional, a completed amendment raises the vexed question whether the constitution, or a part of it, can indeed be unconstitutional. The question

of "an unconstitutional constitution" has been widely debated, as mentioned in this judgment.

[289] The logical awkwardness of parts of a supreme constitution being found to be unconstitutional is a necessary consequence of the courts' duty to protect a constitution and the democracy it embodies. To stop an amendment bill **before** it becomes an Act and the amendment does find its way into the constitution, would be more ideal. This is not always possible though. Like the above question about the Almighty's power, we have to live with the concept of unconstitutional constitutional provisions.

[290] But, does the gate for testing the constitutionality of a constitutional amendment remain open for ever? Does a time not come when the amended provision or provisions have been part of the constitution for so long that judicial review threatens legal certainty, constitutional supremacy and the separation of powers? Does the role of the judiciary not decrease over time? And, does the responsibility not lie with Parliament to rectify what may be wrong by way of legislation, such as an amendment bill if necessary?

[291] In this case the Ninth Amendment Act came into being in 2020. That is when the amendments became part of the Constitution of Lesotho. Its constitutionality was challenged only three years later, in 2023. Is it constitutionally and democratically acceptable that one or more provisions of the Constitution be invalidated after such a long period of time? Should there be a limit; or could it even happen after decades? Does the courts' guardianship of the Constitution include the power continually to be ready

to clean up the Constitution, or should this task be the responsibility of Parliament?

[292] A delay of three years, like in this case, is undesirable from the perspective of the important role of a supreme constitution, as a society's foundation and supreme law. It falls outside what could be regarded as a reasonable time for challenging an amendment. However, without having heard argument on this point, it would not be proper for this Court to uphold the appeal on this basis. Whether the period of three years may play a role in the weighing of relevant factors is dealt with below.

Test for unconstitutionality

[293] When a constitutional amendment is properly passed by Parliament with the required majority, and approved by the majority of voters in a referendum when required, the people have indeed spoken, in a democratic manner. In its simplest form, democracy entails that the will of the majority prevails. It has been said that no one who does not accept the will of the majority can be called a democrat.

[294] However, no democrat has to accept that whatever the majority does with its power at any given moment, perhaps impulsively or under the influence of a populist demagogue, is right and must be law. Because the democracy must protect itself, a court of law may interfere. The separation of powers doctrine demands that this may happen only when necessary; and, indeed, in terms of the constitution itself. *Simply put, how "serious" (for lack of a better term at this stage) a threat must the amendment pose, before it amounts to being unconstitutional?* At this

stage the question is posed in a general sense and not with specific reference to Lesotho, or this appeal.

[295] Half a dozen hypothetical examples may be useful, not to reach any judicial decision on, but to urge theoretical consideration to take its practical application into account. These examples are dealt with in the discussion below. Assume the amendment –

(i) requires regular elections to be held every five years, instead of every four years;

(ii) abolishes regular elections;

(iii) declares that the President, King, or Police Chief will be Chief Justice at the same time;

(iv) radically changes the constitutional provision prescribing how the constitution can be amended, for example by stating that the President or King can do it by decree;

(v) alters the provision that guarantees the right to life, in order to revive the death penalty in a jurisdiction where it has for long been abolished; or

(vi) abolishes or radically changes the provision protecting property rights.

[296] As indicated above, the first respondent, as applicant in the High Court, submitted in the Founding Affidavit that the amendment violated *"the basic structure of the Constitution provided for in section 1"*. Quoted above, section 1 declares Lesotho to be a sovereign democratic kingdom.

[297] Before this Court, counsel used the term *basic structure*, but indicated during oral argument that other terms could just as well be used. The *spirit and purport of the constitution* was proposed; and stated to be more appropriate than the b*asic structure*.

[298] As to the *basic structure* test, the High Court majority referred to the above-mentioned Indian case of *Kesavananda Bherati,* which suggests the *identity of the constitution* as an alternative.[59]

> *"A judicial principle according to which even in the absence of explicit constitutional limitation on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basic structure* ***or identity****."* (Emphasis added)

[299] In *Reference re Senate Reform*[60] the Canadian Supreme Court seems to regard *basic structure* and *architecture* as alternatives, carrying the same meaning:

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[59] *Supra.*
[60] S*upra* para 27.

