Prosecutorial Independence in Lesotho: A Critique of the Model

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Abstract

The Constitution of Lesotho is substantially cast on the Westminster prototype. As such, its institutions, by and large, reflect the structure of similar institutions at Westminster. The institution of the Director of Public Prosecutions (DPP) is no different: it has been designed to mirror its namesake under the British constitutional design. The underlying feature of classic British-based constitutions is the weak separation of powers and the predominance and condescending nature of the executive branch of government, as incarnated by the office of the Prime Minister. As such, most institutions within the design are beholden to the executive in general and to the Prime Minister in particular. The institution of the DPP is integral in the administration of criminal justice. Hence, its independence and its accountability in the discharge of this important constitutional mandate are of paramount importance. This notwithstanding, the Constitution of Lesotho is generally weak on safeguarding the independence of the office of the DPP and ensuring its corresponding duty of accountability. The purpose of this article is to critique the constitutional design in relation to the office of the DPP and to expose the deficiency of the constitutional clause establishing the Lesotho DPP office. The article contends that while the Constitution, under section 141, provides for some small measure of independence of this office, the broader schematisation of the Constitution is feeble on the independence and accountability of the office. The article analyses the constitutional design of the Lesotho DPP office in comparison with international developments.

Keywords: Constitution of Lesotho; Director of Public Prosecutions; constitution; Attorney General; rule of law; independence of the office of the Director of Public Prosecutions

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Introduction

The constitutions of Lesotho,[1] since independence, have always recognised the importance of public prosecutions and the need to have a constitutional institution mandated to oversee them.[2] According to section 99 of the 1993 Constitution, the office of the Director of Public Prosecutions (DPP) is mandated to institute, take over, or discontinue any criminal prosecutions.[3] While it would seem that the sensitivity of this mandate has always been appreciated, the constitutions have always taken the independence of this institution for granted. When Lesotho gained independence from Britain in 1966, almost all the institutions of the state—the judiciary, legislature, and the executive—were cast on the British model.[4] As Macartney has pointedly observed, in relation to the legislature,

> certainly the physical pattern is that of Westminster, down to the dispatch boxes presented by the British House of Commons and the Gentleman Usher of the Black Rod, who looks just as much the part as does his British namesake. In its anxiety not to deviate from British parliamentary practice indeed the National Assembly is officially converted into an upper house for the Speech from the Throne by the simple expedient of a ritual draping of the Speaker's chair with royal purple.[5]

The above observation is true even for the institution of the DPP. The 1966 Constitution established the institution as an 'office in the public service'[6] and invested it with fairly broad powers to institute and undertake any criminal proceedings against any person in any court and to take over or discontinue any criminal proceedings.[7] In keeping with the British conception, the office of the DPP was established as the *dominus litis* of all criminal prosecutions.[8] Its independence was established under section 84(6) of the Constitution as follows: '[I]n the exercise of the functions vested in him by subsection (2) of this section and by section 62 of this Constitution, the Director of Public Prosecutions shall not be subjected to the direction of control of any person or authority.' This section was a salutary embodiment of the doctrine of prosecutorial independence.[9] However, the 1966 Constitution never created a proper institutional framework to realise the independence of this institution. The relationship of the institution with the

1 Both the Constitution of 1966 and the Constitution of 1993.
2 See Lesotho Independence Constitution of 1966 (Schedule to Lesotho Independence Order No 1172 of 1966).
3 Section 99(2)(a), (b), and (c).
4 Allan Macartney, 'African Westminster? The Parliament of Lesotho' (1970) Parliamentary Affairs 121.
5 ibid.
6 Section 84 of the Independence Constitution of 1966.
7 ibid.
8 *S v Sole and Others* (CRI/T/111/99) <https://www.lesotholii.org/ls/judgment/high-court/2001/35> accessed 27 March 2019.
9 Didrick Castberg, 'Prosecutorial Independence in Japan' (1997) 16 UCLA Pacific Basin LJ 38.

executive remained undefined, even though this institution evolved in Lesotho as an 'office in the public service.' This has resulted in maladies.

When the 1966 Constitution of Lesotho was suspended in 1970,[10] the office of the DPP was largely used to persecute political opponents of the government.[11] The pattern continued even under the military junta that spanned the period 1986–1993.[12] When the country returned to constitutional democracy in 1993,[13] the new 1993 Constitution reaffirmed the centrality of the DPP in the constitutional design. However, the Constitution again failed to bring any significant innovations regarding the enhancement of the independence and accountability of the office of the DPP.[14] In tandem with its forerunner, the 1993 Constitution perfunctorily restates the doctrine of the independence of the office of the DPP. Similarly, the 1993 Constitution does not go into detail about the creation of an institutional framework for the full realisation of the independence and accountability of this institution.

When the country entered the era of fragile and unstable coalition governments in 2012, most of the institutions that were cast on British design—whose defining feature is the dominance of the executive and the weak separation of powers—came under immense pressure.[15] After the return to electoral democracy in 1993, politics in Lesotho was dominated by a single party, so much so that most of the institutions were never really tested by disagreement.[16] The real test came in 2012, when the change of government also brought about an unprecedented coalition arrangement. Most of the institutions and personnel manning those institutions found themselves in an awkward position of having to co-exist with the new government, and the institution of the DPP was no exception. In fact, it was one of the first institutions targeted by the new government. Consequently, the question of the independence of this institution and its relationship with the executive was again brought to the fore when the then DPP challenged his

10 Allan Macartney, 'The Lesotho General Election of 1970' (1973) 8 Government and Position 473; see also L Jonathan, 'Declaration of Emergency' Broadcast on Radio Lesotho, Friday 30 January 1970.

11 See cases such as *Moerane and Others v Rex* 1978 LLR 36; BM Khaketla, *Lesotho 1970: An African Coup under the Microscope* (C Hurst 1971).

12 Tefetso Mothibe, 'Lesotho: The Rise and Fall of Military-Monarchy Power-Sharing 1986–1990' (1990) 20(4) Africa Insight 242.

13 Roger Southall, 'Lesotho's Transition and the 1993 Election' in R Southall and T Petlane (eds), *Democratisation and Demilitarisation in Lesotho, the General Election of 1993 and its Aftermath* (Africa Institute 1995).

