LESOTHO

IN THE HIGH COURT OF LESOTHO
(Sitting in its Constitutional Jurisdiction)

HELD AT MASERU **CONSTITUTIONAL CASE NO.0020/2023**

In the matter between:-

LEJONE PUSELETSO **APPLICANT**

AND

THE SPEAKER OF THE NATIONAL ASSEMBLY **1ST RESPONDENT**
CLERK OF THE NATIONAL ASSEMBLY **2ND RESPONDENT**
PRIME MINISTER **3RD RESPONDENT**
MINISTER OF CONSTITUTIONAL AFFAIRS **4TH RESPONDENT**
THE ATTORNEY GENERAL **5TH RESPONDENT**
AND 49 OTHERS

Neutral Citation: Lejone Puseletso v. The Speaker of the National Assembly and Others [2023] LSHC 10 Const. (16 February 2024)

CORAM: **MONAPHATHI J. MAKARA J. MOAHLOLI J.**

HEARD: **7th, 11th, 12th and 14th December 2023**

DELIVERED: **16 FEBRUARY 2024**

SUMMARY

The Applicant challenged the Constitutionality of a constitutional amendment complaining that it undermines the basic structure of the democratic constitution of the Kingdom. It was common cause that this is the nature of the constitution. The challenge was premised upon the rule of law. The Court determined that the Applicant was qualified to bring the case because a citizen has a right to protect the constitution since it is the covenant to which citizens are the parties. The Court concluded that the *basic doctrine* has been undermined since the amendment constituted of the misrepresentations of the views of the electorate expressed at the legislatively established forums for that purpose and that Parliament unilaterally imposed its own provisions in the Amendment.

Finally, the impugned provisions in the Amendment were declared to be unconstitutional.

ANNOTATIONS

CITED CASES

1. Attorney-General v Boloetse and Tuke C of A (CIV) 50/ 2022
2. Boloetse v The Speaker of National Assembly & Others [2023] LSCA 62 (17 November 2023)
3. Boloetse & Tuke v His Majesty the King & Others [2022] LSHC 216 Const.
4. Coleman v Miller, 307 U.S. 433 (1939)
5. Dillon v Gloss, 256 U.S. 368 (1921)
6. Finn v. The Attorney General [1983] I.R. 154
7. Kesavananda Bharati v. State of Kerala and Another 1952 (4) SA 769 (A)
8. Leser v. Carnett, 258 U.S. 130 (1922)
9. Premier, KwaZulu-Natal & Others v President of the Republic of South Africa & Others 1996 (1) SA 769 (CC)
10. Pitso Ramoepane v The Crown C of A (CIV) 33/2018
11. Riordan v. An. Taoiseach (No. 1) [1999] 4 I.R. 321
12. The Speaker of the National Assembly and Others v Likeleli Tampane [2019] LSHC 35 (20 August 2019)
13. Ferreira v Lewin NO. 1996 (1) SA 984
14. Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A)

STATUTES & SUBSIDIARY LEGISLATION

1. Constitution of Lesotho, 1993
2. High Court 1980
3. Order No.1 of 1986
4. National Reforms Authority Act No.4 of 2019
5. Parliamentary Powers and Privileges Act No.8 of 1994
6. Hansards 1st session 8th meeting Tuesday, 22nd October 2019 (unrevised), 1st Session 9th meeting Thursday, 12th March, 2020 (unrevised)

BOOKS & JOURNALS

1. C.V. Keshavamurthy. Amending Power under the Indian Constitution – Basic Structrue Limitations (1982 Deep & Deep Publications)
2. D.D. Basu. Comentary on the Constitution of India, 9th Ed; Vol. 1 (2014 LexisNexis India)
3. Karabo Mohau KC. Lesotho Law Journal (2014) Vol.21 Special Edition
4. Richard Albert. Constitutional Amendments: Making, Breaking and Changing Constitutions. (2019 Oxford University Press)
5. Richard Albert, Malkhaz Nakashidze, & Tarik Olcay, "The Formalist Resistance to Unconstitutional Constitutional Amendments" (s019) 70 Hastings Law Journal 101.
6. Ronald Dixon & David Laudau. "Transnational constitutionalism and a limited doctrine of unconstitional constitutional amendment" I. CON (2015), Vol. 13, No. 3, 606
7. Stephen Grandberry. 'A glimpse of the Genesis of Democracy in Ancient Athens' Scotland Democratic Forum Vol. 27 of 1965
8. Two Principles of Constitutional Legitimacy, published online by Cambridge University Press Volume 12

9. Yavin Roznai. Unconstitutional Constitutional Amendments: The Limits of Amendment Powers. (2017 Oxford University Press)
10. Makalo Khaketla Lesotho 1970 A coup under the Microscope university of California Press.

JUDGMENT

MAKARA J

Introduction

[1] The genesis of this authorship is the constitutional notice of motion instituted by the Applicant who initially sought the intervention of this Court through its issuance of the order in the following terms:

> a. That 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. 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 comprehensive provisions to regulate the passing of vote no confidence.
>
> c. The respondents pay costs of suit.
> d. That the Applicant be granted such further and/or alternative relief.

[2] Subsequently, however, prior to the hearing on the jurisdictional question, the Applicant sought for the amendment of prayer (a) to include asking the Court to accommodate an additional prayer that it declares Sections 83 (4) and 87 (5) as unconstitutional. The reason advanced was that they equally violate the constitutional basic structure. The application was by consent, granted.

[3] It should at the onset, be clarified that this application was never couched in urgent terms – hence there was no interim relief sought for and, therefore, no suggested return date. To reinforce the point, there was no justification provided for any urgency in the matter. All that the Applicant explained was that the Court is seized with an important constitutional matter that deserves serious attention. The Court correspondingly appreciated that importance.

[4] The application was initially served upon some of the Respondents whose offices' physical addresses were not easily identifiable. The challenge was subsequently resolved through the assurance undertaken by Adv. Lephuthing that it would suffice for the service of the parties whose offices have not been locatable to be done through his chambers. The resultant impression being that, he was acting upon their instructions.

[5] An important dimensional aspect in this case is that, though all the parties who have been served with the processes have duly opposed the application, it is only the Basotho Action Party (BAP), that has filed its answering affidavit through its Deputy Leader, Motlatsi Maqelepo. Thus, it would be logical to conjecture that the rest of Respondents who were served with the application, may have strategically allowed the contestation to obtain between the Applicant and the BAP while they await the judgment of the Court for the appropriate action.

[6] The chronological developments in these proceedings are materially pertinent for their coherent comprehensiveness and the appreciation of the logistical challenges that relatively militated against the hearing of the case as originally scheduled. The primary testimony here is that the Applicant instituted the Notice of Motion under consideration, on the October 16th 2023 and suggested that it be heard on the 30th of the same month.

[7] In the meanwhile, the Respondents suddenly reciprocated to the main application by filling a Notice of Intention to Oppose and the Answering Affidavit to the main application. Almost simultaneously, the Respondents brought a rather *sui generis* application headed *Application for the Expedited Hearing.* In that move, they asked the Court to advance the hearing date for the matter to any nearer before the 30th October. Appreciably, this rather interventionistic move was intended to have the hearing over the matter expedited. This notwithstanding, it did not *prima facie* satisfy the urgency test as provided under Rule 8 (1) (c)[1].

[8] The Court having listened to the representations from all the sides regarding the ideal date for the accommodation of their varying concerns advanced the hearing to the 26th October 2023 as the hearing date and directed that the parties should have filed all their papers on or before that date. Sadly, on that day, it turned out that it was only Adv. M. Moshoeshoe for the 1st to 5th Respondents in the *Application for Expedited Hearing* who had

[1] High Court Rules, 1980

complied with the order by having submitted the requisite documents.

[9] Resultantly, therefore, on account of the failure by almost all the counsel, to file the papers contrary to the order of the Court, the hearing could not take place on the 26th October 2023, since it became practically impossible for that to happen in the face of the failure by the lawyers to have met the filing datelines. Consequently, the Court re-ordered that the remaining papers be filed to facilitated for the earliest hearing. After some discussion on the predicament, it was resolved that the hearing on the jurisdictional question be the initial one to be interrogated on the 31st October 2023. This was inspired by the Court of Appeal decision in *Pitso Ramoepane v DPP*[2] where it was ruled that the jurisdictional question should always take precedence over all other considerations irrespective of their nature.

[10] At the commencement of the intended hearing on the jurisdictional controversy already scheduled for the 31st October 2023, the lawyer for the Applicant suddenly interjected with an application to amend prayer (a) to accommodate a constitutional challenge upon Section 83 (4) and 87 (5). This was not opposed and then the Court allowed the amendment. Immediately thereafter, the jurisdictional issue was heard, and on the 10th November 2023, it was ruled that the Court commands jurisdiction over the matter.

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[2] (C of A (CIV) 33/2018)

[11] It is important to explain that the latter hearing date was identified after the Court had briefly heard and ruled that it would be judicially wise to dispense with the hearing of the *Application to Expedite the Hearing.* This included the objection raised by the Applicant against it on the ground that it lacked legal foundation since it did not comply with the Rule 8 (1) (c)[3] prescription. It was then maintained that the Court should not entertain such a matter. Instead, the Court insisted that given the constitutional magnanimity of the case, all the efforts should be dedicated towards the expedited hearing into the merits. Resultantly, this rendered the *Application for the Expedited Hearing moot pro tanto* as correctly described by the Applicant.

[12] On the 16th November 2023 it emerged that Advocate Thakalekoala had only served the other parties with Heads of Argument on the previous day. His adversaries protested that they had not been afforded time to study those Heads and, therefore, unable to respond to them. The same problem confronted the Court. Resultantly, the hearing was postponed to the 17th November 2023.