"The concept of an 'amendment to the Constitution of Canada … is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a collection of discrete textual provisions. It has an ***architecture****, a* ***basic structure****. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's* ***architecture****."* (My emphasis)

[300] It has also been suggested that an amendment may have such a radical impact that it amounts not to an amendment of the constitution, but indeed to abolition or destruction thereof. The test would then be *whether a purported amendment effectively abolishes, abrogates, or destroys, rather than amend, the constitution*. In *Premier, Kwazulu-Natal and Others v President of the Republic of South Africa*[61] Mahomed DP held that –

"there was a procedure … prescribed for amendments to the Constitution and this procedure had to be followed: if that was properly done, the amendment was unassailable. It might perhaps be that a purported amendment to the Constitution, following the prescribed procedures, but ***radically and fundamentally restructuring and re-organising the fundamental premises of the Constitution*** *might not qualify as* ***an amendment at all****. But even if there was this kind of implied limitation to what could properly be the subject-matter of an amendment, none of the*

[61] 1996(1) SA 769 (CC) at 783I – 784F.

amendments in casu could conceivably fall within the category of amendments so basic to the Constitution as effectively to abrogate or destroy it." (emphasis added)

[301] Doing away with the clause regulating amendment and giving the President or King the power to amend by decree as she, he, or they may deem fit (example (iv) above), would probably amount to abolishing or destroying, rather than amending, a constitution. Because the right to vote in regular elections is an essential ingredient of democracy, the same may well apply to example (ii), doing away with regular elections.

[302] Depending on how the concept of the *basic structure of the constitution* is interpreted, it does not seem – to the author of this judgment – to be the most accurate description of what one tries to capture. The term *structure* of the constitution may be seen to refer to the organisation of the contents of the constitution, like the division into and order of chapters. Otherwise, it could refer to the structure of the state and its institutions, for example the separation of powers. Of the above-mentioned examples, only (iii) (on the Chief Justice) falls comfortably into this description, as it clearly violates the principle of separation of powers and thus the nature of the state.

[303] My concerns about the *basic structure* test also apply to the *architecture of the constitution*, mentioned next to the *basic structure* in the Canadian case referred to. The difference between the two is small: whereas *structure* seems to have engineering connotations, *architecture* refers to design.

[304] Violation of the *spirit and purport* of the constitution may be closer to accurate, but is not perfect. The phrase appears in section 39(2) of the South African Constitution and may carry with them judicial interpretations of that clause:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights."*

[305] The advantage of the basic structure test is that it has been used fairly widely elsewhere in the world. However, I would propose – for Lesotho, perhaps to be picked up elsewhere - whether the amendment is *destructive of the constitutional democracy* in the jurisdiction at stake. This formulation is close to the test whether a purported amendment is indeed *an amendment, or amounts to abolishing or destroying the constitution*. It emphasises the degree of seriousness required, before a court can declare a constitutional amendment to be constitutionally invalid; and emphasises the serious side and high bar of the *basic structure* test, to which it can in any event be linked. The minority judgment in the High Court actually neatly connects the *basic structure* and *destruction of democracy* tests, by asking –

> *"whether these amendments radically change and destroy the basic structure of the Kingdom of Lesotho as 'a sovereign democratic kingdom' ".*

[306] This requires a higher level of concern than mere structural alteration. It indeed goes to the essence of democracy in Lesotho.

[307] In the final analysis, the choice of a specifically formulated test for the unconstitutionality is probably neither of utmost importance generally, nor decisive of the outcome of this appeal. Under any of the above wording, examples (ii), (iii) and (iv) would be constitutionally unacceptable as a constitutional amendment. Altering the time period between elections from four to five years (example (i)) would probably not be serious enough to attract unconstitutionality. Introducing capital punishment in a society that has been without it for long (example (v)), is debatable.