14 The new Constitution of 1993 copied the independence model, with exactly the same wording used in the relevant sections.

15 Khabele Matlosa and Neville Pule, 'The Military in Lesotho' (2001) 10(2) African Security Review 62.

16 Hoolo 'Nyane, 'The Advent of Coalition Politics and the Crisis of Constitutionalism in Lesotho' in M Thabane (ed), *Towards Anatomy of Political Instability in Lesotho, 1966–2016* (Morija 2017).

removal by the Prime Minister. The matter received the attention of the superior courts in the case of *Leaba Thetsane v Prime Minister and Others.*[17]

These developments have highlighted one important deficiency in the design of this institution: while the 1993 Constitution cursorily establishes the institution and cloaks it with some small measure of independence, it does not provide a good institutional framework for its independence. The institution is still disproportionately beholden to the executive, which renders its independence hollow and unrealisable in practice. This article contends that there is a deficiency in the constitutional clause establishing the Lesotho DPP office. The article analyses the constitutional design of Lesotho in light of constitutional strides made regarding similar office(s) at the international level.

Problematising Prosecutorial Independence and Accountability within the British-Based Constitutional Design

The notion of prosecutorial independence, like most constitutional doctrines, can best be understood within a particular constitutional set-up.[18] While it may have general contours, its conceptualisation differs from one design to another, and from one constitutional epoch to another.[19] Unlike judicial independence, which is a fairly well-trodden subject,[20] the literature on prosecutorial independence is only now growing.[21] In Lesotho, there is scanty literature and judicial precedent on the subject. Nevertheless, the office of the DPP is generally and vaguely expected to be independent.[22] The central question tormenting scholars and practitioners alike in Lesotho is the nature of this independence—whether or not it borrows from the precepts of judicial independence such as security of tenure and institutional and financial independence.[23] While

17 (Constitutional Case No 5 of 2014) Unreported <https://www.lesotholii.org/ls/judgment/high-court-constitutional-division/2014/21/> accessed 27 March 2020.

18 Albert Chen, 'Prosecutorial Discretion, Independence, and Accountability' (1998) 28 Hong Kong LJ 406. At 407 the author contends that 'in England and in all common law jurisdictions which have Attorneys General (AGs) with the same functions as the English AG, it has been recognised that the AG performs a dual role, one political and the other legal or quasi-judicial. In some of these jurisdictions (but not England), the AG is a member of the Cabinet and as such performs a political role in top policymaking.'

19 Albert Chen, 'The Powers and Accountability of the Attorney General' (1990) 20 Hong Kong LJ 6; also see, generally, John Edwards, *The Attorney General, Politics and the Public Interest* (Sweet and Maxwell 1984).

20 Philip Amoah, 'Independence of the Judiciary in Lesotho' (1987) 3(2) Lesotho LJ; Nqosa Leuta Mahao, 'Judicial Independence and the Enforcement of the Constitution in Lesotho' (2005) 3(2) Journal of Commonwealth Law and Legal Education 51; *Law Society of Lesotho v Prime Minister* 1985-90 LLR 500; *Basotho National Party v The Government of Lesotho* 2005(11) BCLR 1169; Thompson Denning, 'The Independence and Impartiality of the Judges' (1954) 71 SALJ 345.

21 International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors (ICJ 2007).

22 Section 199(6) of the Constitution of Lesotho, 1993.

23 Denning (n 20).

prosecutorial independence is such a hallowed constitutional precept,[24] emerging scholarship on the subject rejects the analogous conceptualisation with judicial independence, not only because of historical developments but also because of the separate functions of the prosecution and the judiciary. The functions are pre-eminently different and, as such, it is improper to analogise.[25]

The inquiry on the nature of the independence of the prosecutor will invariably start with the original purpose and development of the notion of prosecution itself within the British legal tradition as opposed to the legal traditions of broader continental Europe.[26] The prosecution in England developed out of a fusion with the investigatorial role of the police[27] and the politico-legal role of the Attorney General.[28] As Grieve pointedly contends, 'until the last half of the twentieth century, in England and Wales, criminal offences were prosecuted by a curious mix of private individuals, police officers or police solicitors, country prosecutors and, oftentimes, local firms of solicitors.'[29]

The fusion notwithstanding, it is apparent that in the *trias politica* of the judiciary, executive, and legislature, prosecutions are located within the executive. However, recognition of this fact does not end the chase. The prosecution of crime is not an ordinary executive power; it involves the rule of law and legality, to which all the branches of government are subject—including the executive.[30] Thus, the institution entrusted with prosecutions deserves some measure of independence, even from the executive. In pursuit of this laudable constitutional imperative, the British model was reformed fundamentally at the twilight of the twentieth century and efforts were made to enhance the independence of the institution.[31]

24 Jonathan Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26(4) Oxford Journal of Legal Studies 775.

25 In civil law countries, prosecutorial services are regarded as judicial services. As such, prosecutorial independence exists within the broader notion of judicial independence. See Stephanie Dangel, 'Is Prosecution a Core Executive Function? Morrison v Olson and the Framers' Intent' (1990) 99(5) The Yale LJ 1069.

26 Pendleton Howard, 'Criminal Prosecution in England' (1929) 29 Columbia LR 715.

27 John Langbein, 'The Origins of Public Prosecutions at Common Law' (1973) XVII The American Journal of Legal History 313.

28 Philip Kurland and Donovan Waters, 'Public Prosecutions in England 1854–79: An Essay in English Legislative History' (1959) 4 Duke LJ 493.

29 'The Case for the Prosecution: Independence and Public Interest' Speech by the Attorney General <https://www.gov.uk/government/speeches/the-case-for-the-prosecution-independence-and-the-public-interest> accessed 27 March 2018.

30 Generally, see Open Society Institute, *Promoting Prosecutorial Accountability, Independence and Effectiveness: Comparative Research* (Open Society Institute 2008).

31 Iain Glidewell, 'The Review of the Crown Prosecution Service: Summary of The Main Report with the Conclusions and Recommendations' Paper Presented to Parliament by the Attorney General by Command of Her Majesty, June 1998, Cm 3972.

