COALITION POLITICS IN LESOTHO

A Multi-disciplinary
Study of Coalitions and
their Implications for
Governance

Editors

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LIST OF ACRONYMS

ABC	All Basotho Convention
ACP	Alliance of Congress Parties
AD	Alliance of Democrats
AG	Attorney General
AJA	Administration of the Judiciary Act
AMHC	All Mauritian Hindu Congress
ANC	African National Congress
BAC	Basutoland African Congress
BAP	Basotho Action Party
BBDP	Basotho Batho Democratic Party
BCP	Basutoland Congress Party
BDNP	Basotho Democratic National Party
BNP	Basotho National Party
CAM	The Comité d'Action Musulman
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CID	Criminal Investigation Division
CMW	Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
CORD	Coalition for Reforms and Democracy
COVID-19	Coronavirus Disease of 2019
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organisations
DC	Democratic Congress
DCEO	Directorate on Corruption and Economic Offences
DPL	Democratic Party of Lesotho
DPP	Director of Public Prosecutions
ECF	Extended Credit Facility

ECK	Electoral Commission of Kenya
EMB	Election Management Body
FIU	Financial Intelligence Unit
FORD	Forum for Restoration of Democracy
FPTP	First-Past-The-Post
GDP	Gross Domestic Product
GNU	Government of National Unity
HRC	Human Rights Committee/Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IFP	Inkatha Freedom Party
IMF	International Monetary Fund
IPA	Interim Political Authority
JIMC	Monitoring and Implementation Committee
JSC	Judicial Service Commission
KANU	Kenya African National Union
KSC	Kenya Social Congress
LCD	Lesotho Congress for Democracy
LCN	Lesotho Council of Non-Governmental Organisations
LCS	Lesotho Correctional Services
LDF	Lesotho Defence Force
LHWC	Lesotho Highlands Water Commission
LLA	Lesotho Liberation Army
LMPS	Lesotho Mouted Police Service
LP	Labour Party
LPC	Lesotho People's Congress
LPF	Lesotho Para-Military Force
LWP	Lesotho Workers Party
MCA	Millennium Challenge Account

MEC	Movement for Economic Change
MFP	Marematlou Freedom Party
MMM	Mouvement Militant Mauricien
MMP	Mixed Member Proportional
MPs	Members of Parliament
MSM	Mkenya Solidarity Movement
NARC	National Rainbow Coalition
NASA	National Super Alliance
NDPC	National Dialogue Planning Committee
NEC	National Executive Committee
NIP	National Independence Party
NLF	National Leaders' Forum
NRA	National Reforms Authority
NSS	National Security Services
NUL	National University of Lesotho
NYS	National Youth Service
ODM	Orange Democratic Movement
PAC	Public Accounts Committee
PDP	Peoples Democratic Party
PEFA	Public Expenditure and Financial Accountability
PFD	Popular Front for Democracy
PM	Prime Minister
PMSD	Parti Mauricien Socialiste Democrate
PMU	Police Mobile Unit
PNU	Party of National Unity
PR	Proportional Representation
PSIC	Public Sector Investment Committee
PSIP	Public Sector Investment Programme
RCL	Reformed Congress of Lesotho
RLDF	Royal Lesotho Defence Force

SACU	Southern African Customs Union
SADC	Southern Africa Development Community
SGR	Standard Gauge Railway
SMM	Single Member Majoritarian
SMMEs	Small, Micro and Medium Enterprises
SMP	Single Member Plurality
SOMILES	SADC Observer Mission to the Kingdom of Lesotho
SOU	Special Operations Unit
TNA	The National Alliance
TRC	Transformation Resource Centre
TRC	Truth and Reconciliation Commission
UDF	United Democratic Forum Party
UPR	Universal Periodic Review
URP	United Republican Party
WDM	Wiper Democratic Movement

THE CONSTITUTIONAL POWERS OF THE ATTORNEY GENERAL WITHIN THE CONTEXT OF COALITION GOVERNMENTS

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Rapelang Mosae and Mokitimi Ts'osane