[308] Alteration of the property clause (example (vi)) may depend on the context and history of a society. In South Africa, for example, section 25 of the Constitution, dealing with property, was agreed on during the constitutional negotiations as a compromise. Land ownership has resulted from centuries of colonialism and apartheid. The redistribution of land is a constant topic for political and economic debate. Attempts have been made to amend section 25 in order to allow (or allow more clearly) for expropriation without compensation. Whereas the matter is a sensitive and emotional one, it is very unlikely that a court will find amendment of the provision to be against the *basic structure* of the constitution, or *destructive of constitutional democracy.*

[309] In order to utilise the *destruction of constitutional democracy* test, even as a refinement of the *basic structure* test, some common

understanding of democracy is necessary. This judgment cannot analyse the concept from Plato onwards, through John Locke, Thomas Hobbes, Thomas Jefferson and Hannah Arendt, to Frantz Fanon and recent critical race and feminist thinkers. Differences occur between recognised democracies. One also hears of "the Chinese narrative of democracy"; and North Korea is officially called "the Democratic Peoples' Republic of Korea".

[310] One has to work with minimum requirements for democracy. Two of these are regular elections; and an independent judiciary, as part of the separation of powers. As already indicated, an amendment that abolishes regular elections, or makes the head of state or police Chief Justice, is highly likely to be destructive of the constitutional democracy and thus wholly unwelcome in an otherwise democratic constitution.

[311] Where does this take Lesotho's Ninth Amendment Act regarding a motion of no confidence? Do universally accepted procedures and consequences set general standards for motions of no confidence in Westminster democracies?

Motions of no confidence and their consequences: Comparative perspective

[312] Parliamentary motions of no confidence occur generally in democracies functioning according to the Westminster tradition. Like in section 83 of the Constitution of Lesotho, section 102 of the South African

Constitution provides for it. So does article 39 of the Namibian Constitution.

[313] However, it is not always stipulated and regulated in the constitution itself. The United Kingdom, where it has often been used, does not have a written constitution. In Canada it is dealt with by convention, that is established practices and traditions that are regarded as part of the constitutional constellation.

[314] It would seem that a motion of no confidence is usually proposed by members of one or more opposition parties in Parliament, when a strong perception exists that a government or its leader (as President or Prime Minister) fails, or does not enjoy the confidence of the people.

[315] A generally accepted or strictly prescribed procedure around motions of no confidence does not necessarily exist in Westminster democracies. A widely accepted practice, when a motion of no confidence is passed by the majority, for example in the National Assembly or House of Commons, is that the head of government resigns, or requests the head of state (the King, or Governor General) to dissolve Parliament. A general election is then called to determine which party governs and the head of state appoints a new Prime Minister.

Application to the facts of this case

[316] On the preliminary points raised in the grounds of appeal, such as jurisdiction and standing, the High Court cannot be faulted.

[317] As to motions of no confidence, the pre-Ninth Amendment Act situation in Lesotho was similar to that elsewhere. The Prime Minister had to either resign, or advise the King to dissolve Parliament, in which case a general election would follow. If the Prime Minister did not do so within three days, the King could act by dissolving Parliament.

[318] As pointed out above, the motion of no confidence can include a proposal as to which member of the National Assembly should be appointed by the King. Dissolution of Parliament is no longer necessary.

[319] As furthermore indicated above, the main objection is that the electorate is denied the opportunity to choose a new government at the ballot box. Another is that the role and power of the King are diminished.

[320] In considering this, it must be remembered what the role of courts, including this Court, is within a system based on the separation of powers. It is not to decide on what is good, bad, preferable, or unwise for governance in Lesotho, in the eyes of the judges. Courts are neither to make binding decisions on policy matters, nor draft a perfect constitution for Lesotho. For suspicions and misgivings about, or a lack of trust in politicians, other individuals or groups, there is no place in judging, regardless that these sentiments may be understandable, given past events.