The most important reforms were the ones introduced in 1985 through the enactment of the Prosecution of Offences Act, which established the Crown Prosecution Service.[32] The rationale for the Act, according to Bradley and Ewing, is to separate the functions of the investigation of crime, which is the responsibility of the police, and the prosecution of offences, which is the responsibility of a single national prosecution service.[33] The Act established the office of the DPP as the head of the Service appointable and superintended by the Attorney General.[34] Thus, independence within the ever-changing British model has an overarching feature: the prosecution has been treated as an independent professional body. However, the executive maintains a check on the service through the superintendence of the Attorney General. Section 9 of the Act provides that,

> (1) As soon as practicable after 4th April in any year the Director shall make to the Attorney General a report on the discharge of his functions during the year ending with that date.
>
> (2) The Attorney General shall lay before Parliament a copy of every report received by him under subsection (1) above and shall cause every such report to be published.
>
> (3) The Director shall, at the request of the Attorney General, report to him on such matters as the Attorney General may specify.

While it would seem that the British prosecutor is accountable to the Attorney General, the relation between the DPP and the Attorney General has been the subject of considerable controversy not only in England but also throughout the entire Commonwealth.[35] Most of the Commonwealth countries adopted the British model of placing the head of public prosecutions under the Attorney General. The major controversy surrounds the independence of the office of the Attorney General itself and the extent to which it can control the head of prosecutions.[36] These issues have already received judicial attention in a number of Commonwealth countries.

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32 See Section 1 of the Prosecution of Offences Act 1985.

33 Anthony Wilfred Bradley and Keith Ewing, *Constitutional and Administrative Law* (12th edn, Longman 1997).

34 Section 2 of the Act provides that,
'(1) The Director of Public Prosecutions shall be appointed by the Attorney General.
(2) The Director must be a person who has a ten-year general qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990.
(3) There shall be paid to the Director such remuneration as the Attorney General may, with the approval of the Treasury, determine.'

35 Douglas Hay, 'Controlling the English Prosecutor' (1983) 21(2) Osgoode Hall LJ 165.

36 Alana McCarthy, 'The Evolution of the Role of the Attorney General' (2004) 1(4) Murdoch University Electronic Journal of Law <http://www5.austlii.edu.au/au/journals/MurUEJL/2004/30.html#The%20Office%20of%20Attorney General%20in%20Australia_T.1> accessed 27 March 2019.

The Supreme Court of Namibia had occasion to pronounce itself on the matter in *Ex parte Attorney General, Namibia: In re the Constitutional Relationship between the Attorney General and the Prosecutor-General.*[37] The case arose out of an unusual, but not wholly unexpected, dispute between the DPP and the country's Attorney General. The case orbited around the question of who, between the two offices, is the *dominus litis* in criminal prosecutions. The Attorney General had instructed the Prosecutor General to halt a certain criminal prosecution,[38] an instruction which the latter brazenly defied, citing prosecutorial independence. The Constitution of Namibia, in keeping with the British model, provides, in section 87(a), that 'the powers and functions of the Attorney General shall be: (a) to exercise the final responsibility for the office of the prosecutor general; (b) to be the principal legal adviser to the President and the Government; (c) to take all action necessary for the protection and upholding of the constitution.' Correspondingly, the Namibian Constitution also provides for prosecutorial independence. Article 88 of the Constitution provides that the powers and functions of the Prosecutor General shall be to '(a) prosecute, subject to the constitution, in the name of the Republic of Namibia in Criminal Proceedings, (b) conduct and defend appeals, and (c) perform all functions relating to the exercise of such powers.'

The Court heavily relied on the British conventions and how the traditions have percolated through the broader Commonwealth. The Court ultimately found that 'the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the office of the Prosecutor-General. The notions are not incompatible.'[39] The Court affirmed the independence of the Prosecutor General by finding that the office is not under the instruction of the Attorney General; neither is the Attorney General a *dominus litis* in criminal prosecutions. This finding is very profound because a contrary finding would not only be contrary to British conventions but also denigrate the important doctrine of prosecutorial independence in the era of rule of law and legality. However, the decision has been criticised for overly emphasising independence and disregarding the corresponding need for accountability of the Prosecutor General. In that regard, Obadina contends that 'the court failed to accord sufficient weight to the principle of accountability contrary to requirements of the Constitution. It held, correctly it is submitted, that the Attorney General's duty "to exercise final responsibility for the Prosecutor General" renders him accountable to Parliament and the President for that office.'[40] The critique is, however, not well made, because the Court emphasised the

37 1995(8) BCLR 1070.

38 *Attorney-General of Namibia and the Prosecutor-General v Gorelic and Others* Case No. C2/93.

39 *Attorney-General of Namibia* (n 38) page 39 of the original judgment. The Court went further to warn that 'the Attorney-General and the Prosecutor-General [must] adopt the English practice of ongoing consultations and discussions which would be in the best interests of the cause of justice and the well-being of all the citizens of Namibia.'

40 Derek Ade Obadina, 'Ex parte Attorney General, Namibia: In re the Constitutional Relationship between the Attorney General and the Prosecutor-General' (1996) 40(1) Journal of African Law 106 at 110.

need for a reporting relationship between the two offices but refused to grant the Attorney General the 'power to instruct'.

The Canadian design is fundamentally in the same rubric; the Attorney General still exercises the overarching responsibility for prosecution services in the country, but the notion of prosecutorial independence is equally the centrepiece of Canadian constitutional design.[41] The notion was flagged by the Supreme Court in the case of *Krieger v Law Society of Alberta*.[42] In this case, the Supreme Court was seized with the question of whether the Law Society can exercise disciplinary powers over a public prosecutor despite the fact that the Attorney General had already decided on the question of the conduct of the prosecutor concerned. The prosecutor in question pleaded prosecutorial independence to exclude the jurisdiction of the Law Society.[43] The Supreme Court traced the roots of the office of the Attorney General and the notion of prosecutorial independence to England. Whilst the Court found that the public prosecutor is subject to professional regulation by the Law Society, it made a revealing dictum about the Canadian design and its deviations from the maiden English design. The Court pointedly stated:

> Attorneys Generals in this country are, of course, charged with duties beyond the management of prosecutions. As in England, they serve as Law Officers to their respective legislatures, and are responsible for providing legal advice to the various government departments. Unlike England, the Attorney General is also the Minister of Justice and is generally responsible for drafting the legislation tabled by the government of the day.[44]

Nevertheless, the Court still reiterated that 'it is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.'[45] While the Canadian design is still embedded within the broader Commonwealth design, the country has its unique variations. One such variation is the strong relationship of the Attorney General with the executive. That pattern demonstrates that the strong relationship between the executive and the prosecution service is not *per se* contrary to the notion of prosecutorial independence.