[13] On the said 17th November 2023, the case took a different dimension when the counsel for the Applicant, suddenly applied for leave to file copies of the extracts of the Hansard of the Parliament relating to the deliberations on the 9th Amendment of

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[3] High Court Rues, 1980

the Constitution[4]. The move was by the consent of the counsel for the Respondents. Advocate Moshoeshoe undertook to use the goodness of his office in the chambers of the Attorney- General to intervene towards the availability of the desired documents. The lawyers appeared to recognize the importance of those documents for reference in the matter. It was estimated that it may take two weeks for them to be secured. In the meanwhile, the lawyers asked that they be allowed to file the Supplementary Heads as a reaction to whatever may emerge from the expected set of the Hansards. It was, then, found ideal to have the hearing postponed to the 6th, 7th, 11th, 12th and 14th December 2023, respectively.

[14] On the 6th December 2023, the anticipated smooth progression of the hearing as planned, was interrupted by the sudden information given to the Court by the counsel for the Respondents who reported that their relationship with their clients has almost broken down. On that note, they stated that they would on the following day, file their formal withdrawal as the counsel for the Respondents. So, for that reason, the hearing already intended for the 6th December 2023, did not take place.

[15] The Court in realization of the catastrophic implications of the withdrawal by the said counsel adopted a robust approach by allowing the lawyers for the Respondents to vacate the bar and then invited one of the Respondents to personally represent himself for the purpose of addressing the predicament. It then

[4] 1st session 8th meeting Tuesday, 22nd October 2019 (unrevised), 1st Session 9th meeting Thursday, 12th March, 2020 (unresided)

appealed to him to consider a reconciliation with his then erstwhile counsel. After some deliberations, he conceded to revisit the impasse. Subsequently, the lawyers were on the next day re-engaged because of the intervention by the Court.

[16] Against the backdrop of the narratives on the legal and logistical challenges which confronted all the lawyers featuring for the parties except for Adv. Moshoeshoe, the case became for the first time ready for hearing in the merits on the 7th December 2023. This was immediately after all the necessary papers including the Heads, were filed and the lawyers were also ready and available to prosecute their mandate. For over-emphasis's sake, at all material dates since the 16th October 2023, when the case was enrolled, it was never ever ready for any hearing into its merits. This explains why thus far, the Court had only delivered judgment on jurisdiction on the said date of the 10th November 2023.

[17] One of the sad moments that caused the delays in addressing the merits occurred when one of the lawyers failed to appear before the Court and later explained that he suddenly got engaged in the commercial division of the Court. Otherwise, everyone was present and prepared to transact the business of the day. The Court in clear terms reprimanded the concerned counsel.

[18] The Notice of Motion proceedings are founded and driven on the documents. The Hansards were at the commencement of the initial stage, discovered to be some of the vital documents for reference to assist the Court to construct the intention of the

Parliament during its configuration of the 9th Amendment. The absence of such vital instruments could have occasioned an unfair trial or the subversion of justice. The dedication was on the due administration of justice, but not the expediency at all costs to the detriment of justice.

[19] To demonstrate the importance of the documents of various denominations in these proceedings, there were some which the lawyers having referred to them during their presentations, were only filed almost a week after the addresses were concluded. This included the legal authorities which were subsequently discovered with the assistance of the Judges' Researchers while we were the in our first week on call from the 8th to the 21st January 2024(speaking for the Judge who was tasked with judgment writing). To be fair to the lawyers concerned, they had asked for the indulgence to later prepare for their filing which was allowed. At the end, the pile of the documentations reached the top of the rotatrim paper box and each of them necessitated the attention of the Court.

The Synopsis of the Parties' Representations on Jurisdiction

[20] The jurisdictional intervention introduced by the Respondents against the application is, foundationally premised upon the *Separation of the State Powers Theory* which is indispensable in a democratic constitution. It is precisely against this backdrop that the Respondents charge that the application seeks to undermine the constitutional autonomy of the Parliament. They specifically ascribed that to prayer (b) which asks the Court to stay in abeyance the process of the passing vote of no confidence

in parliament pending the conclusion of the reforms process. In their interpretation, this would have the effect of interfering with deliberations which are quintessentially the political prerogative of Parliament and, therefore, non-justiciable.

[21] To place the unconstitutionality of the impugned prayer into the practical perspective, the Respondents lamented that it calls upon the Court to interdict the members of Parliament from executing their constitutional mandate. This specifically pertains to the initiation of the vote of no confidence against the Prime Minister. Appreciably, in the context of this case, reference is being made upon the 9th Amendment of the Constitution as the pillar of their case. The relevant provision shall, in due course, be projected, and finally synthesized into being applied to the merits.

[22] In the endeavour to demonstrate that the Parliament has the power and authority under consideration, the Respondents referred the Court to the series of the historical precedence incidences where it was exercised and to which it could simply take judicial notice. The latest testimony of such exercise of constitutional mandate was in 2020 when Parliament successfully passed a vote of no confidence against Prime-Minister T M Thabane and his replacement by Prime-Minister M Majoro.[5] The materiality of the reference is the fact that the change was initiated upon the 9th Amendment.

[5] This was per Counsel for Respondents

[23] It was against the background of the said precedence relied upon by the Respondents and their construction of the amendment that they strongly questioned the *bona fides* of the Applicant in the matter. In a rather rhetoric but serious note, they remarked that the case has been instituted as a delaying tactic and has no merits since the Prime-Minister has lost the numbers in Parliament while the nominated candidate is ready to assume the office. One counsel likened the scenario to that of a dead man who purports to resist descending into his already constructed grave.

[24] The Respondents fortified their jurisdictional point by questioning the authority of the Speaker to have suspended the business of Parliament after being served with the Notification that its constitutionality is being tested in the Constitutional Court. They then submitted that Standing Order No. 43 does not authorize the Speaker to do so and that his decision remains *ultra vires* the Constitution since that would provide the avenue for the undermining of the Parliament.

[25] Quite ingeniously, the Respondents sought to enhance the subject by maintaining that the matter was prematurely filed since the Parliament had not deliberated upon the motion up to its conclusion. In their view, the Court would only assume competency over the proceedings when Parliament shall have resolved the vote of no confidence-initiated process. In simple terms, it was charged that the Applicant commenced with the litigation before the requisite developments could ripen for the Court to exercise its judicial authority. The Court appreciated the

submission to accurately resonate with the conceptualization articulated by Ackerman J in Ferreira v Lewin NO[6] that:

> The doctrine of ripeness serves a useful purpose of highlighting that the business of the court is generally retrospective; it deals with situations or problems that have already *ripened* or crystallized, and not with prospective or hypothetical ones.

[26] In precise terms, the Applicant maintained that the Court has the jurisdiction over the matter upon the reasoning that he has initiated a rule of law-based litigation in contrast to the one founded upon the protestation over the violation of a human right sanctioned under Section 22 (1) of the Constitution. To illustrate the point, he emphatically cautioned that the rule of law-based approach, does not require a prove of a violation of the right of the litigant and that instead, it would suffice to allege the offence against the basic structure of a democratic constitution.

[27] The Applicant justified his case by charging that the 9th Amendment of the Constitution[7] shook the foundational architecture of our democratic constitution. He elucidated the proposition by blaming the amendment for specifically serving as the antithesis of the very foundational provision under Section 1 in the Constitution that makes Lesotho, a sovereign democratic kingdom. In his analysis, this key provision should be read in conjunction with Section 2 which is the supremacy clause in the Constitution and for practical purpose, be read with Section 20 of

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[6] 1996 (1) SA 984 (CC)

[7] Enacted through Act. No,7 of 2020

the same which accommodates the *right of the citizenry to participate in government.*

Ruling on Jurisdiction

[28] The Court determined that it commands jurisdiction to hear the protestation of any citizen that the 9th Amendment undermines the basic architecture of the democratic constitution. It recognizes the litigation to be premised upon the lamentation that the rule of law as anchored by the Constitution is being violated. There is abundance of legal literature and case law in support of the jurisdiction of the courts of competent standing to intervene in such a situation.

[29] The rule of law-based challenge over the constitutionality of a legislative enactment including the constitutional amendment, applies to the complaint on the substantive and/or procedural transgressions occasioned by any enactment. To demonstrate the importance of the rule of law, even the Apartheid South Africa relatively allowed the rule of law-based litigation. The testimony is the celebrated case of *Minister of the Interior and Another v. Harris and Others*[8]. Here, the Court entertained the case in which the Applicant challenged the constitutionality of the legislative enactment passed by an unduly constituted parliament depriving the coloureds people of their voting rights. There is a *plethora* of other cases of international note which reiterate the same principle from the foreign jurisdictions. The *Kesavananda Bharati v. State of Kerala and Another*[9] including the cases therein were relied upon.