[321] The role and indeed duty of courts are to honour, interpret and apply the Constitution by which they are bound; and, furthermore, to preserve and protect the democratic constitutional order, embodied in the

Constitution. Evidence and arguments properly presented to the court are what a judicial decision should be based on. Alarmist speculation about the possibly disastrous consequences of the amendment must be handled with care. However, a court would neglect its duty if it does not seriously consider the foreseeable consequences of the amendment.

[322] The above two objections are worthy of concern. However, do the amendments reach the level of *undermining the basic structure of the Constitution*; amounting to *abolishing rather amending the Constitution*; or being *destructive of the constitutional democracy*?

[323] **Reasons for concern** include the following, firstly about the dissolution of Parliament:

(a) A successful motion of no confidence means that the government falls. A new government must take over, as soon as possible. That is why the pre-amendment position imposes a three-day time limit for the Prime Minister's decision-making. A fresh mandate is needed. A general election is a widely accepted way of choosing a government. To deny the electorate that opportunity, poses a serious threat to democracy.

(b) On behalf of the first respondent it is pointed out that in Westminster democracies like the United Kingdom, Canada, Australia and New Zealand the right to ask the monarch (or Governor General) for the dissolution of Parliament resides in the Prime Minister.

(c) The power of the monarchy to dissolve Parliament has been described as one of the central features of the English Constitution.[62]

(d) Direct participatory democracy is a part and form of democracy, in addition to indirect democracy through elected representatives. The High Court emphasised the importance of participatory democracy with reference to the Popular Initiative or Wanyiku in Kenya and the Hungarian Constitutional Court decision on Referenda and Popular Sovereignty 52 of 1997.

(e) The amendment opens the door for already elected politicians to make deals with one another about the office of the Prime Minister and other positions, even to rotate the Prime Minister, without the participation of the electorate.

(f) In Westminster democracies, it is unusual for a motion of no confidence to include, at the same time, a proposal as to who the new Prime Minister must be.

[324] Regarding the King, the following causes concern:

(i) According to section 86 of the Constitution "(t)he executive authority of Lesotho is vested in the King". The position of the

[62] See William Bagehot *The English Constitution* Oxford University Press 167, as quoted in the first respondent's heads of argument.

King seems to be weakened by the amendment. The pre-amendment section 83(4)(b) stated that the Prime Minister "may advise a dissolution to the King". The King then "may dissolve Parliament" with the advice of the Council of State. The amendment provides for a name to be proposed "for the King to appoint". The difference between this wording and the earlier formulation that the King "may" dissolve Parliament when advised to do so, which suggests a discretion on his side, could be interpreted as a reduction of the King's power. Because section 1 of the Constitution, to which the *basic structure* of the Constitution is linked, states that Lesotho is a democratic kingdom, tampering with the Kings powers amounts to a violation of the *basic structure*. (However, see the reference to section 83(5) below.)

[325] In **defence** of the amendment, the following is and could be argued on the dissolution of Parliament and a general election:

(i) Whereas constitutions should not easily be amendable, in the interest of stability and certainty on the highest level of law, too rigid limitation of Parliament's power to amend may block necessary change. This may be more so in youngish democracies who have relatively recently been liberated from a colonial power, or is still grappling with ongoing decolonisation.

(ii) The members of the National Assembly have indeed been democratically elected to represent voters. They need not call

elections to test whether each and every one of their decisions carry the approval of the people. If they act outside what they undertook to the people to do, they will be accountable to their constituencies between or during the next elections.

(iii) Elections in Lesotho take place regularly. Voters can express their consent or dissent within a few years.

(iv) By a two-thirds majority the National Assembly can force dissolution of Parliament.

(v)When certain clauses of the Constitution (including sections 83 and 84) are amended, a referendum has to take place. This does not exclude judicial review, because one of the functions of a constitution and the courts as its guardian is to protect the people and democratic order against irresponsible majority decision-making. However, a referendum on the very point at stake does give the electorate an opportunity to express their view, in the absence of a general election. In this case no referendum took place, but amendment includes the possibility and indeed necessity in certain cases.

(vi) The amendment changes the immediate consequences of a motion of no confidence; it does not abolish or radically change it.