41 See the Canadian Director of Public Prosecutions Act SC 2006, c 9.

42 [2002] 3 SCR 372.

43 The brief facts of this case are that Krieger, who was a prosecutor for a murder case, delayed giving DNA results to the defence. The defence counsel only learnt of the DNA results at the preliminary hearing, and complained to the Deputy Attorney General that there had been a lack of timely and adequate disclosure. Krieger was reprimanded and removed from the case after a finding that the delay was unjustified. Six months later, the accused complained to the Law Society about Krieger's conduct. Krieger sought an order that the Law Society had no jurisdiction to review the exercise of prosecutorial discretion by a Crown prosecutor.

44 *Krieger* (n 42) para 27.

45 ibid para 30.

The Supreme Court of Canada, in *R v Cawthorne*,[46] refused to invalidate the law that empowered the Minister for Defence to appeal a decision of the Court Martial.[47] The minister's appeal was challenged on the basis that the minister does not have the requisite prosecutorial independence, which is an aspect of 'fundamental justice'.[48] The Court, rather startlingly, decreed:

> The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General—also a member of Cabinet—can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard.[49]

There is a rationale in Canadian jurisprudence for locating prosecutorial function within the broader executive function of government. The rationale was succinctly captured by L'Heureux-Dubé J in the case of *R v Power*,[50] where the Court held that the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, 'the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public but also to honour and express the community's sense of justice.'[51]

It would seem that the pattern within the Commonwealth countries is virtually the same: prosecutions are located within the broader functions of the office of Attorney General. However, the extent to which the Attorney General controls the head of public prosecutions is a matter of great controversy. It also varies from one constitutional design to another. While many Commonwealth countries retain the relics of British constitutional design, there are huge differences—particularly between the relationship of the Attorney General and the executive branch of government. In the Namibian case of *Ex parte Attorney General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General*,[52] Leon J, after reviewing impressive Commonwealth literature, identified about four models: (1) a political Attorney-

46 [2016] 1 SCR.

47 In terms of the National Defence Act, RSC 1985, c N-5.

48 On the doctrine of fundamental justice under the Canadian jurisprudence, see the cases of *R v Malmo-Levine*, [2003] 3 SCR 571 and *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76.

49 *R v Cawthorne* (n 46) 996.

50 [1994] 1 SCR 601. See also Marc Rosenberg, 'The Attorney General and the Administration of Criminal Justice' (2009) 34 Queen's LJ 813; Ian Scott, 'Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s' (1989) 39(2) The University of Toronto LJ 109; Lori Sterling and Heather Mackay, 'Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v Law Society of Alberta*' (2003) 20 The Supreme Court LR (2d) 169.

51 *R v Power* (n 50) 616.

52 *Ex parte Attorney General, Namibia* (n 37).

General, (2) a public service Attorney-General, (3) a specially appointed public prosecutor subject to at least some specific directions of a supervisor (including the Attorney-General) and (4) a specially appointed public prosecutor not subject to the directions of a supervisor.

Prosecutorial Independence in Lesotho

Development of Prosecutorial Independence Prior to the 1993 Constitution

The function of public prosecutions in Lesotho started in earnest during the wide-ranging reforms of 1938, which were carried out under the British colonial administration.[53] The administration passed the Criminal Procedure and Evidence Proclamation 59 of 1938, which was based on the British model. Section 7 of the Proclamation provided that 'the Attorney General is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of Her Majesty the Queen in respect of any offence committed in the territory.'

As demonstrated in the foregoing discussion, these models of entrusting the Attorney General with the function of being *dominus litis* in public prosecutions is classically of British mould.[54] The model is not necessarily predicated on the notion of prosecutorial independence; the function of prosecution is fused with not only the investigatory function but also the executive function. Under this model, the function of public prosecutions is pre-eminently in the executive sphere of government. The 1938 Proclamation did not, therefore, provide safeguards for the independence of the judiciary. The safeguards were to be guaranteed by the independence Constitution of 1966. For the first time, in tandem with developments in Britain,[55] the Constitution established the office of the DPP separate from the office of Attorney General. The Constitution, in section 84(1), created the office of the DPP as 'an office in the public service.' The Constitution further provided, in section 84(6), a safeguard for the independence of the office in that 'in the exercise of the functions vested in him by subsection (2) of the section and by section 62 of this constitution, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.'

While the 1966 Constitution did not specifically provide that the type of independence imagined for the DPP is akin to that accorded to a judge, the scheme of the Constitution provided more or less similar safeguards. The 1966 Constitution provided security of tenure for the Director in that he was only removable on grounds of inability to exercise

53 Proclamations 61 and 62 of 1938.

54 Leonard James King, 'The Attorney-General, Politics and The Judiciary' (2000) 74 The Australian LJ 444.

55 Hartley Shawcross, 'The Office of the Attorney General' (1954) VII(4) Parliamentary Affairs 381.

the functions of the office or misconduct,[56] the same grounds which are required to remove a judge.[57]

The fact that the function of public prosecutions falls in the sphere of the executive was emphasised by the Court of Appeal of Lesotho in the case of *Law Society of Lesotho v Honourable the Prime Minister of Lesotho and Another*.[58] The context in which the case was decided was the suspension, in 1970, of the Constitution of 1966. In this case, Mr Peete, who was a senior member of the staff of the DPP, received an appointment to act as a judge of the High Court of Lesotho for an indefinite period. While he was acting as a judge, he remained an employee of the Office of the DPP. The applicant challenged the appointment on the ground, amongst others, that the appointment of a member of staff of the Office of the DPP as a judge is an affront to the doctrine of the independence of the judiciary.[59] The gravamen of the applicant's case was that Mr Peete would, essentially, despite his appointment as an acting judge, remain under the authority and control of the DPP. Thus, he could not simultaneously be in the employ of the DPP and also be an independent judge of the High Court. The appeal succeeded on the basis that Mr Peete could not be a member of the staff of the Office of the DPP, which is in the executive, and also be a member of the judiciary. The court therefore nullified the appointment.