1 Introduction

Since the dawn of coalition governments in Lesotho, the autonomy and integrity of the Office of the Attorney General have been placed under intense scrutiny. Despite the existence of a constitutional principle that the Attorney General shall not be subject to the direction or control of any other person or authority (Constitution of Lesotho, 1993 section 98(4)), the practice under coalition politics has oftentimes reduced this to words on a piece of paper. The practice has reduced the “supposedly independent” Office of the Attorney General to an active accomplice in the crony administrative efforts of incumbent prime ministers. The duty of loyalty has shifted from the Constitution, where it ought to be, to an individual occupying the Prime Minister’s political office. Before the collapse of the first coalition government in 2015, the Office of the Attorney General became a platform of contestation between the Prime Minister and the Deputy Prime Minister (Gebremichael, et al., 2019:9). Before 2012, this contestation was effectively not so relevant to Lesotho as she had a leader of a single political party with the required majority in the National Assembly forming cabinet from 1993 to 2012 (Sejanamane, 2017:167).

Essentially, the advent and the dawn of hung parliaments and coalition politics ushered in a new era with a shift in the cabinet government system toward the greater conflict in advising opposing forces by the Attorney General. Over the years after 2012, the Attorney General is sometimes confronted with the dilemma of advising opposed forces. In essence, coalition politics is amply characterised by coalition governments where different parties with different political interests and ambitions divide among themselves different strategic ministries.

What then should the Attorney General do when either confronted by opposing forces or when his/her advice appeases one side to the detriment of the other, like the dilemmas the first coalition government ran into between 2014 and 2015? For example, in a letter dated 5 January 2015, the then Prime Minister, Thomas Thabane ordered the dismissal, with immediate effect, of Lesotho's chief delegate to the Lesotho Highlands Water Commission (LHWC), Topollo Charles Putsoane, over the latter's alleged poor performance and insubordination (*Lesotho Times*, 2015). The then Energy, Meteorology and Water Affairs Minister, Tséliso Mokhosi and LCD, refused to heed the Prime Minister's instructions and even threatened to go to court.

The abovementioned incident raised fundamental issues on the Attorney General's role and duty when there are conflicts between institutions, government ministries, public offices and public agencies. The Office of the Attorney General is legally mandated to advise and represent the aforementioned public offices while maintaining its autonomy and independence as mandated by Section 98(4) of the Constitution. Despite this guaranteed institutional independence and functional autonomy, the legal sphere relies on interpretation, notwithstanding that the Attorney General only owes his or her loyalty to the Constitution, meaning he or she can direct the advice towards any direction he or she wishes. This previous statement will be addressed later in this chapter with concrete examples. Experience has shown that despite the Office of the Attorney General owing its allegiance to the Constitution, nothing precludes opinions from the Attorney General intended to advance a particular strategic agenda ramping up a partisan position. A case in point was when Thabane faced an ouster in 2019, and the Attorney General issued instructions to the Treasury to give the former Deputy Prime Minister, Mothejoa Metsing, his benefits despite the court case that was dealing with the same issue. On 16 April 2021, Mosotho Attorneys, in a letter titled "*Re: pending judgements in CIV/APN/ 316/2017, CIV/ APN/380/ & CIV/Apn/212/2018*", wrote to the Registrar of the High Court, bringing it to her attention that the cases, including that involving Metsing's benefits, were argued to finality before Monaphathi J, but judgements in those matters had not been handed down.

At the time, the former Prime Minister Thabane was trying to foster an alliance of convenience with Metsing, and the Office of the Attorney General was instrumental in those political deals. It has to be borne in mind that as a constitutional creature, the Office of the Attorney General carries functions of great constitutional importance that should not be swayed by political interests actuated by the political climate.

Since the dawn of coalition politics, the Attorney General as the government's chief legal advisor has been mired in constitutionally controversial issues in the execution of his legal mandate, functions, and duties, which have political implications. For instance, in August 2017, the former Deputy Prime Minister from the two consecutive coalition governments, Honourable Mothejoa Metsing, filed an application before the High Court of Lesotho

seeking nullification of the government's decision to deny him any benefits which he argued accrued from 2012 during the first coalition government to 2017 when the second coalition government was voted out of power.

In that case, the Attorney General, who was employed on a contractual basis by the incoming Prime Minister, instructed a private attorney, one Attorney Tumisang Mosotho, to oppose the application (*Mothejoa Metsing v Minister Responsible for Public Service and Others*, 2017). The parties argued their respective cases.

At the time, the then Prime Minister Thabane, who led a political party which the then Attorney General Phoofole KC once represented in parliament, initiated talks with his nemesis to forge a partnership that would rescue his sinking ship. The Attorney General made this politically motivated decision disregarding the *sub judice* rule, which legally restricted him and the Executive from making any decisions or deliberations on the matter which the High Court was seized with.