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[8] 1952 (4) SA 769 (A)

[9] (1973) 4 SCC 225

[30] It should suffice to be highlighted for the sake of certainty, that in this jurisdiction, the Constitutional Court and the Court of Appeal have entrenched the acknowledgement of the right of a citizen to initiate a rule of law-based litigation, The background philosophy was to maintain the constitutional triumph over the vertical and horizontal relationships within the context of the democratic governance. The jurisprudence was comprehensively articulated by the Court of Appeal in *Attorney-General v Boloetse and Tuke*[10] in associating itself with the decision of the Constitutional Court over the subject, stated:

> [23]Section 2 of the Constitution provides that the Constitution of Lesotho 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. Does this confer locus standi on every person in Lesotho, without more, to institute proceedings in court against any authority for non-compliance with the Constitution? The concept of the rule-of-law review has its origin in English law. The grounds recognised by the English courts for interference in decisions subject to the rule-of-law review are substantially similar to the ones recognised by our courts as justification for a rule-of-law review. To call it a rule of law review is merely an appellation because the principles underlying such a review are the same as any other review.
> [24] In our view, the requirement that government should observe the law must be a constitutional priority which the courts should recognise. We cannot imagine any principled reason for nonobservance of the Constitution. While the standing principle poses important questions about the meaning of the rule of law, the Constitution, statute law and common law coalesce into one legal system.[11]

[31] The proposition which the Respondents stated in passing that Section 24 of the Parliamentary Powers and Privileges Act[12] has ousted the jurisdiction of the courts over the business of

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[10](C OF A) (CIV) 55/ 2022
[11] Spra at para 23 and 24
[12] No. 8 of 1994

Parliament irrespective of the circumstances, is found to be of no legal basis. For ease of reference and appreciation, the section provides:

> The President or the Speaker and the Officers or the Senate or the Assembly shall not be subject to the jurisdiction of any court in respect of the exercise of any powers conferred on or vested in the President or Speaker or the officials of Parliament by or under this Act.

[32] The reliance upon the above section in support of the submission that it excluded the powers of the courts is not novel. The same construction was advanced in the case of *The Speaker of the National Assembly and Others v Likeleli Tampane*[13]. Here, the applicant had invoked the reviewing powers of the court under Section 119 (1) of the Constitution. This was upon her protestation that the Speaker had suspended her membership from Parliament without following the due process. As the matter was pending before the court, the Speaker initiated the disciplinary proceedings against her, and she was convicted.

[33] Against the background of the disciplinary proceedings which were held while the said application was pending before the court, the Respondents maintained that the *Separation of Powers Theory* which is one of the key characteristics of our Constitution, bars the Court from interfering in the matter. They rather logically reasoned that Section 24 simply affirms the independence of Parliament from any censure by the Judiciary.

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[13] CIV/APN/235/2018

[34] In conclusion, the respondents in that matter, had submitted that in any event, the jurisdiction of the court had been overrun by the developments and that Section 24 simply reinforced the position. The proposition was dismissed *inter alia* upon the reasoning that any legislation or deserving action irrespective of its origin, is subject to a challenge before the court. This is attested to under Section 119 (1) of the Constitution which entrusts the High Court with the reviewing powers in the following terms:

> There shall be a High court which shall have unlimited and original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-marshal, tribunal, board or officer excessing judicial, quasi-judicial or public administrative functions under any law and such jurisdiction as may be conferred on it by this constitution or by any other law.

[35] On a more profound reflection, it must be underscored that in the instant case, the Applicant is specifically challenging *the constitutionality of a constitutional amendment introduced through Section Act No.7 of 2020 that culminated into the Ninth Constitutional Amendment.* In a rather rhetoric version, the Court was called upon to resolve the question concerning *the issue on the constitutionality of a constitutional provision.* This explains its classification by the Applicant as a *rule of law-based matter since the challenge against the Amendment is based upon the submission that it violates the basic structure of a democratic constitution.* This is a complex assignment especially when it is unprecedented in the jurisprudence of the Kingdom. It is for that reason that reliance for guidance was predominantly found in foreign case law and literature.

[36] In the final analysis, the Court finds that the form in which the Applicant approached it and correspondingly the remedies for which he asked for its intervention, represents a *rule of law-based* litigation and, therefore, it found that it has the jurisdiction over the matter.

Addressing the *Locus* and the Merits

[37] At this level, the *locus* of the Applicant was, in keeping with the already designed protocol in addressing the points law, featured as the preliminary task before exploring the merits. It should be recalled that in principle, the Respondents challenged the *locus* of the Applicant in the matter. This was primarily justified upon the reasoning that he has not satisfied the Section 22 (1) of the Constitution requirement by demonstrating that his right has been violated and, consequently, he seeks to vindicate that. To elucidate the picture, the Respondents contended that the Applicant is not the Prime-Minister and, therefore, the motion of no confidence against the incumbent holder of office, would not violate any one of his sections 4 to 21 rights (inclusively). For ease of reference, Section 22 which forms the basis for the challenge, provides:

> (1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.
> (2) The High Court shall have original jurisdiction-
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and

> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),
> and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution:

[38] It transpires from the pleadings filed by the Applicant that his application is not based upon the instrumentality of Section 22 (1) and this could explains his omission to allege the violation of any one of his Chapter II rights in the Constitution. On the contrary, his pleadings especially their corresponding substantive prayers, are self- explanatory that his initiative is rule of law based and inspired. At the risk of repetitiveness, the man is, in the main, simply asking the court to declare that the 9th Amendment to Section 87 (5) of the Constitution, be declared unconstitutional for undermining the basic structure of the Constitution of the democratic Kingdom.

[39] In the secondary prayer, the Applicant is asking the Court to defer the process of the passing vote of no confidence in parliament 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.

[40] The counter reaction mounted by the Respondents in their pleadings and through the points of law, made it clear that they resisted the application by charging that the relieves sought for by the Applicant, lacked legal basis and should, consequently, be dismissed. Thus, the belligerent positions maintained by both sides naturally defines the legal issues upon which the final

determination would be made. However, at this stage, it should be recorded that during the deliberations on the question that the Court posed concerning the practicability of prayer (b), the Applicant expressed lack of enthusiasm on that rather incidental or complementary remedy sought for.

[41] The factual landscape which has predicated this constitutional litigation is, *ex- facie* the pleadings tendered by both sides, of a common cause content. In a summarized version, the legal crisis which culminated into these proceedings, was authored by the *motion of vote of no confidence* against the Prime-Minister which was prosecuted before the National Assembly by Lehata MP. The move was primarily sanctioned by the impugned 9th Amendment and duly instrumentalized by the Standing Orders[14]. The deliberations were suddenly interrupted by the announcement made by the Speaker to the House informing it that he has been served with a court process that seeks for the intervention of the Court over the very *motion of no confidence against the Prime-Minister.* On that note, the Speaker almost instantly ruled that in the circumstances, Standing Order No. 43 enjoins him to respect the s*ub-judice rule* by staying the deliberations over the matter in abeyance pending its final determination by the courts. The Standing Order which has a telling effect over the matter stands as follows:

> 43. Contents of Speeches
> (1) A Member shall restrict his observations to the subject under discussion and shall not introduce matter irrelevant to that subject.

[14] Standing Orders of the National Assembly of Lesotho

(2) No Member shall refer to any matter on which a judicial decision is pending.

The Genesis and the Effect of the 9th Amendment of the Constitution

[42] The question pertaining to the constitutionality or otherwise of the constitutional Amendment under consideration, should be appreciated systematically through the legislative matrix that culminated in its promulgation into law. This would, thus, correspondingly, provide the answer on whether it undermines the basic structure of the Constitution as the Applicant charges. It is common cause that the Constitution was, in terms of Section 85 of the Constitution, amended through Act No.7 of 2020. This grafted the 9th Amendment into it. The authorizing Section reads:

"85. Alteration of Constitution

(1) Subject to the provisions of this section, Parliament may alter this Constitution.

(2) 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

(3) A bill to alter any of the following provisions of this Constitution, that is to say—

(a) this section, sections 1(1) and 2, Chapter II except sections 18(4) and 24(3), sections 44 to 48 inclusive, 50(1) to (3), 52, 86, 91 (1) to (4), 92, 95, 103, 104, 107, 108, 118(1) and (2), 119(1) to (3), 120(1), (2), (4), and (5), 121, 123(1), (3), (4), 125, 128, 129, 132, 133 and sections 154 and 155 in their application to any of the provisions mentioned in this paragraph; and

(b) sections 37, 38, 54 to 60 inclusive; sections 66, 66A, 66B, 66C and 66D, 67, 68, 69(1) and (6), 70, 74, 75(1), 78(1), (2), (3) and (4), 80(1), (2), and (3), 82(1), 83 and 84; sections 134 to 142 inclusive, 150 and 151 and sections 154 and 155 in

> their application to any of the provisions mentioned in this paragraph,

[43] The 9th Amendment has become a constitutional provision by virtue of Section 85 that authorizes the alteration of the Constitution and by operation of Section 154 (1) (i) of same, that reads:

> *"law"* includes any instrument having the force of law made in the exercise of a power conferred by a law, and the customary law of Lesotho.

[44] It is precisely in recognition of the explained legal status of the Amendment that the Applicant challenges its consonance with the basic structure of the Constitution of Lesotho as a declared democratic sovereignty. This legal *status quo* automatically attracts the jurisdiction of this Court at the instigation of any private citizen who may contest the extent of its constitutionality. In this respect the challenge should be appreciated in recognition that the amendment under consideration, was introduced through an Act of Parliament that transcended into the Constitution. This *per se,* subjects it to a constitutional challenge almost analogous to the one mounted by the Applicant in *Boloetse & Tuke v His Majesty the King & Others*[15]. Here, the Constitutional Court *inter alia* invalidated the laws passed by the unconstitutionally constituted Parliament.

[45] The challenge advanced by the Applicant that the 9th Amendment undermines the basic structure of the Constitution can only be determinable through the comparative analysis of the

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[15] [2022] LSHC 216 Const. (12 September 2022

relevant provisions in the original configuration and the relevant parts in the amended version. This was very foreshadowed in the original prayers and in their subsequent amendment in which the Court was further asked to declare Sections 83 (4) and 87 (5) as unconstitutional for its undermining of the basic structure of the Constitution. The comparative setting is commenced with the depiction of the relevant original version of the provisions prior to the amendment. They stood thus:

Prorogation and dissolution of Parliament
Section 83

(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.