(vii) The inclusion of the name of a preferred candidate for appointment as Prime Minister in a motion of no confidence did not result from the amendment. Section 83(5) indeed demanded it for a motion of no confidence to be valid, before the amendment.

[326] Regarding the King, the following has been or can be argued:

(a) How much real political power does the King have in practice? Section 83(4) of the Constitution states that the King "shall act in accordance with the advice of the Prime Minister". In statutory language "shall" mostly expresses an obligation. In "plain language" it would be translated as "must". How much difference does it make for democracy whether the King acts on the advice of a Prime Minister, who has just lost a vote of no confidence, or in response to a decision by the National Assembly?

(b) The inclusion in a motion of no confidence of the name of a member of the National Assembly "for the King to appoint as Prime Minister" (in the words of the amendment) is not a creation of the amendment. As indicated above, it has been in section 83(5) all along. In this respect the King's power is not affected by the amendment.

(c) More fundamentally, is it necessarily *destructive of the constitutional democracy*, or does it undermine the *basic structure* of the Constitution to change the perceived power of the King? It could be

increased or reduced. This question may be highly sensitive in Lesotho and some other monarchies, but even in the United Kingdom and some of its colonies countries abolition of the monarchy is often publicly debated. In 2021 Barbados became a republic. A monarchy can be a democracy, but is not the only form a democracy can take. The Kingdom of Lesotho is surrounded by democratic republics. Should this Court rule that the King's position may never ever in all perpetuity be altered? Although it seems hardly thinkable to abolish the monarchy at this stage, it is theoretically possible that the legislature may, at some point, resolve to amend section 1 of the Constitution by stating that Lesotho is a sovereign democratic republic, for example if a referendum may show that the majority of people prefer this. Alternatively, Parliament may over time, by passing amendments to specific provisions, alter the power of the King. Should this Court find that an amendment in the interest of gender equality to provide for the monarch to be a woman, by replacing the term "King" with "Queen", or "kingdom" to monarchy", necessarily *destroy the constitutional democracy*, or *violate the basic structure* of the Constitution? Section 1 also states that Lesotho is a *sovereign* democracy. Its sovereignty gives it considerable power to determine its own path forward, provided that it remains a democracy. Whereas a democracy clearly has to defend itself, with the help of the courts, the same duty to self-preserve does not necessarily rest on a kingdom.

[327] This brings to the fore the role of the courts in a constitutional democracy based on the separation of powers. Would it not be preferable that Parliament itself addresses perceived problems, or provisions that might have been rendered bad, obstructive, outdated, or unworkable, by amending the Constitution with the power afforded to it by the Constitution? Judicial restraint may well be called for. The minority judgment mentions that the American Supreme Court on several occasions refused to entertain controversies of this kind, because they are political questions reserved for resolution by the law makers.[63] The French Constitutional Council has declined jurisdiction.[64]

[328] To the previous point can be linked the argument from the side of the first respondent that it is undesirable to amend the Constitution on a matter such as no confidence notions, while a larger process of overall constitutional reform is going on. This process should encompass reform of no confidence procedures, if necessary. The converse would be equally valid: Should this Court invalidate constitutional provisions that have been in place for three years, while a larger constitutional reform process is under way?

[329] Unwise timing of a constitutional amendment, or the creation of the possibility of repeated amendments, does not equate to the *undermining of the basic structure of the Constitution*, or the *destruction of constitutional democracy*. It does raise the question though whether this

[63] *Leser v Garnett* 258 US 130 (1922); *Dillon v Gloss* 256 US 368 (1921); *Coleman v Miller* 307 US 433 (1939).
[64] *CC Decision* 2003-469DC, Mar 26 2003; *CC Decision* 92-312DC Sept 2 1992 Rec 76; *CC Decision* 62-20DC, Nov 6 1962 Rec 27.

is a case for interference by an unelected judiciary, or rather for judicial restraint and deference to the political process.

Conclusion

[330] The High Court's majority and minority judgments contain detailed reasoning. Counsel for all parties provided strong arguments, based on useful authority. The judgments by my Brothers on the bench of this Court provide interesting and mostly compelling reading. The issue to be decided is not an easy one.