This is not the only conflict of interest the occupant of the Office of the Attorney General had run into since the dawn of coalition politics as a direct consequence of factionalism in a coalition government. On 12 February 2015, the Attorney General, supported by the Office of the Deputy Prime Minister, through an affidavit, unprecedentedly launched an application against the King, the Prime Minister and the President of the Court of Appeal (*Attorney General v His Majesty the King and Others*, 2015). In other words, the principal advisor and legal representative of the King, executive, cabinet and the judiciary stood against the decision of the institutions he has a legal obligation to represent. It is worth mentioning that the then Attorney General, Tsókolo Makhethhe, had been appointed in July 2007 by the leader of a political party which the Deputy Prime Minister, Metsing led (Sello, 2017).

The abovementioned instances were just considered to establish a context, and as such other illustrative examples will be considered in due course. This chapter analyses and examines the conflict of interest that cloaks the Attorney General as a political appointee as a direct consequence of the dawn of coalition politics and governments in Lesotho. This chapter also examines how the transformation of the Cabinet Government to Prime Ministerial Government has impacted and affected the function of the Office of the Attorney General. This chapter also adds to the debate on the reform of the Attorney General Office for a broader autonomy as an important constitutional functionary which represents all three arms of government, but which seems to be politically compromised since the dawn of the coalition governments.

Confrontations between the Attorney General and conflicting governmental authorities, institutions, powers, departments and agencies which are direct consequences of coalition politics are one of the major reasons why the Office of the Attorney General needs to be

reformed. This is because any political connection during this constitutional and political era have not so desirable connotations which compromise the entire mandate and functions of the Attorney General. There is an erosion of public confidence and trust in the Office of the Attorney General which is also a protector of public interest. The Attorney General does not hold the Office on his behalf but on behalf of the public that he serves, which in turn is represented by the government (*Mpunga v Malaba*, 1959; *Du Randten 'N Andre v Du Toit*, 1995).

This chapter shall provide a background of hung parliaments and the advent of coalition politics in Lesotho and how they have affected the efficiency and effectiveness of the Office of the Attorney in a broader constitutional scheme with two illustrated cases between the Attorney General and the King and the Attorney General and the former Deputy Prime Minister Mothejoa Metsing. Then the chapter will outline a conceptual and constitutional framework which establishes and outlines the duties of the Attorney General. Further, the shift from a Cabinet Government to a Prime Ministerial Government will be extensively discussed as one of the problems which face the Office of the Attorney in highly contested coalition politics. Then the chapter will conclude and advance recommendations with a plea for reforms to the Office of the Attorney General.

2 Conceptual and constitutional framework for the office of the Attorney General

As stated earlier in this chapter, Lesotho adopted a Westminster system of governance – its Constitution is filled with constitutional arrangements similar to the British conventions, principles and traditions (Machobane, 1990:306, 'Nyane, 2017:83). Therefore, it is a given that the title and Office of the Attorney General of the Kingdom of Lesotho have their origin in the Office of the English Attorney General. The only notable difference without any perceptible change in the functions of the Office is that the Office of the Attorney General of England has no statutory basis (Lord Goodlad, et al., 2008:21)

In 1959 Lesotho adopted a constitution under the guidance of Professor Cowen who subscribed to the British model of government (Machobane, 1990:261, Basutoland Report on Constitutional Discussion, 1959). Following the 1960 elections, a Commission was appointed by King Moshoeshoe II to draft a constitution that Lesotho would adopt when she assumed her independence from Britain (Machobane, 1990:292). The commission reported in 1963 and recommended a Westminster-style constitution (Shale, 2012). The Constitution was approved by the British Royal Degree in January 1965.

The 1965 Constitution created the Office of the Principal Legal Adviser whose appointment vested in the Public Service Commission, acting in after consultation with the Prime Minister (section 121(1)). In 1970, Prime Minister Leabua Jonathan declared a state of

emergency and suspended the Constitution (Mothibe, 2017:56). In 1993, a new constitution was adopted and it established the Attorney General under section 98. In terms of section 140, the power to appoint a person to hold or act in the Office of the Attorney General vest in the King, acting in accordance with the advice of the Prime Minister. The duties, roles and powers of the Office of the Attorney General are outlined under section 98(2) of the Constitution of Lesotho, 1993.