The amended Section 83 reads:
83(4) –

(d) 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 propose a name of a member of the national assembly for the King to appoint in the place of the Prime Minister.

(e) the Prime Minister shall not advise a dissolution under this section, unless the dissolution is supported by a resolution of 2/3 majority of the National Assembly.

[46] The impression discernible from the amended version on the dissolution of Parliament and its consequences is that it has 'revolutionized' 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. This manifests itself by firstly, mis conceptualizing the Prime-Minister as the appointee or the electee of the parliamentarians exclusively and, therefore, removable at their behest exclusively. The provided 2/3rd support which could save the Prime-Minister (PM), is unrealistic because he shall have already lost most of the support of the membership in Parliament. In the final analysis, the amendment provides the avenue for the PM to be unseated by a simple majority. The inherent danger is that this route has a high propensity to make the country to have many prime ministers within few years, which could easily destabilized it.

[47] Moreover, the dispensation with the powers and the interventionistic role of the King, simply facilitates for the future of the Prime-Minister to remain at the pleasure of the members of Parliament whose move may not necessarily be in the national interest. The revolution has, thus, removed all the interventionistic mechanisms that were provided in the original regimen to ascertain the legitimacy of the move to have the Prime-Minister removed from office. In the economically beleaguered State and less resourced Intelligence establishments, the removal of the

Prime-Minister could be sponsored from the multiplicities of the internal collaborations in pursuit of their own personal interests or from the external establishments such as in State capture manoeuvrings. On the other hand, the move could be inspired by genuine concerns and national interest. This justifies the intervention by the electorate as the ultimate judges.

[48] The architecture in the amended relevant provisions, disregards the reality that the Prime-Minister is elementarily a Leader of a majority party or a coalition of political parties in the National Assembly. Usually, this would be due to ones personal endowments notably charisma, resources, credentials etc.

[49] The real politic is that usually the Leader who becomes a Prime-Minister, would have served as the face of the party mainly on account of one's grass-roots background, command of confidence from the public, progression through its structures up to its leadership. Most significantly, lead the party to secure well meaning numbers of votes to be considered for that highest political office and, thereby assuming national leadership. Appreciably, the members of public would, in all their sectors and political formations, develop substantial interests and the legitimate interest in the Prime-Minister.

[50] Thus, the future of the Prime-Minister cannot legitimately be left solely in the hands of the members of Parliament as though they own the man. 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.* It would be over-simplistic to synthesize that the mere fact that the Prime-Minister is elected by parliamentarians, automatically means that they *ex-lege* have an exclusive and determinative authority to vote any incumbent out of that high office without the involvement of the electorate. It would have to be recognized that the PM holds a political office which must be distinguished from the statutory, judicial, public service office etc.

[51] The Legislature had originally in Section 83(4,) read with 87(5)(a), recognised wisdom in providing for some form of a mediatory intervention by the King acting with the advice of the Council of State over the matter. The profundity of its wisdom demonstrated the recognition of the indispensability of the intervention by the electorate in the event of a dissolution of Parliament. The importance of word of the electorate to feature as the final arbitrator was embraced. In that original configuration, the matter was regarded to be so important in the affairs of the nation such that it could not be exclusively left into the hands of the parliamentarians. By the necessary implication, this was inspired by the founding Section 1 provision that Lesotho shall be a democratic Kingdom and given practical effect in Section 20 as a *participatory democracy.*

The Legitimacy of the Amendment Based Vote of No Confidence Question

[52] The subject is premised upon the question concerning the legality and the legitimacy of the process followed by the

Respondents in moving the motion of no confidence against the Prime-Minister. In this background, however, the fact that the constitutionality/ legality issue has been addressed, the legitimacy dimension should complement the picture. It would be elementarily important to have the term *legitimacy* defined for the harmonization of the commonness in the understanding of the concept.

Definition of Legitimacy

[53] The dictionary meaning of the word is defined as:

> Legitimacy comes from the Latin verb *legitimare*, which means lawful. Legitimacy, then, refers to something that is legal because it meets the specific requirements of the law [16]
> It is common to assume that the legitimacy of constitutions hinges on the fact that they are representative (or expressive) of the people they govern. Numerous scholars have reiterated this observation and argued that constitutions should express the distinctive will, identity, character, sand values of the nation they govern. Representativeness of constitutions is considered a prerequisite for their legitimacy[17].

[54] Tellingly, the above dictionary meaning denotes that legitimacy is the integral component of any legislation inclusive of a constitutional enactment and in the same vein, implies element of legality which would be characterized by the generality of application, regularity, morality, recognition, publication, and substantial acceptability.

[55] In the instant case, the legitimacy of the motion of no confidence in the Prime-Minister, must be tested against the

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[16] Vocabulary.com Dictionary

[17] Two Principles of Constitutional Legitimacy, published online by Cambridge University Press Volume 12, Issue 1

relevant socio-political historical background and the material factors that influenced the challenged Amendment. It is *inter alia* for the same reason, that three sets of the copies of the Hansard were by consent furnished to the Court for ease of reference towards the ascertainment of the mind of Parliament when the Amendment was deliberated upon and then passed into law.

The Brief Historical Narrative

[56] It should suffice to be revealed that in consequence of the series of episodes of political instability in Lesotho since its independence. These are characterized by the Thaba-Bosiu encounter in 1966[18] mainly occasioned by the dispute over the outcome of the disagreement over the 1965 general elections;[19] the 1970 declaration of the State of Emergency; suspension of the Constitution, seizure of power by Chief Leabua Jonathan[20] and the reign of terror as described by Makalo Khaketla[21]; the 1974 uprising by the opposition and its forceful suppression[22]; the 'Miraculous' general elections of 1985[23]; the 1986 military coup led by Major-General M.Lekhanya immediately followed by the repealing of the 1985 Parliament Act[24] and the promulgation of law styled an Order establishing the ruling Military Council and the Council of Ministers[25]; coups amongst the generals, the Palace

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[18] The Thaba-Bosiu Incidence that resulted in the deaths of people including members of the armed forces

[19] Narrowly won by the Basotho National Party

[20] Announced by Prime-Minister Jonathan after his annulment of the 1970 elections

[21] Makalo khaketla Lesotho !970 A Coup under the Microscope University of California Press p.262

[22] Resulting in human and material destruction

[23] 'won' landslide by the then ruling Basotho National Party led by Prime-Minister Jonthan without the casting of a single ballot paper.

[24] Order No.2 of 1986

[25] Order No.1 of 1986

coup which toppled the democratically elected government led by Dr. Ntsu Mokhehle of the Basotho Congress Party after the return to democracy and its reinstatement after the SADC diplomatic intervention led by President Nelson Mandela; series of conflicts within the ruling party which caused internal splits; emergence factions within the disciplined forces which culminated in the killing of Lieutenant-General Maaparankoe Mahao that shocked the country, SADAC and the international community.

[57] Immediately after the death of the General, Prime-Minister Mosisili announced the establishment of a Commission of Inquiry to investigate the circumstances that lad to his death and to make the recommendations. This was done under the Public Inquiries Act[26]. The process was entrusted upon SADAC and led by Mr. Justice Phumaphe of the Republic of Botswana -hence, there was a legal controversy on whether it was a Lesotho or a SADC Commission.

[58] The work of the Commission reached its epoch in 2015 when its chairperson finally pronounced the recommendation. It was, in the main, simply that the Commission has found that the political related problems that have confronted Lesotho ever since its independence can only be resolved through the constitutional reforms. The areas for the transformational task were specified as the Parliament, Judiciary, Public and the Security Sector. The recommendations were, besides the killing of the Army Commander inspired by the previous year attempted coup against

[26] Act No.1 of 1994

Prime-Minister Thabane who even fled to the Republic of South Africa (RSA).

The Establishment of the Structures & processes for the Implementation of the Reforms

[59] This was established in terms of the National Reforms Authority Act[27]. Its terms of reference are provided for under section 8(1)(c) that provides:

> Without limiting the generality of section 4 and subject to section 6. The functions of the Authority are to-
>
> (a)...
>
> (b)...
>
> (c) Propose and approve policy documents, draft bills and any legal instrument from the Chief Executive Office as may be necessary for national reforms in line with the resolution and decisions of Plenary II

[60] It would appear from the legal interpretative perception that the Establishment owed its origin from section 70 of the Constitution of Lesotho which stands as follows:

> (1) Subject to the provisions of this Constitution, the legislative power is vested in parliament.
> (2) Nothing is sub section 1 shall be construed as preventing parliament from conferring on any other person or authority to make any rules, regulations, by laws, orders or other instrument having legislative effect as parliament may determine.

[61] The sub section 2 legislative dispensation finds resonance from the Section 154 (1) definition of what constitutes the law in the kingdom. Section (3) of the NRA Act enjoined the body to expedite the national transformation of Lesotho *through an independent,*

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[27] Act No.4 of 2019

transparent, and accountable strictness of the law process in the implementation of the resolutions and decisions of Plenary II. In rhythm with that, it was tasked to compile the records of the multi-stake holders authored by the national dialogue and those from Plenary II. The impression hereof is that the NRA was obliged to use the stated documents as the foundational documents for reference and guidance including at the climax of all the processes, by the Parliament itself.

[62] The Plenary II report features as the primary and the cardinal document the representations since it constitutes of the recorded representatives of the nation in almost its all its formations. It stands as a testimony of what in the current political nomenclature is expressed in Latin terms as *voce populi vox Dei.* In Sesotho, it translates into *lentsoe la sechaba ke poho* and most relevantly, that as such, the word of the people must be honoured. In Sesotho, *Lentsoe la Sechaba le aheloa lesaka.*

[63] The history behind the formation of the NRA is materially important for lending credence to the Plenary II Report regarding its accuracy, authenticity, and representativeness.