In this case, the Court did not necessarily invoke the principles of prosecutorial independence, despite the fact that a member of staff of the DPP was now going to be under an authority different from the DPP. However, as was noted earlier, the case happened during the period of suspension of the Constitution of 1966. During this period, the function of public prosecutions was discharged in terms of an Act of Parliament, the Criminal Procedure and Evidence Act 9 of 1981. The Act was not comprehensive regarding the notion of independence of the DPP.[60] At most, the Act provided, in section 6(3), that 'the powers vested in the DPP by section 5(b) and (c) shall be exercised by him to the exclusion of any other person or authority.' Besides the Criminal Procedure and Evidence Act, there is no statute dedicated specifically to the regulation of the office of the DPP.

It would seem that with the suspension of the 1966 Constitution, the notion of prosecutorial independence lost its constitutional safeguards. As a result, the function

56 Section 131(4).

57 Section 112.

58 C of A (CIV) No 5 of 1985.

59 The main thrust of the *Law Society* case is that the appointment contravenes the terms of sections 16(6) of the Human Rights Act 24 of 1983, which provided that 'the State shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by this Act.' The Human Rights Act has been repealed by the Constitution of Lesotho, 1993.

60 See s 5 of the Act.

of DPP became palpably an office in the executive. The executive recruited, dismissed, and even controlled the function in the same way it treated other civil servants.

Prosecutorial Independence under the 1993 Constitution: Relationship with Attorney General's Office

When the country returned to constitutional democracy in 1993, most of the institutions of government were revamped. However, the new Constitution drew heavily from the maiden institutional structures envisaged by the 1966 Constitution; hence, the 1993 Constitution invariably created institutions based on Westminster design.[61] The office of the DPP was no exception.

The office was established as 'an office in the public service.'[62] Its independence was guaranteed under section 99(6) in the following terms: 'Save as provided in section 98(2)(b)[63] of this Constitution, in the exercise of the functions conferred on him by subsection (2) of this section or section 77 of this Constitution the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.'[64] In keeping with the Commonwealth pattern, section 98(2)(b) of the Constitution puts the independence of the DPP under the superintendence of the Attorney General. The Attorney General's duty to exercise ultimate control over the DPP has not been unpacked—not through the constitutional provisions nor through an Act of Parliament.[65] Similarly, section 98(2)(b) has not received any direct judicial interpretation.

The nearest opportunity the superior courts had was in the case of *Attorney General v His Majesty the King and Others.*[66] The case arose out of extraordinary political circumstances in the country in the aftermath of the 2012 elections. Following the inconclusive elections of 2012, three parties managed to cobble together a hairbreadth majority to form a government: the All Basotho Convention (ABC), the Lesotho Congress for Democracy (LCD), and the Basotho National Party (BNP).[67]

61 Hoolo 'Nyane, 'Development of Constitutional Democracy: 20 Years of the Constitution of Lesotho' (2014) 21 Lesotho LJ 59.

62 Section 99(1) of the 1993 Constitution of Lesotho.

63 '(2) It shall be the duty of the Attorney-General: (b) to exercise ultimate authority over the Director of Public Prosecutions.'

64 This section is a mirror image of s 84(6) of the Independence constitution.

65 See Office of Attorney General Act 6 of 1994.

66 (CONS/CASE/02/2015) [2015] LSCA 1 (12 June 2015) <https://www.lesotholii.org/ls/judgment/court-appeal/2015/1-0> accessed 27 March 2020.

67 The three parties that managed to form a government had sixty-one seats in the National Assembly: the ABC had thirty, the LCD had twenty-six, and the BNP had five. See Independent Electoral Commission (IEC), 'Lesotho National Assembly Elections 26th May 2012: Final Seat Allocation'. In terms of s 87(2) of the Constitution of Lesotho, the King shall appoint as Prime Minister the member of the National Assembly who appears to Council of the State to be the leader of the political party or

One of the nagging issues which the coalition government encountered as soon as it took office was the minor judicial crisis, wherein there was a contest for precedence between the then Chief Justice and the President of the Court of Appeal.[68] The Prime Minister attempted to handle the crisis by amicably approaching the two high-ranking judges, with a view to luring both of them to resign.[69] The Chief Justice seemingly agreed, but the President of the Court of Appeal refused. The Prime Minister then changed his strategy and initiated impeachment proceedings against the President of the Court of Appeal. The President of the Court of Appeal challenged, in vain, the said proceedings.[70] When his bid failed, he resigned before the impeachment proceedings could commence. The position of the President of the Court of Appeal then fell vacant, like that of the Chief Justice. The Prime Minister recommended the appointment of the Chief Justice.

At the time of the appointment of the new Chief Justice, the coalition was still intact and there was no disagreement in the coalition about the appointment. However, about two years into the coalition government, relations deteriorated between the Prime Minister (from the ABC) and the Deputy Prime Minister (from the LCD). The breakdown of relations between the two led to many political and constitutional issues, which were ultimately resolved through an agreement, brokered through the Southern African Development Community (SADC), to hold early elections.[71] While the Parliament stood dissolved, the Prime Minister appointed the President of the Court of Appeal, Kananelo Mosito.[72]

The appointment was strongly opposed by the opposition parties (including the LCD),[73] some senior lawyers,[74] and the Attorney General. That notwithstanding, the King went ahead and appointed Mosito, on the advice of the Prime Minister, in terms of section 124 of the Constitution of Lesotho. The Attorney General challenged the appointment

coalition of political parties that will command the support of a majority of the members of the National Assembly.

68 For a detailed analysis of the crisis, see International Commission of Jurists, 'The Crisis in Judicial Leadership in the Kingdom of Lesotho: Report of the High-Level Mission of the International Commission of Jurists to the Kingdom of Lesotho.' May 2013.

69 ibid.

70 See the Court of Appeal decision in *President of the Court of Appeal v Prime Minister and Other* C of A (CIV) No 62/2013 (unreported).

71 The agreement was signed on 2 October 2014. See Communiqué by SADC Facilitator Deputy President Cyril Ramaphosa: Maseru Facilitation Declaration on 2 October 2014.