The role of the Office of the Attorney General evolved as a matter of convention in Britain. The Office assumed its modern shape in the 17th Century when the Attorney General became the legal adviser to the Crown (Lord Goodlad et al., 2008:5). Like other British colonies, Lesotho codified the common law powers and duties of the English Attorney General. However, the difference is that the English Attorney General, just like that of Australia and Canada, combines the legal and ministerial functions (The Governance of Britain: A Consultation on the Role of the Attorney General Constitutional Affairs Select Committee on the House of Commons (CASC), 2007:12).

There are several duties attached to the Office of Attorney General but principally, the Attorney General's first and principal duty is to provide legal advice to the Government (*Attorney General v His Majesty the King*, 2015:28). In terms of section 2 of the Office of Attorney General Act, 1994, the Attorney General is the principal legal adviser of the Government of Lesotho. This duty of the Attorney General is stated in section 98(2) of the Constitution of Lesotho, 1993 and provides as follows:

98. Attorney-General

(1)

(2) It shall be the duty of the Attorney-General -

(a) to provide legal advice to Government;

(b) ...

(c) to take necessary legal measures for the protection and upholding of this Constitution and the other laws of Lesotho

According to Lord Goodlad (2008:6), this duty “involves providing high-level advice to ministers, the Cabinet and also on occasion to the King and Parliament.” In paragraph 51 of the landmark case of the *Attorney General v King* (2015) the Court of Appeal endorsed a point from the Prime Minister's Affidavit that: “the Attorney-General attends cabinet meetings to give advice to the government, but he is not a member of the cabinet” (*Attorney General v King*, 2015). That notwithstanding, the Office of the Attorney General is established under Chapter VIII which is designated “The Executive”; the Attorney General is not solely an officer of the Executive branch and legal advisor to the cabinet. The Attorney General is also a legal advisor to the legislature and may address either houses of parliament (section 76(2) of the Constitution). Recently, the Speaker of the National Assembly sought legal advice from the Attorney General on the validity of the motion of no-confidence which was filed on the

5 June 2019 by Motebang Koma, a member of parliament who stood for election under All Basotho Convention (ABC) flag at Koro-Koro (Phakela, 2019). The Attorney General advised the Speaker of the National Assembly that the motion was constitutionally valid. Unfortunately, the Speaker of the National Assembly on 26 November 2019 rejected the counsel of the Attorney General and threw out the motion on the basis that it “had no basis in both the Constitution and in the practice of parliament” (Kabi, 2019).

Unlike in the United States of America, the Office of the Attorney General does not identify only with the Executive to the exclusion of other branches (Kramer & Siegel, 1960:529). Under common law which was often formally adopted through constitutions by the British colonies, the Attorney General also identifies with the judicial branch in addition to the legislative branch (Ibid.). In all suits, actions or proceedings where the judiciary as an institution or through its officers is involved, the Attorney General is cited as a party (section 98(2)(a) of the Constitution and section 3 of the Attorney General Act, 1994).

Another offices for which the Attorney General is responsible is the Office of the King. Section 50(5) of the Constitution vests the powers to protect the King or any person exercising the functions of the Office of the King as Regent or by virtue of a designation under section 45(3) in respect of legal proceedings in the Attorney General. Section 3 of the Government Proceedings and Contracts Act, 1965 provides:

- (1) In any action or other proceedings which are initiated by virtue of the provisions of section 2 of this Act, the plaintiff, the applicant or the petitioner (as the case may be) may make the Principal Legal Advisor the nominal defendant or respondent.
- (2) Save as may otherwise be provided as law sections or other proceedings by Her Majesty in her Government of Basotoland (*sic*) shall be instituted by and in the name of the Principal Legal Advisor.

Borrowing from Kramer and Siegel (1960:30) the general duty of the of the Attorney General can amply be summarised thus:

Generally, it has been said that the Attorney General of England has the ultimate responsibility of all litigation to which the Crown or a government department is a party, and much of this litigation is brought or defended in the name of the Attorney General.