ESTABLISHMENT OF THE NATIONAL REFORMS AUTHORITY (NRA)

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[28] No.4 of 2019

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[66] The sub section 2 legislative scheme finds resonance from the Section 154 (1) definition of what constitutes the law in the kingdom. Section (3) of the NRA Act enjoined the body to expedite the national transformation of Lesotho through an independent, transparent, and accountable strictness of the law process in the implementation of the resolutions and decisions of Plenary II in rhythm with that, it was tasked to compile the records of the multi-stake holders authored by the national dialogue and those from Plenary II. The impression hereof is that the NRA was obliged to use the stated documents as the foundational documents for reference and guidance.

[67] The Plenary II report features as the cardinal record for reference since it constitutes the recorded climax of the representations made by the representatives of the nation in almost the totality of its formations. It stands as a testimony of what in the current political nomenclature is expressed in Latin terms as *voce populi vox Dei* expression. In Sesotho, it translates into *lentsoe la sechaba ke poho.* In simplified terms, the Plenary II report constituted the blueprint of Bill for the amended version of the constitutionally challenged provisions.

[68] The history behind the formation of the NRA is materially important for lending credence to the Plenary II Report regarding its accuracy, authenticity, and representativeness. So, the Bill intended for amending the Constitution should have materially transitioned into it in both form and content.

[69] The NRA has grassroots origins. This is attributable to the democratic processes that preceded its establishment. Initially, the national dialogue was held to deliberate on how Lesotho could be reformed through the transformative process. It was resolved at that forum that there be a nation-wide consultation so that, the Basotho can directly architect the reforms towards the Lesotho that they want. Resultantly, Plenary II was convened. The composition of the NRA has a telling effect concerning its national representativeness. The answer is provided under Section 5 which is headed, *Composition of the Authority.* It provides:

> 5. (1) The Authority shall consist of-

(a) One representative of each of the following political parties registered with the Independent Electoral Commission at the coming into operation of this Act-

(i) African Ark;

(ii) African Unity Movement

(iii) All Basotho Convention

(iv) All Democratic Cooperation

(v) Alliance of Democrats

(vi) Areka Ea Baena

(vii) Basotho Batho Democratic Party

(viii) Basotho Democratic National Party

(ix) Basotho National Party

(x) Basotho Redevelopment Party

(xi) Basotho Thabeng ea Sinai

(xii) Basutoland African National Congress

(xiii) Basotho Congress Party

(xiv) Basutoland Total Liberation Congress

(xv) Community Freedom Movement

(xvi) Democratic Congress

(xvii) Democratic Party of Lesotho

(xviii) Hamore Democratic Party

(xix) Lekhotla la Mekhoa le Meetlo

(xx) Lesotho Congress for Democracy

(xxi) Lesotho People's Congress

(xxii) Lesotho Workers Party

(xxiii) Majalefa Development Movement

(xxiv) Marematlou Freedom Party

(xxv) Movement for economic Change

(xxvi) Mpulule Political Summit

(xxvii) National Independent Party

(xxviii) Popular Front for Democracy

(xxix) Progressive Democrats

(xxx) Reformed Congress of Lesotho

(xxxi) Senkatana Social Democracy

(xxxii) Socialist Revolutionaries

(xxxiii) The White Horse Party

(xxxix) True Reconciliation Unity and

(xxxv) Tsebe Social Democrats

(b) the Minister of Law, Constitutional Affairs and Human Rights or his representative.

(c) the Minister of Foreign affairs and International Relations or his representative.

(d) the Attorney General or his representative.

(e) one representative of each of the following institutions-

(i) Principal Chiefs

(ii) Chiefs

(iii) Headmen

(v) Academia Organisations

vi) Business Sector Organisations

(vi) Citizen Mobilization Organisations

(vii) Democracy Organisations

(viii) Faith-based Organisations

(ix) Farmers Organisations

(x) Government and Political Rights Organisations

(xi) Human Rights Organisations

(xii) Labour Organisations

(xiii) Madia organisations

(xiv) People with Disability Organisations

(xv) Professional Organisations

(xvi) Students Formulations

(xvii) The Law Society of Lesotho

(xviii) The Lesotho Council of Non-Governmental Organisations

(xix) Traditionalist Organisations

(xx) Women Rights Organisations and

(xxi) Youth Organisations.

[70] Section 6 (5) of the Act has far reaching consequences for its binding effect upon those who participated in the activities of the Authority. It states:

> The decisions of the Authority **are final and binding on all political parties and the institutions whose candidates were members or participated in the deliberations and activities of the Authority.**

[71] The provision envisioned that the membership of the NRA would, in good faith feel bound by the decisions reached at the forum mainly on account of its national representativeness and

towards the Lesotho that the nation throughout all its formations, want. The critical understanding was that the members would, throughout all the forums including Parliament in particular, faithfully work towards the implementation of the NRA resolutions

[72] The foundational reality that constitutes a turning point in this matter, is authored by the fact that the Parliament acting under Section 70 (2) of the Constitution which text has already been projected, sub-delegated its law-making processes to the NRA. As said before, this was preceded by the establishment of the initial structures to do the groundwork towards the securing the views from almost all the societal spheres of the nation right from its grass- roots levels and throughout. The cumulative magnanimity of the political instability at the time, dictated that the Basotho should be accorded the right to directly make representations on the constitutional amendments to be introduced to resolve the problem towards the achievement of the Lesotho that they want.

[73] The public based processes relatively reinstated albeit temporarily the *direct representation* in contrast to the normally entrenched *indirect representation* which is done by the elected representatives in Parliament. This relatively became reminiscent of the direct democracy that was practised on top of the Acropolis hill in Athens in the ancient Greece where men directly participated in the law making and policy designs[29]. On the home terrain, this was analogous to the direct democratic rule reputably

[29] 'A glimpse of the Genesis of Democracy in Ancient Athens' Article by Stephen Grandberry, Scotland Democratic Forum Vol. 27 of 1965 page 72

practised on top of Thaba-Bosiu during the early stages of the national building processes.

[74] Understandably, the dispensation circumscribed the usual law-making powers by Parliament because it had introduced the consultative avenues through which the citizens directly suggested the constitutional amendments that they deemed remedial to the perennial political troubles besetting the Kingdom. Thus, Parliament cannot ignore the word of the Basotho by pretending that it was operating under the normal circumstances. Otherwise, it would act contemptuously to the nation and in a manner that lacks *The Spirit of Botho* (without the spirit of humanity).

Jurisprudence on the Delegation of the Legislative Making Processes

[75] The Section 70 (2) initiated constitutional delegation of the legislation making powers upon any establishment for the specified reason and duration, is, not historically a novel idea. Besides its potential enhancement of participatory democracy, it is also an instrument for controlling the three branches of government[30]. It is in the Kenyan legal nomenclature referred to as *The Popular Initiative* or *The Wanjiku*[31]. The phenomena applies specifically where a sovereignty is confronted with a challenge of amending the constitution and recognize that it would be wise to directly secure the views of the citizenry in its diversifies formations.

[30] Commented upon in Petition No.12 of 1921 (consolidated with Petitions Nos,11 & 13 of 2021) pp 102 of 928

[76] The Constitutional Court of Hungary is quoted to have *inter alia* postulated in Decision 52/1997, on Referenda and Popular Sovereignty that:

> Popular initiative is a means of direct democracy; and indeed, direct democracy can only be exercised by the people not their representatives since that would convolute the form of democracy at play ..... This leads to the conclusion that *the popular initiative* is the preserve of the citizen, the Wanjiku, in Kenyan lexicon[32]

[77] 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. This is normally conducted through the community and national *pitsos*. The resolutions reached at that gathering are by consensus binding over the people concerned and they expected to faithfully honour them since they are intended to protect and advance their interests. The attendees of the public gathering concerned, would immediately after the pronouncement of the decision at the forum loudly say, *"it has thundered"* at least twice. The Sesotho version is, *"Le lumme, le lumme"*. The underlying philosophy for the Pitso is that a serious societal challenge is resolvable by uniting as the affected people to address it-hence, the saying that in unity there is strength and more wisdom.

[78] In the circumstances of this case, it is decipherable that the initiative taken to solicit the views of the people throughout for the purpose of assisting the constitutional reforms, is comparable to the Kenyan and the Hungarian approach in the face of relatively

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[32] Op cit. pp 102

the same challenges. The emphasis is on the directness of the participation of the people individually and in their collective structures. The approach is not unprecedented in this jurisdiction. During the military rule and the legislatively created Constituent Assembly[33] consultative forums and processes were created to secure the public views and recommendations that have shaped the existing Constitution. The same approach was adopted prior to the enactment of the Independence Constitution Order enacted by Her Majesty Queen Elizabeth II.[34] This is in recognition of the magnanimity of the Constitution and the wisdom for the creation of the consultative avenues with its would be owners.

[79] The most intriguing enigma that has occasioned this litigation constitutes in the main, of the protestation raised by the Applicant that the motion of no confidence against the PM, was pursuit through the provisions of the 9th Amendment of the Constitution which he charges that are unconstitutional. He attributes that to his construction of the law that at the material moment the motion was initiated, the nation had already rejected its operational provisions *on prorogation, dissolution of Parliament and most relevantly for this case, the vote of no confidence provisions*. In conclusion, he supported his proposition with reference to the electorates suggested version of those provisions in the NRA Reforms Bill[35] that is architected upon the Plenary II recommendations.