[331] The High Court had jurisdiction and the applicant before it had standing. The Constitution provides for constitutional amendment. Amendments can be judicially reviewed, both procedurally and substantively.

[332] Courts must adhere to and apply the Constitution. They must furthermore guard over and protect the democratic constitutional order, including the fundamental rights of the people and the separation of the powers of the legislature, the executive and the judiciary. In doing so, judicial caution is called for.

[333] After weighing the above arguments on whether the Ninth Amendment Act resulted in constitutional invalidity or not, real concerns are raised about the fact that the Prime Minister no longer has the power to advise the King to dissolve Parliament, following the passing of a motion of no confidence. A general election does not have to take place.

To some extent the electorate are excluded from the forming of a new government. The King has to appoint as Prime Minister the person chosen by the members of the National Assembly, as part of the no confidence motion.

[334] The *basic structure* test, developed in India and elsewhere, is accepted in this judgment. Other formulations, that have also been mentioned by courts – sometimes in conjunction with the basic structure notion – are worth consideration.

[335] However troubling the above concerns about the Ninth Amendment may be, they do not rise to the level of being *destructive of the constitutional democracy*. It neither amounts to *abolition rather than amendment of the Constitution*, nor *undermines the basic structure* of the Constitution. It is a long distance away from the examples of abolishing regular elections and making the President, King, or police chief the Chief Justice.

[336] Dissolution of Parliament still has to follow, if the National Assembly so decides with a two-thirds majority. A general election has to take place. Thus, the electorate has the opportunity to say their say. A referendum, when required, does not immunise the amendment against judicial review, but significantly softens the impact of the fact that Parliament does not have to be dissolved for a general election to take place.

[337] The argument that the amendment undermines the principle of responsible government, by potentially allowing a government to remain in power despite losing the confidence of the elected legislative, features

strongly in the erudite judgment of Mosito P. I respectfully find myself unable to understand fully and agree. From sections 83 and 87 it is clear that the motion is one of no confidence in the **government**! When the vote succeeds, the Prime Minister who headed that government vacates office! A new Prime Minister, chosen by the elected legislative, is appointed by the King. Presumably the new Prime Minister can appoint a new cabinet, if she or he so chooses. Suspicions about the plans and intentions of specific politicians, because of insight into the inner workings of Lesotho politics - which a judge like me does not have, should play no role in judging an important issue as fairly as possible.

[338] In the judgment by Mosito P it is mentioned that the role of the King is ceremonial. If that is true, as it seems to be, what real power can be taken away from the King? In practice the role and power of the King are not substantially reduced, but minimally, if at all.

[339] Furthermore, it would be unwise and short-sighted for this Court to render a binding decision that Lesotho may never in the length of time consider changes to the role of the King and even aspects of or the continuation of the monarchy, by, for example, the amendment of section 1 or other provisions dealing with the King, for example to allow for a Queen.

[340] The Constitution provides for its amendment. Parliament can do so by following the prescribed procedure. Also given the nature of the amendment at stake here, as well as the unreasonable lapse of three years since the passing of the Ninth Amendment Act, this seems like a situation in which courts neither have to, nor should, interfere. Parliament

should look after itself. This is what is supposed to be happening right now – as we speak … and write. The court that gifted much of the world with the concept of constitutional supremacy and the power of courts to review the constitutionality of legislation warned us in that direction with their political action doctrine , referred to above.

[341] The High Court misdirected itself in finding that the amendment undermined the *basic structure* of the Constitution. The majority's earlier quoted reference to "the impression that one holds the office of the Prime Minister at the pleasure of parliamentarians" overlooks the fact that this is in any event the case, because of the availability of a motion of no confidence that enables members of the National Assembly to vote the Prime Minister out of office, without a general election.

Order

[342] In view of the above, I would have ordered that the appeal is upheld, without a costs order.

J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree

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M.H CHINHENGO

ACTING JUSTICE OF APPEAL

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