72 Mosito was appointed as the President of the Court of Appeal on 15 January 2015. See Legal Notice 12 of 2015.

73 The contention of the LCD and the Democratic Congress (DC), which had by then established a tacit alliance, was that the appointment of Mosito as the President of the Court of Appeal offended the electoral agreement mediated by South African Deputy President Cyril Ramaphosa under the auspices of the SADC. The agreement was styled 'Maseru Facilitation Declaration'.

74 Five senior lawyers—Salemane Phafane, Motiea Teele, Karabo Mohau, Zwelakhe Mda (all King's Counsel), and Attorney Qhalehang Letsika—publicly raised an objection to the appointment of Mosito on the ground, inter alia, that he was appointed by a caretaker government.

fundamentally on the ground that the Prime Minister has no sole powers to advise the King on matters of government in general, and on the appointment of the President of the Court of Appeal in particular. He contended that, in terms of section 88(2) of the Constitution, the Prime Minister is enjoined to operate collectively within Cabinet when advising the King on all matters of governance. The challenge at the time was that relations between the Prime Minister and his deputy had totally broken down. The situation was unusual, because the government could hardly work as a unit.[75] The power of the Attorney General to institute proceedings against the government was thus brought into question. The Constitutional Court[76] decreed that 'in terms of section 98(2)(a) and (b) [the Attorney General] could thus foreseeably institute action against the Government if there is political interference in his office, but he cannot on any other basis act against the Government.'[77]

In effect, the Court provided that the Attorney General is empowered in terms of the Constitution to litigate in order to protect the independence of his own office and the office of the DPP. As the facts of the case did not call for a decision on the nature of the relationship between the Attorney General and the DPP, the issue remains open. It is contended that on this relationship, the jurisprudence borne out by the decision of the Namibian Supreme Court in *Ex parte Attorney General, Namibia: In re The Constitutional Relationship between the Attorney General and the Prosecutor-General* remains a safe precedent for most Commonwealth models of prosecutorial independence, including Lesotho. Crucially, in this case, the Court pointed out that empowering the Attorney General with the power to supervise the DPP does not deprive the latter of its independence. Instead, it should be regarded as 'truly independent subject only to the duty of the Prosecutor General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office.'[78] The office of the DPP is therefore independent even from the office of the Attorney General. However, for purposes of accountability—which is the corollary of independence—the DPP is accountable to the Attorney General.

75 Ministers from the LCD were publicly criticising the decisions of the Prime Minister. The Prime Minister even purported to dismiss the Minister of Communications, Selibe Mochoboroane, who, through the support of his party, refused to leave office.

76 It is important to note that the Constitution of Lesotho does not establish a superior court called 'the Constitutional Court'. The High Court is the court that has original jurisdiction to adjudicate over constitutional matters. However, the language of the 'Constitutional Court' started floating around in the year 2000 after the adoption of the Constitutional Litigation Rules (Legal Notice 194 of 2000). The rules provide for a special procedure for constitutional matters. The Court of Appeal, in the case of *Chief Justice and Others v Law Society* C of A (CIV) No. 59/2011 (unreported as yet), confirmed that when the High Court is sitting in terms of Constitutional Litigation Rules, the bench must be constituted by no less than three judges.

77 See para 17 of the court a quo judgment in *Attorney General v His Majesty the King and Others* (n 66).

78 *Ex parte Attorney General, Namibia* (n 37) at page 38 of the original judgment.

The most practical guide for this accountability relationship is that the DPP not only accounts for the finances of his or her office to the Attorney General, but also regularly keeps the Attorney General abreast of the operations and activities of his or her office. The former DPP, Leaba Thetsane, confirms that the Attorney General did not control his office on a daily basis, and neither did the Attorney General have a say in the decision to prosecute, for that was the preserve of the DPP's office.[79] The duty to account is done through quarterly reports submitted to the Attorney General. The report is merely operational; it does not include the financial part.[80] It covers the operations of the Office of the DPP. It would seem that the 1993 Constitution does not obligate the Attorney General to account either to the executive or to Parliament about his or her own work or the work of the DPP. Section 98(4) of the Constitution provides that 'in the exercise of the functions vested in him by subsection (2)(a) and (b) and section 69 of this Constitution, the Attorney-General shall not be subject to the direction or control of any other person or authority.' The accountability of the office of the Attorney General is thus the missing link in the overall scheme of accountability over the exercise of prosecutorial functions. There is no evidence that the office of the Attorney General reports anywhere about the work of the DPP.

This therefore calls for investigation into the real nature of the Attorney General's office under the Constitution of Lesotho.[81] It seems to have taken on one of the two major models for this office that are found in Commonwealth countries.[82] The first one is the 'political model'. Under this model, the Attorney General is a political appointee. He or she is a member of the government but, although holding ministerial office, does not sit regularly as a member of the Cabinet. This is the maiden model, followed by Britain.[83] However, even in this model, 'as regards the decision whether or not to institute public prosecutions, the Attorney General acts in the quasi-judicial capacity and does not take

79 Interview held on 15 March 2018, Maseru.

80 See Director of Public Prosecutions, 'Second Quarterly Report' (April–June) 2017.

81 Section 98 of the Constitution provides that,
'(2) It shall be the duty of the Attorney-General-
(a) to provide legal advice to Government;
(b) to exercise ultimate authority over the Director of Public Prosecutions;
(c) to take necessary legal measures for the protection and upholding of this Constitution and the other laws of Lesotho;
(d) to exercise or perform any of the rights, prerogatives, privileges or functions of the State before courts or tribunals; and
(e) to perform such other duties and exercise such other powers as may be conferred on him by this Constitution or any other law.' [Emphasis added]
See also Office of Attorney General Act; see also the case of *Motanyane and Others v Ramainoane* CIV/T/439/99 (unreported).

82 See Commonwealth Legal Advisory Service, 'Chief Public Prosecutors: A Short Comparative Study of the Constitutional Powers in Commonwealth Jurisdictions in 1992' British Institute of International and Comparative Law, Mew Memoranda Series, Mo 11.

83 Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (7th edn, Sweet and Maxwell 1987).

orders from Government.'[84] The second model, which is the one preferred under the Constitution of Lesotho, is the 'public service model'.[85] Here, the Attorney General is appointed as a 'public officer' and remains as such.