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[33] The National Constituency Order No.4 of 1990

[34] Sitting in Council in 1996

[35] Circulated on the authority of hon. L. Rakuane Minister of Justice and Law in 2022

[80] At this stage, the Text of the NRA version of the reforms becomes relevant. It is configured:

Amendment of section 83:

Dissolution and prorogation of Parliament

[81] The Constitution of Lesotho is amended by deleting section 83 and substituting the following section:

Dissolution

83. (1) The term of Parliament shall be five years from the date when the two Houses of Parliament first meet after a general election and shall end on the date that Parliament is dissolved.

(2) The King may, acting on the advice of the Council of State, dissolve Parliament before the end of the five-year term if –

(a) three years have passed since Parliament first met after elections, and the National Assembly has adopted a resolution to dissolve Parliament with a supporting vote of no less than two-thirds majority of its members; or

(b) the office of the Prime Minister is vacant and the King, acting on the advice of the Council of State, 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 coalition of political parties that will command the support of a majority of the members of the National Assembly.

(3) Notwithstanding subsection (1), at any time when Lesotho is at war, Parliament may from time to time extend the period of five years specified in subsection (1) for not more than twelve months at a time, not extending in any case beyond a period of six months after the war has ended.

Prorogation

83A. (1) The session of Parliament shall be twelve months, and Parliament shall thereafter be prorogued by the King acting on the advice of the Council of State.

(2) The Prime Minister may, at any time before the end of the session, recommend prorogation of Parliament to the Council of State for a period not exceeding fourteen days.

(3) Where the Prime Minister intends to recommend to the Council of State to prorogue Parliament for a period exceeding fourteen days, the Prime Minister shall seek the approval of Parliament before making such a recommendation, and such prorogation shall not exceed sixty days.

Vote of No confidence

83C. (1) The National Assembly may at any time pass a vote of no confidence in the Government of Lesotho

(2) The motion of no confidence in the Government of Lesotho passed pursuant to subsection (1) shall –

(a) be supported by a resolution of two-thirds majority of the members of the National Assembly:

(b) Propose a name of a member of the National Assembly, who shall be appointed by the King to take the place of the Prime Minister.

(3) Where the motion of no confidence is passed, the Prime Minister shall immediately cease to hold office.

(4) A motion of no confidence shall not be introduced more than once in the same session.

[82] The Court finds that against the background of the described constitutionally sanctioned developments, the legislative establishment of the National Dialogue Forum, the NRA and the nationwide suggested constitutional reforms, constitutes a legal process within the meaning of *'law'* under Section 154 (2) of the Constitution. The Section 6 binding effect of the NRA decisions over its membership in particular the political parties and their undertaking to support that, is indicative that its sponsored Bill on reforms should be faithfully treated by the concerned political parties and that this would transcend into Parliament.

[83] It is deserving to reiterate the fact that this litigation is premised upon the Ninth Amendment of the Constitution and hence the legal polemics exchanged before the Court were basically founded and driven by the jurisprudence pertaining to it. Appreciably, this is so mainly on account of the discussed revolutionary effect that the Amendment introduced. The comparative analysis between the original version that existed before the amendment and the one occasioned by the amendment

has been done. It is in that scenario that the Applicant maintains that the amendment is unconstitutional because it undermines the basic structure of a constitutional democracy. The Respondents disagree vehemently.

[84] The irreconcilability of the positions maintained the parities in the matter, occasioned the realization of the importance of reference to the relevant Hansards for the understanding of the intention of the Parliament in passing the Amendment. So, the Hansards of the 22nd October 2019 and 12th March 2020 were studied. It should for the sake of fairness suffice to explain that the Member of Parliament who motivated the passing of the Ninth Amendment to become the law naturally justified the rationale behind the contemplated changes in the Constitution.

[85] The initial reasoning advanced in favour of the amendment sought for, was, in essence for the economic reasons to safe the country from the danger of repetitiveness of subjecting the country into incurring millions of moneys resulting from the suddenly holding of the general elections following the dissolution of Parliament which frustrates the sustenance of developmental programmes. On the one hand, substantial justification was dedicated upon the reasoning that the amendment would safe parliamentarians from losing their jobs to sustain their livelihood together with that of their families and cautioned that they are also under employment.

[86] It is really beyond the jurisdiction of the Court to evaluate the merit in the speech delivered by a parliamentarian and, it

accordingly refrains from doing so. Its assignment is restricted to the defined constitutional issues places before it. However, it is pertinent for the purpose of the depiction of the intention Parliament to be stated that the passing of the Bill was, preponderantly, motivated upon its importance in seeking to protect the interests of Parliamentarians.[36]

[87] The Ninth Amendment provisions on *Prorogation of Parliament, dissolution of Parliament* and *the passing of no Vote of Confidence against the Prime-Minister* are almost totally different from their counterparts in the NRA Bill. This is paradoxical because the Parliament should, during its enactment of the Ninth Amendment have used the corresponding provisions in the NRA Bill as the blueprint for reference and guidance for honouring the word of the nation about the Lesotho it wants. In any event, the preamble in the Bill stands as a clear testimony of the recognition of the significance of the background forums and processes through which the decisions on the Lesotho we want were made. This *per se,* reinforces the imperativeness of commitment, consistency, and faithfulness towards translating the relevant national resolutions into the legislation. In part the preamble reads:

> The purpose of the Bill is to amend the Constitution of Lesotho 193, to give effect to the resolution of the Multi –Stakeholder National Dialogue on comprehensive national reforms as espoused the Plenary II Report.

[36] This is addressed through pages 5 to 7 in contrast to the personnel economic related justification expressed in hardly 4 lines. These explicitly reveal the true interest of the Parliamentarian behind the Ninth Amendment.

[88] The Bill is a result of consultations and debates among members of the National Reforms Authority and a wide number of stakeholders. Resoundingly, the Preamble attest to this truth.

[89] It is found wise towards the conclusion of the matter, to be acknowledge that Parliament has the constitutional authority to legislatively amend the Constitution. However, this is circumscribed in exercising that power, it should not undermine its *basic democratic structure.* This denotes the origin of the theory of *the basic structure doctrine* in constitutional jurisprudence. In the Kesavananda Bharati v The State of Kerala[37] the concept was explained as:

> 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.

[90] In this case, Parliament is found to have transgressed the *basic character of our democratic constitution* by:

1. primarily disregarding the democratically expressed views of people and unilaterally legislated as it wanted and excluded the inherent right of the electorate to participate in the critical determinations despite the directness of its interest. This has happened after millions of Maloti and Dollars from the international partners was invested for the electorate to introduce the constitutional amendments through which it would realize the Lesotho that it wants.

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[37] supra

2. Unilaterally introducing into the Ninth Amendment, the provisions that excluded the inherent right of the electorate to participate in the stated critical processes despite its directness and substantial interest over them.

3. Ignoring the true status of the Prime-Minister and the interest of the electorate in that political office and instead, introduced the regimen the effectively reduced it to the level of being held exclusively at the mercy of Parliamentarians.

[91] The analysis justifies the conclusion that it may have perhaps, inadvertently, escaped the wisdom of Parliament that the developments strictly destined it to legislate in accordance with the instructions given in the Plenary II report and *mutandis mutatis* as reiterated in the NRA Bill. Unfortunately, as it has been analysed, Parliament deviated from its key mandate concerning the impugned provisions in the Ninth Amendment which for the reasons already elaborately stated, undermined the basic structure of the democratic constitution of Lesotho.

[92] It is at this stage found worthwhile for the Court to revisit the fact that the counsel for the Applicant, had twice in response to the reservation it expressed about the tenability of the prayer for the order staying the process of moving of the vote of no confidence against the PM, stated that he would not insist upon it. This would be important for the understanding of the decision on the concerned prayer.

[93] In the premises, the final decision stands as follows:

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 83 (4) and 87 (5) is equally 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.
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 comprehensive provisions to regulate the passing of vote no confidence.
4. There is no order on costs because this is a constitutional matter.

E.F.M. Makara
Judge of the High Court

Concur: **T.E. Monapathi**
Judge of the High Court

Moahloli J (dissenting)

[94] I have had the opportunity to read the majority judgment penned by my brother Makara J, and have reluctantly decided to exercise my prerogative to write separately because, in as far as prayer (a) is concerned, I unfortunately disagree with the majority regarding the applicability of certain legal principles and the correct legal conclusions to be drawn.

SURVEY OF ARGUMENT

As to Prayer (a):

[95] Although this prayer is couched in very broad terms in the applicant's notice of constitutional motion, it is clear that the gravamen of this case, i.e. the precise question for consideration, is whether Section 3 and 4 of the Ninth Amendment to the Constitution, which amended Sections 83(4) and (5), as well as Section 87(5) (a) of the Constitution, respectively, 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)].

[96] Applicant contends that 'there is infraction to the basic structure of the Constitution provided for in Section 1 of the

Constitution'[38] because the Ninth Amendment has removed or done away with –

(i) 'the power of the Prime Minister under the old Section 87(5)(a) to opt for dissolution of Parliament in the event of a vote of no confidence being passed'[39]; and

(ii) '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 (sic) get fresh mandate but decide on black cheque by themselves as to who should be the Prime Minister contrary to how the electorate had elected'.[40]

[97] Applicant further submits that the Ninth Amendment is flawed because it focuses only on Section 87, whereas this provision is not capable of being divorced from Section 86.

[98] The complaint of the Applicant is that although the 9th Amendment has effectively been an amendment to section 1(1) of the Constitution, it was not done in compliance with the provisions of Section 85(3) (a) in that the bill was never referred to a referendum. As a default position the bill was invalid on that procedural basis alone.

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[38] Paragraph 20 of Lejone Puseletso's founding affidavit at page 28 of the Record of Proceedings.
[39] Para 13 r/w para 19 at page 26 & 27-28 of the Record.
[40] Para 19 at page 28 of the Record.