To reiterate, from the foregoing, it is clear that the Attorney General renders legal advice to the Prime Minister, cabinet members, and officials of other agencies within the government. The role is not exclusive to the Executive arm but extends to the other branches of government – Legislature and the Judiciary. With the advent of coalition politics, different political parties form alliances of convenience and divide strategic government ministries among themselves. The question which keeps ringing is whether the Office of the Attorney General, whose role cross-cuts all branches of government, should still be aligned through appointments to a particular political party. It has to be borne in mind that the Attorney General is the defender of the Constitution and public interest and above all is a lawyer.

3 Functions of the Attorney General in the context of Prime Ministerial government

The advent of the coalition government in 2012 dawned with a Prime Minister who wielded so much power; the ebb and flow of authority marked a shift from a Cabinet Government to a Prime Ministerial Government. From 1993 to 2012, Lesotho was led by a single-party government where the Executive had a majority of members in the National Assembly and the Cabinet was not a forum for the contestation of power (Kapa & Shale, 2014:93).

It is safe to assume that before the advent of coalition governments, the Prime Minister, who was also the leader of a political party with an absolute majority in the National Assembly, had considerable influence over the policy direction and outcome of cabinet discussions. It was safe and convenient to pass most decisions through the cabinet. It was guaranteed that whatever the Prime Minister put before the cabinet would rarely, if ever, be opposed or contested.

The *status quo* changed with the emergence of a hung parliaments in 2012 and the Coalition Government that followed. In 2012, Thomas Thabane from All Basotho Convention (ABC) eventually had to be deputised by Mothejoa Metsing, a rival politician from Lesotho Congress for Democracy (LCD). They formed a coalition of convenience which ousted the long-serving Pakalitha Mosisili who had defected from the Lesotho Congress for Democracy (LCD) on 28 February 2012 to lead a newly formed Democratic Congress (DC). Pakalitha Mosisili had resigned from LCD after bitter infighting and factionalism which was led by Metsing (*Mail & Guardian*, 29 February 2012). The pact between ABC and BNP was motivated by an insatiable desire to oust a man whom Metsing had previously accused of being an authoritarian dictator.

From the start of the coalition, the powers of Prime Minister Thabane were compromised as he did not have a choice over who would be his deputy, and ministerial appointments had to be agreed upon by the coalition partners (Coalition Agreement between ABC, LCD and BNP, 2012). Worse still, each partner in the coalition had a choice to dictate to the Prime Minister who would be placed in charge of which ministry and he was reduced to a rubber stamp.

These changed dynamics threatened the hegemonic status of the Prime Minister and reduced his power and influence. It was this eventuality that prompted the Prime Minister to adopt a “command and control strategy” to sustain his powers. With this strategy, the Prime Minister Thabane went for patronage appointments to create a chain of command in strategic positions which would “seemingly” not be constrained in his influence yet follow his lead. This was a way to avert a dilemma where the Prime Minister would appear too authoritarian or too gullible which would have allowed his rivals to revert to their natural selfishness and to pursue their political interests.

The Prime Minister had to strategise and resort to patronage appointments and vindictively purge those in strategic positions who did not pay allegiance to him. Soon after becoming the Prime Minister, Thabane sought to retire the older officers in strategic constitutional positions and replace them with his own. The Attorney General along with his subordinate, The Director of Public Prosecutions, Leaba Thetsane were forced to retire to make way for Thabane's patronage appointments which failed after courts' interventions. The scuffles culminated in *Makhethe v Prime Minister* (2014) in which the Director of Public Prosecutions challenged the Prime Minister's decision to force his retirement. The vindictive purges and patronage which the Prime Minister wanted to undertake as a means to entrench his power as the central figure enraged his deputy who complained that he was never consulted. The Attorney General in his founding papers in *Attorney-General v His Majesty the King* (2015) alleged that Prime Minister Thabane purged top officials to replace them with pliable employees. He further alleges that the Prime Minister was on a mission to "capture key state institutions" (*Attorney General v His Majesty The King and Others, 2015:para 6.1.1*).

When Prime Minister Thomas Thabane had disagreements with his deputy, he utilised all his powers in the Constitution, sometimes even undermining representative democracy and the essential role of other institutional establishments like the Office of the Attorney General. During the SADC Commission of Inquiry (Phumaphi Commission) which was appointed by the Prime Minister at the initiation of the Southern Africa Development Community (SADC) to enquire into political and security incidents which occurred between July 2012 and June 2015, it was revealed that Thabane had a resource group which advised him and often bypassed the Attorney General (Ntaote, 2014).