In terms of section 140(1) of the Constitution of Lesotho, 'the power to appoint a person to hold or act in the office of Attorney-General shall vest in the King, acting in accordance with the advice of the Prime Minister.' Clearly, while the country has sought to avoid the 'political model' by establishing the office as an office 'in the public service', the appointment process has political undertones. The fact that the Attorney General is appointed by the Prime Minister clearly suggests that it is quasi-political. The history of this office in Lesotho buttresses the argument that the office is, at best, quasi-political. The Attorney General was not spared the rollercoaster that targeted senior civil servants in the aftermath of the 2012 elections.[86] The coalition government that was formed after those elections clearly came on a collision course with the then Attorney General, Ts'okolo Makhethe, as evinced by the case of *Attorney General v His Majesty the King and Others*. As a result of the irreconcilable differences between the Prime Minister and the Attorney General, the Prime Minister, in a shrewd strategy to avoid the laborious constitutional process for removing the Attorney General,[87] sought to send the

84 ibid, 332.

85 See s 98(1) of the Constitution of Lesotho, 1993.

86 After the 2012 elections, the new coalition administration removed all senior civil servants, largely because they had been appointed by the previous administration. This included principal secretaries, the President of the Court of Appeal, ambassadors, the Attorney General, and the DPP.

87 Section 140 of the Constitution provides that,
'(4) subject to the provisions of subsection (6), the Attorney-General shall vacate his office when he attains the prescribed age.
(5) A person holding the office of Attorney-General may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.
(6) The Attorney-General shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (7) and the tribunal has recommended to the King that he ought to be removed for inability as aforesaid or for misbehaviour.
(7) If the Prime Minister represents to the King that the question of removing the Attorney-General under this section ought to be investigated, then-
(a) The King shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held high judicial office; and
(b) the tribunal shall enquire into the matter and report on the facts thereof to the King and recommend to him whether the Attorney-General ought to be removed under this section.
(8) If the question of removing the Attorney-General has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend the Attorney-General from the exercise of the functions of his office and any such suspension may at any time be revoked by the King, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the King that the Attorney-General should not be removed.
(9) The prescribed age for the purposes of subsection (4) is the age of fifty-five years or such other age as may be prescribed by Parliament.'

Attorney General on forced leave. The Attorney General unsuccessfully challenged the forced leave.[88] When the government changed in 2015, the Attorney General resumed his duties, but the impression created was that the office is not as independent as the Constitution prescribes. As such, all the functions of this office, including the supervision of the DPP, are overshadowed by the same overarching impression.

The Relationship of the Director of Public Prosecutions with the Executive

Unlike other constitutional systems, the Constitution of Lesotho does not directly create a relationship between the executive and the office of DPP. Instead, an indirect relationship is created through the procedures for appointment, accountability, and removal from office. In terms of the Constitution, the DPP, unlike the Attorney General, who is appointed directly by the executive, is appointed by the Public Service Commission.[89] This appointment process is in keeping with section 99, which establishes the office as 'an office in the public service'.[90] However, this indirect appointment relationship does not insulate the office from the strong executive influence.

Invariably, the executive has a subtle hand in the appointment of the DPP. The longest-serving DPP under this Constitution, Leaba Thetsane, was appointed in the year 2000 under the administration of Prime Minister Pakalitha Mosisili. There is no direct evidence that the administration had a hand in his appointment, but in 2012, when the new administration of Prime Minister Thomas Thabane took office, it sought to oust Thetsane, citing his 'retirement age'. The matter was considered by the Court of Appeal in the case of *Leaba Thetsane v Prime Minister and Others.*[91] The facts of this case are intriguing and shed some light on the practical relationship between the DPP and the executive. To begin with, section 141(8) of the Constitution provides that the DPP should retire at the age of 55 or 'such other age as may be prescribed by Parliament.' The Constitution further provides that, 'provided that an Act of Parliament, to the extent to which it alters the prescribed age after the appointment of a person to be or to act as a Director of Public Prosecutions, shall not have effect in relation to that person unless he consents that it should have effect.'[92]

An Act of Parliament was passed in 2005 prescribing the age of retirement for public servants as 60 years of age.[93] However, it had the caveat that the public officer may 'elect to retire on attaining the age of 55 or 60 years.'[94] In 2010 the DPP had 'elected'

88 See the case of *Makhethe v Prime Minister and Others* CIV/APN/214/2014.

89 Section 137(3)(c) of the 1993 Constitution.

90 Section 99(1) of the 1993 Constitution.

91 (C of A (CIV) No 51/2014) [2014] LSCA 53 (6 November 2014) <https://lesotholii.org/ls/judgment/court-appeal/2014/53/> accessed 27 March 2018. Also see the court *a quo* decision in *Leaba Thetsane v The Prime Minister and Others* (n 17).

92 See the *Proviso* to s 141(8) of the Constitution.

93 The Public Service Act 1 of 2005.

94 ibid, s 26(4)(b).

to retire at the age of 60. In May 2014, a year after the appellant had attained the age of 55 years, the Government Secretary wrote to the appellant advising that both he and the Prime Minister were of the opinion that the appellant had exceeded the age of retirement and must, therefore, proceed to retirement. The Government Secretary, writing with the concurrence of the Prime Minister, went further than simply bringing their viewpoint to the attention of the DPP. On 5 June 2014, the Government Secretary, with instruction from the Prime Minister, wrote a letter directing the DPP to 'vacate office of DPP with immediate effect.' The Court of Appeal correctly pointed out that 'the direction was clearly unconstitutional.'[95]

The directive was unconstitutional not only because it eroded the independence of the Office of the DPP as provided for by the Constitution, but also because the Constitution did not create any direct relationship between the Government Secretary (or the Prime Minister) and the DPP. In any event, section 141(8) of the Constitution provides that the retirement age 'is the age of fifty-five years or such other age as may be prescribed by Parliament,' and an Act of Parliament had been passed prescribing it at 60.[96]

The relationship of the then DPP, Leaba Thetsane, and the executive also came to the fore in 2018 following the change of government in June 2017. According to Thetsane, two incidents ignited his disagreement with the executive. The first one was the withdrawal of the case against former President of the Court of Appeal, Kananelo Mosito. In 2015, the DPP had issued an indictment against the sitting President of the Court of Appeal, Mosito, with nineteen counts of failing to render annual returns of income, dating back to 1996. The indictment became the basis for the impeachment proceedings that followed.[97] When the new government came to office, it sought to reappoint Mosito, who had resigned in view of the impeachment proceedings in 2016. The Minister of Law and Constitutional Affairs, in the new government, advised the DPP to withdraw the criminal case against Mosito.[98] The DPP refused. Another incident concerned the former Minister of Defence, Ts'eliso Mokhosi, who was arrested on the allegation of murder of a police constable, Mokalekale Khetheng. The DPP did not oppose Mokhosi's bail application and he was accordingly released on bail. According

95 *Leaba Thetsane* (n 91) para 16.