[99] Applicant further complains that the 9th Amendment enacts alterations that undermine the democratic nature of the Kingdom. Specifically, by curtailing the participation of the people in the dissolution process.

[100] The 1st to 5th respondents (hereafter referred to as "the government respondents") filed an intention to oppose. So did the 7th, 8th, 17th (BNP), 19th (DC), 28th (PFD), 32nd (SR) and 43rd (BPP) respondents (who I shall hereafter, for convenience, collectively refer to as "the political party respondents"). Mr Motlatsi Maqelepo, Deputy Leader of the Basotho Action Party (42nd respondent) filed the sole answering affidavit, in his official capacity, which he claims that he is duly authorised to depose thereto.

[101] In his answering affidavit, Maqelepo begins by dismissing this application as 'a tactical move calculated to delay the democratic process under the guise of *sub judice* principle'. A ruse "to use a judicial arm of government to stall the democratic process [of motion of no confidence] which is sanctioned by the supreme law of the land being the Constitution".[41]

[102] Regarding the alleged unconstitutionality of the Ninth Amendment, Maqelepo contends that this challenge is a non-starter, as in terms of Section 20(1) "Lesotho is a democratic state where elective democracy plays a part" and citizens elect

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[41] Para 1.4 at page 42 of the Record.

legislators to exercise the powers spelt out under the Constitution and it [was] therefore disingenuous for a legislator [Mr Puseletso] to make an averment that the very power under which he is exercising rights and obligations is unconstitutional."[42]

[103] The political party respondents also filed a counter-application to the main. The founding affidavit thereto was deposed by Mr Mootsi Lehata, who describes himself as a Member of Parliament for the Makhaleng constituency under the banner of the Democratic Congress (DC) (8th respondent). He claims to be deposing to the affidavit in his capacity as the MP who seconded the motion of no confidence in the Prime Minister.

[104] Regarding the question of the constitutionality of the Ninth Amendment, Lehata contends that the applicant in the main-

(i) "placed no basis for challenging the constitutionality of the 9th Amendment to the constitution"[43]; and

(ii) "gave no reasons for declaring it unconstitutional."[44]

[105] He maintains that the "challenge on (sic) the 9th Amendment is overtaken by events as the law had seen (sic) applied to force former Prime Minister Thabane to resign and this issue around applicability of this law must be treated as moot."[45]

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[42] Para 2.2 and 2.3 at page 43 of the Record.
[43] Para 1.10 at page 61 of the Record.
[44] Para 1.10 at page 62 of the Record.
[45] Para 1.13 at page 62 of the Record.

[106] The other defences advanced by the respondents against the applicant's unconstitutionality challenge are that –

(i) there is no support for such challenge in our domestic jurisprudence; and

(ii) requiring a court to declare a constitutional amendment invalid would lead to the violation of the sacrosanct principle of separation of powers.

ANALYSIS OF ARGUMENT

[107] The political party respondents are in essence asking this Court to accept and apply the orthodox approach to constitutional amendments judicial review. It is that, if any provision of the Constitution was amended by Parliament in conformity with the requirements of Section 85(3), that Amendment Act is unassailable, and its validity is not subject to the power of judicial review.[46]

[108] As authority for their position they cite the recent judgment of our apex court in *Boloetse v The Speaker of the National Assembly and Others*, where, albeit *en passant* and perhaps *obiter dictum*, J van der Westhuizen AJA said:

> "Ripeness
> The question of ripeness, or at what stage it is appropriate or otherwise for a court to intervene in the legislative process was dealt with by the High Court. Based on the fact that once the Bill results in a fully adopted amended new Constitution, it will be the supreme law and its constitutionality can no longer be challenged, the Court held

[46] Cf. D.D. Basu. Commentary on the Constitution of India, 9th Ed; Vol. 1 (2014 LexisNexis India) at p.611

> that the matter was ripe for adjudication."[47][Emphasis added]

[109] However this notion of unassailability once the procedural restrictions have been overcome has proven to be problematic. Should the scope of amendment power be so unlimited as to permit any amendment whatsoever, even one that violates fundamental rights and basic principles? Scholars and courts in many parts of the world have stressed the imperative to limit the power to amend Constitutions. For instance, Professors Ronald Dixon and David Laudau[48] have cautioned that:

> "A deep tension exists in many parts of the world between commitments to democracy and procedures for constitutional amendment. Amendments are frequently passed that follow formal democratic procedures but are aimed at achieving anti-democratic or "abusive" constitutional aims – i.e., to help powerful presidents extend their term in office, to remove parliamentary or federalism-based checks on executive power, and to narrow or suspend basic human rights protections. Limiting a power of constitutional amendment, therefore, can have clear democratic benefits. One way to do this is via a judicially enforceable doctrine of "unconstitutional constitutional amendment." While such a doctrine may not be a complete solution to anti-democratic uses of constitutional amendment powers, it can create an additional hurdle to change. But such a doctrine should be approached with caution from a democratic perspective, because it can also create a significant road-block to the legitimate use of amendment procedures as a means of overriding courts decisions deemed unreasonable or unacceptable by a majority of citizens. In order to promote democracy rather than undermine it, any doctrine of unconstitutional constitutional amendment must be limited in scope."

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[47] (C of A (CIV)62/2023) [2023] LSCA... (17 November 2023) at para 15

[48] "Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment" I. CON (2015), Vol. 13, No. 3, 606

[110] In his very insightful article, "Constitutionalism and Constitutional Amendment in Lesotho: A case for substantive limitations",[49] Adv Karabo Mohau KC, makes the following very important observations:

> "This discussion has shown that constitutionalism is underpinned by structural, procedural and substantive limitations on the exercise of power by government. It has shown that the Constitution of Lesotho, to a large extent meets those requirements except for a few areas of concern especially with regard to substantive limitations. It has also been argued that while an attempt has been made to fortify the most important provisions of the Constitution against easy amendment, the provisions for such entrenchment are not as stringent as in other countries.
>
> It is proposed that the Constitution needs to do more than merely to make the amendment of its basic features difficult; it should render them completely unalterable, unless the proposed amendment does not detract from, or diminish the nature of the affected provision. The full extent of such fundamental features could be a matter of debate but there is no doubt that the democratic nature of the country as provided for under section 1, the supremacy of the constitution enshrined under section 2, and human rights protected under Chapter II of the Constitution should be part of these "unalterable" features.
>
> The basis for this proposition lies first in the fundamental nature of the provisions concerned. The second reason is that to leave these provisions unfortified against possible amendment is to give them a precarious existence, dependent on the hope that no demagogue will ever assume power and convince the voting public that, for example, certain rights are responsible for promoting crime and need to be removed from Chapter II of the Constitution."

[111] The foremost expert on this subject of unconstitutional constitutional amendments is Professor Yaniv Roznai. In his seminal work, *Unconstitutional Constitutional Amendments*,

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[49] Lesotho Law Journal (2014) Vol.21 Special Edition, pp.1-32 at p. 32

he states that "there is a growing trend in global constitutionalism not only to impose limitations on the constitutional amendment powers, but also to enforce this unamendability by means of substantive judicial review of constitutional amendments."[50] He admits that "the idea that amendments that were enacted according to the amendment procedure could be declared 'unconstitutional' on the grounds that their content is at variance with the existing constitution is perplexing. After all, is it not the purpose of amendments to change the existing constitution's content?"[51] Professor Roznai argues that the first step towards unravelling this paradox is to understand the main concept – the constitutional amendment power, its nature, and its scope.

[112] Roznai's theory of constitutional amendment power is aptly summarised as follows, by another renowned expert in this area, Professor Richard Albert, in his erudite book *Constitutional Amendments*:[52]

> "Constituent power is a pre-constitutional authority that controls both how a constitution is made and also how constituted powers exercise their limited delegated authority to change the constitution in the name of the people. As Roznai explains, the constituent power – the body we consider "the people" – creates a constitution, and in turn

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[50] Unconstitutional Constitutional Amendments: The Limits of Amendment Powers. (2017 Oxford University Press) at p.6. This book is a true *locus classicus*. It gives a thorough account of and a theoretical foundation for constitutional unamendability. It is a veritable encyclopaedia of how various apex courts worldwide have decided cases in this crucial area of comparative constitutional studies.

[51] At pp.6-7

[52] Constitutional Amendments: Making, Breaking and Changing Constitutions. (2019 Oxford University Press) at p.217. This book is a masterly comparative account and analysis of constitutional amendments in theory and practice.

> authorizes the constituted powers – the organs of government – to act in the people's name consistent with the constitution. These constituted powers are authorized to alter the constitution as long as any alteration to it does not undermine the constitution as built by the constituent power. The constituent power alone has the competence to change the constitution in a way that departs materially from what the old constitution has established as law. From here it is a short step to the assertion that democracy requires courts to protect the constituent power's choice to concretize its sovereign will in higher law at the moment of constitutional creation. The power of courts to protect this agreement, the argument continues, includes the authority to invalidate constitutional changes made by constituted powers that go beyond the popularly approved limits of the constitution. The argument concludes: the judicial act of striking down a transformative change is a justifiable intervention to safeguard the terms of the original bargain approved by the people. On this view, the doctrine of unconstitutional amendment is a triumph of democracy."

[113] Roznai explains that even if a constitution is silent with regard to any explicit limitations on the amendment power, this does not necessarily mean that the amendment power is unlimited. In practice certain implied limitations may be imposed upon amendment powers in order to preserve that constitution's identity. "Thus, in many ways, these *noli me tangere* or 'not to be touched' provisions compromise the 'genetic code' of the constitution."[53]

[114] It must be noted that although the literature on implicit unamendability focuses on India, there is an emerging global trend towards adopting implicit limits to constitutional amendment powers, be it by the 'Basic Structure Doctrine', the 'Doctrine of Basic Features', the 'Constitutional

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[53] Roznai, p.38

Replacement Doctrine', the 'Substitution of the Constitution Doctrine' or other variations of the basic structure doctrine.[54]

[115] To recap, "the amendment power is a constitutional power delegated to a certain constitutional organ. Since it is a delegated power, it acts as a trustee of 'the people' in their capacity as a primary constituent power. As a trustee, it possesses only fiduciary powers: hence it must *ipso facto* be intrinsically limited by nature. Conceived in terms of delegation, certain acts by the amendment authority could be considered as going beyond permissible bounds, since they would flout the terms of the 'delegation'. Put differently, the understanding of the amendment power as a delegated power means that a vertical separation of powers exists between the primary and secondary constituent powers. As in the horizontal separation of powers, this separation results in a power block. The holder of the amendment power is not permitted to conduct any amendment whatsoever, but may be restricted, either explicitly or implicitly, from amending certain principles, institutions, or provisions. Certain constitutional decisions thus require the re-emergence of the primary constituent power and force 'the real sovereign to return from its retirement in the clouds' in certain constitutional moments. Therefore, constitutional

[54] Roznai pp. 69-70; Albert pp. 153 - 156

unamendability is not eternal and can be overcome or changed through the exercise of the primary constituent power."[55]

[116] I have quoted this recapitulation *in extensio* because apart from helping us understand the nature of constitutional amendment powers, it can assist the reader to properly understand the role and status of the public and parliament in the current national reforms exercise.

[117] It must be noted at this juncture that the theory of delegation and the distinction between the primary and secondary power, explained above, shows that the basic structure doctrine 'is not a creature of the Judges but a necessary consequence of the organisation of the amending power in the context of a limited government'.[56]

How should a review be exercised?

[118] According to Roznai, when the Constitutional Court reviews *implicit* constitutional unamendability, it is the court that decides what the constitution's basic structure is and that enforces its unamendability. And the Constitutional Court is competent to nullify constitutional amendments that contradict the constitution's basic structure. Roznai states that "courts around the world, in countries such as India, Bangladesh, Kenya, Colombia, Peru, Taiwan and Belize, have

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[55] Roznai pp.133 - 134

[56] C.V. Keshavamurthy. Amending Power under the Indian Constitution – Basic Structure Limitations. (1982 Deep & Deep Publications) p. 82

held that the amendment power is inherently limited, even in the absence of explicit unamendability, and the court, as the guardian of the constitution, has the duty to enforce such implied unamendability. Therefore, the non-existence of explicit unamendability provisions does not – and, according to the theory of delegation, should not – necessarily mean that judicial review of constitutional amendments is impossible. The language of the constitution is not only explicit; it is also implicit. Every constitution has an implicit unamendable core that cannot be amended through the delegated amendment power. Judicial review is a mechanism for enforcing this limitation."[57]

[119] In South Africa, the Constitutional Court in *Premier, KwaZulu-Natal & Others v President of the Republic of South Africa & Others*[58] acknowledged the possible existence of the basic structure doctrine. Mahomed DP held "that there was a procedure which was 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 (at para [47]). But even if there was this kind of implied limitation to what could

[57] At p.209
[58] 1996 (1) SA 769 (CC) at 783I-784F

properly be the subject-matter of an amendment to the Constitution, none of the amendments *in casu* could conceivably fall within the category of amendments so basic to the Constitution as effectively to abrogate or destroy it." (at para [49]).

[120] Albert, however warns that the approach permitting review of constitutional amendments is not unanimous. Courts in many other countries have taken the contrary view, declining to recognize the power to invalidate constitutional amendments.[59] In Ireland, for instance, the Supreme Court has taken the popular sovereigntist view that no amendments can be unconstitutional.[60] In the USA the Supreme Court refuses to entertain such controversies, saying that they are political questions reserved for resolution by the law makers.[61] In France the Constitutional Council says that it lacks jurisdiction to review constitutional amendments.[62] And in the Republic of Georgia the Constitutional Court says that once amendments become official they become part of the constitution, and the court has no authority to evaluate the constitutionality of the constitution itself.[63]

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[59] See Richard Albert, Malkhaz Nakashidze, & Tarik Olcay, "The Formalist Resistance to Unconstitutional Constitutional Amendments" (2019) 70 Hastings Law Journal 101.

[60] Finn v. The Attorney General [1983] I.R. 154; Riordan v. An. Taoiseach (No. 1) [1999] 4 I.R. 321.

[61] Leser v. Garnett, 258 U.S. 130 (1922); National Prohibition Cases, 253 U.5. 350 (1930); Dillon v Gloss, 256 U.S. 368 (1921); Coleman v Miller, 307 U.S. 433 (1939).

[62] CC decision no. 2003-469DC, Mar. 26, 2003, Rec. 293; CC, decision no. 92-312DC, 5ept. 2, 1992, Rec. 76; CC decision no. 62-20DC, Nov. 6 1962, Rec. 27.

[63] Ruling N2/2 486, July 12, 2010; Ruling N1/3 523, October 24, 2012; Ruling N 1/1 549, February 5 2013

[121] This court reiterates that it has jurisdiction over the constitutionality of constitutional amendments as already discussed in paragraphs [119], [113] and elsewhere in this judgment and in the majority judgment.

Standard of review of unconstitutional constitutional amendments

[122] According to Roznai, there are three possible standards of judicial review.

(a) The minimal effect standard:

In terms of this standard, any violation or infringement of an unamendable or sacred principle, no matter how severe, should be prohibited, including amendments that have minimal effect on the protected principle. The rationale for this approach is that "if the aim of unamendability is to provide for hermetic protection of a set of values or institutions, then any violation of these principles ought to give rise to grounds for judicial intervention."[64] This standard is rejected because it is considered-

(i) to be stringent and inflexible;

(ii) to grant the courts too much power to intervene in legislative activity;

(iii) to stifle constitutional progress;

(iv) to place too wide restrictions on the ability to amend constitutions; and

[64] Roznai, p.218

(v) to be likely to lead to absurd results.

(b) The disproportionate violation standard:

(i) This test is considered appropriate for *governmental amendment powers* (as opposed to *popular amendment powers*), which, like ordinary legislative procedures, do not carry a very strong democratic legitimacy and are considered to be more prone to abuse.[65]

(ii) "Proportionality generally requires that a violation of a constitutional right has a 'proper purpose', a rational connection between the violation and that the purpose, and a law that is narrowly tailored to achieve that purpose, and it requires that the proportionality *stricto sensu*, or balancing, test is met. This standard emphasises the balancing of conflicting interests and may also be suitable for judicial review amendments...

(iii) In the case of unamendability, the balance would be between the core of the protected unamendable principle on the one hand, and the pursued interest and the means taken by the constitutional amendment for its achievement on the other hand."[66]

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[65] Roznai, p.220

[66] Ibid

(iv) As amendability is intended to preserve the core nucleus principles of the constitution, or in other words its identity, the disproportionate violation standard would examine whether the core of an unamendable principle was disproportionately violated. This would allow the amending authority enough discretion and scope to amend even unamendable principles.[67] This is the test already used by our courts in the review of the constitutonality of ordinary legislation.

(c) The fundamental abandonment standard:

This standard is most suited for reviewing amendments processed using *popular amendment power.* It is maintained that since this power utilizes inclusive, participatory and deliberative mechanisms that carry a high degree a democratic legitimacy and minimal risk of abuse, the courts should apply the lowest level of scrutiny. "According to this standard, only an extraordinary infringement of unamendable principles, or a constitutional change that 'fundamentally abandons' them, would allow judicial annulment of constitution amendments"[68]

Application of the appropriate standard

[67] Roznai, p.221
[68] Roznai, p. 221

[123] Applicant is challenging the constitutionality of the amendments to Sections 83 and 87 of the Constitution. Under normal circumstances, the procedure to be followed to alter Section 83 is the procedure prescribed in Section 85(3)(b) – i.e. the votes of no less than two-thirds of all the votes in each House of Parliament. And the applicable test to apply is the disproportionate violation standard, since the impugned alteration entailed the exercise of governmental amendment power.

[124] In my view the amendment of Section 83 (4) did not result in the violation or any unamendable principle, as I do not agree with Applicant's contention that this amendment affected the status of the Kingdom of Lesotho as a democratic Kingdom. The alteration in question did not disproportionately violate, or violate at all, the core of the principle of democracy as enshrined in Section 1(1) of the Constitution.

[125] The alterations to Section 83(4) and 87(5) of the Constitution affected the principles declared by Section 1(1) in any manner which could be conceived as a radical and fundamental violation of the said principles. They did not effectively abrogate or destroy the said principles. They left the core principles of sovereignty and democracy enshrined in Section 1(1) still intact and unscarred.

[126] In the result, prayer (a) would be dismissed.

[127] As to prayer (b) :

Held, that this court has no authority or competence to issue the type of order sought by applicant. The doctrine of separation of powers, *inter alia,* does not allow the courts to interfere in the lawful exercise of powers by the legislature. It therefore did not come as a surprise that applicant's counsel wisely decided not to insist on this prayer.

Held, in the result, that prayer (b) would be dismissed as well.

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K. L. Moahloli

Judge of the High Court

Appearances:

For Applicant: Adv M. Teele (KC) and Adv L. Molati Instructed by Attorney T. Chabana

For 1st to 5th Respondents: Adv. Moshoeshoe & Adv. Thakalekoala from Attorney General Office

For Political Party Respondents: Adv Lephuthing and Attorney Rasekoai Instructed by T.M. Maieane & Co.