96 Section 26(1) of the Public Service Act provides: 'A public officer shall retire from the public service, and shall be so retired, on attaining the age of 60 years.' Section 26(4) further provides:
'Notwithstanding sub-sections (1) and (2), a public officer already employed in the public service on the coming into force of this Act shall, within a period and in a manner to be prescribed by the Minister–
(a) elect to voluntarily retire from the public service on attaining the age of 45 or 50 years; or
(b) elect to retire on attaining the age of 55 or 60 years.'

97 See the case of *Kananelo Mosito v Direction of Public Prosecutions and Others* C of A (CIV) 66/2015 (unreported as yet) <https://www.lesotholii.org/ls/judgment/court-appeal/16/17> accessed 17 April 2018.

98 *Thetsane* (n 79).

to Thetsane,[99] the government was not happy that he had made the decision not to oppose bail.

According to Thetsane, these two incidents led to his forced retirement. The Public Service Commission wrote him a letter advising him to go on retirement. The Court of Appeal had earlier ruled that he would be due for retirement at the age of 60 years.[100] He then launched a constitutional application in *Leaba Thetsane v Minister of Law and Constitutional Affairs and Others*.[101] The gravamen of his case was that this forced retirement is akin to removal, which is regulated by section 141, read with section 155(4), of the Constitution.[102] The section imposes stringent removal procedures for the DPP, similar to the removal of a judge or Attorney General.[103] However, it is apparent that the interlocutor created by the Constitution, in the form of the Public Service Commission, is not sufficient to protect the DPP against the dominance of the executive. The problem is common and turns on the undefined structure and independence of the

99 ibid.

100 *Leaba Thetsane v Prime Minister and Others* (n 91).

101 Constitutional Case No 2 of 2018.

102 Section 155(4) of the Constitution provides that,

'References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service:

Provided that-

nothing in this subsection shall be construed as conferring on any person or authority the power to require a judge of the Court of Appeal or a judge of the High Court or the Attorney-General or Director of Public Prosecutions or the Ombudsman or the Auditor-General to retire from the public service.'

103 Section 141 of the Constitution provides that,

'(4) A person holding the office of Director of Public Prosecutions may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(5) The Director of Public Prosecutions shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (6) and the tribunal has recommended to the King that he ought to be removed for inability as aforesaid or for misbehaviour.

(6) If the Prime Minister or the Chairman of the Public Service Commission represents to the King that the question of removing the Director of Public Prosecutions under this section ought to be investigated, then-

(a) the King shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held high judicial office; and

(b) the tribunal shall enquire into the matter and report on the facts thereof to the King and recommend to him whether the Director of Public Prosecutions ought to be removed under this section.

(7) If the question of removing the Director of Public Prosecutions has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Public Service Commission, may suspend the Director of Public Prosecutions from the exercise of the functions of his office and any such suspension may at any time be revoked by the King, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the King that the Director of Public Prosecutions should not be removed.'

Public Service Commission itself.[104] The executive influence on the independence of the DPP is systemically inevitable.

Conclusion

The function of public prosecutions has been thrust into the centre of constitutional democracy in Lesotho since independence. What has become apparent throughout this article is that Lesotho has taken on the British-based model of public prosecutions. In this quasi-executive model of public prosecutions, the function is pre-eminently in the executive sphere of government, but without being completely controlled by the minister or the executive. The Constitution places the head of public prosecutions under the superintendence of the Attorney General. The office of Attorney General is also quasi-executive because, unlike the DPP, who is appointed by the Public Service Commission, the Attorney General is appointed by the King on the advice of the Prime Minister. However, the Constitution secures the tenure of both the Attorney General and the DPP by providing for a removal process akin to the removal of a judge.

A careful study of the developments around the office of DPP since 2012 demonstrates that the institutional fabric for appointment, supervision, accountability, and removal of the DPP cannot protect the office against the undue influence of the executive. While the 1993 Constitution has, commendably, ensured that there is no direct relationship between the DPP and the executive, the interlocutory institutions set up between them create an indirect relationship. The Attorney General and the Public Service Commission are such interlocutors; instead of being cushions against executive influence, they are avenues for the executive to influence the independence of the DPP.

The lack of a proper statutory framework is one of the weak links in the quest to enhance independence and accountability in the exercise of prosecutorial functions. The office of DPP has no formative statute; it operates solely on the basis of the Constitution and the Criminal Procedure and Evidence Act. Neither does the country have a prosecution policy or guidelines. This statutory lacuna becomes fertile ground for intrusion into the independence of the office.

It is recommended that the country jettison the quasi-executive model and take on the fully independent (not autonomous) model. This model can be attained by removing executive-based interlocutors in the appointment, supervision, accountability, and removal of the DPP. As the United Nations Office on Drugs and Crime and International Association of Prosecutors contends, the advantage of the involvement of the executive in the appointment process of the head of public prosecutions is that it gives democratic

104 Section 136(1) of the Constitution provides that 'there shall be a Public Service Commission which shall consist of a Chairman and not less than two nor more than four other members, who shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission.'

legitimacy to the appointment. However, the associated risk is the politicisation of the prosecution service.[105]

Furthermore, in the proposed reforms, there must be proper guidance on the development of prosecutorial policy and guidelines, which are currently non-existent.[106] Such guidelines ought to improve on the independence of the DPP and do away with the exposed opportunistic controls inherent in the evolution of the DPP office in Lesotho.

105 United Nations Office on Drugs and Crime and International Association of Prosecutors, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide* (United Nations 2014) 11.

106 *Thetsane* (n 79).

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