In *Attorney General v His Majesty the King*, the Attorney General and the Deputy Prime Minister accused the Prime Minister of bypassing the cabinet; thereby disregarding the principle of collective responsibility. The then Right Honourable Prime Minister, Motsaahae Thabane was repeatedly accused of excessive purging of government officials perceived to be aligned to his political opponents. The Director of Public Prosecutions and the Attorney General, who was appointed by the previous Prime Minister, were also on the books of those whom the Prime Minister sought to get rid of and it all culminated in *Leaba Thetsane v Prime Minister* (2014). The attempted dismissal of the Attorney General and the Director of Public Prosecutions caused a serious rift between the Prime Minister and his Deputy.

The Prime Minister also attempted to fire Lesotho's Chief Delegate to the Lesotho Highland Water Commission, Charles Putsoane, without consulting the Attorney General (Motsamai, 2015:6). This enraged Deputy Prime Minister Metsing and the Water and Energy Minister who reportedly prepared a robust response to Thabane's action. An interesting dilemma would have come to the fore had the Prime Minister, Deputy Prime Minister and Ministry of Water and Energy in their official capacities while holding opposed positions sought the advice of the Attorney General.

The Deputy Prime Minister also opposed the Prime Minister's dismissal of army commander Lieutenant General Kamoli. Without the advice of the Attorney General, Thabane unilaterally summoned then on leave Police Commissioner Khothatso Ts'oana back to Lesotho to the disgust of many who alleged that this was a breach of the Maseru Peace Accord. Despite the allegation levelled against him, Thabane, however, insisted that it is within his constitutional power to change government personnel. The appointment of Mosito as the President of the Court of Appeal was also done without consulting the cabinet and the Attorney General whom the Prime Minister had previously sought to retire. The then Prime Minister had also unilaterally prorogued parliament without seeking the advice of the Attorney General.

After these and other episodes, it became clear that Thabane had transformed Lesotho from a cabinet government to a Prime Ministerial Government amassing powers that undermined the functions of other institutions like the Attorney in advising the government on important constitutional matters. Borrowing the words of Tony Benn as cited by Watts: "the present centralisation of power into the hands of one person has gone too far and amounts to a system of personal rule in the very heart of our system of parliamentary democracy" (Watts, 2012:131). The Prime Minister had sought to deploy subtlety to maintain the unity of command and control his appointees like puppets on a string.

The alleged disproportionate abuse of executive power by the Prime Minister had serious constitutional implications as far as the Office of the Attorney General was concerned. Among other things, it raised issues of factionalism within a coalition government to the effect that such could even affect the autonomy and may result in the Attorney General in a conflict of interest dilemma where his clients hold opposing positions. Such impasses should imperatively arouse interest to examine the relationship between the Attorney General *inter se* the offices of the Prime Minister and other government institutions.

In Britain, Brown (2020) traces the shift from what could amply be termed a cabinet government to what has been termed a Prime Ministerial Government to the premiership of Margaret Thatcher. Brown further notes that Thatcher's premiership provided a huge impetus to the idea that political power belongs to the prime minister. Like Margaret Thatcher, Thomas Thabane appeared to stretch the power of the prime ministerial office to its limits, even bypassing the importance of the Attorney General in Lesotho's constitutional dispensation.

The rift of collegiality in the Thabane-Metsing coalition was troublesome for the Attorney General because one sought to purge him to replace him with someone pliable while the other sought strategic alliances with disgruntled officers that Thabane was trying to boot out of office. The monolithic style of governance that Thabane assumed led to the downfall of the first coalition with the relationship between the Prime Minister and the Attorney General broken beyond repair and was hardly a model of good governance (*Lesotho Times*, 2015).

In an interview with *Lesotho Times*, Thabane, urged voters to give him an outright majority of seats in parliament to enable him to continue with his agenda of eradicating corruption. This happened on 26 February 2015, two days before the General Elections. Thabane further vowed to fire Director of Public Prosecutions (DPP) Leaba Thetsane and Attorney-General Tšokolo Makhete, if he was returned to Office as Prime Minister. Thabane also described Advocate Makhete's decision to challenge the appointment of Kananelo Mosito as Court of Appeal President, a "drunken decision" (*Lesotho Times*, 2015).

Like the British Prime Ministers such as Margaret Thatcher and Tony Blair, Thabane was effectively shifting the whole governance system towards personal rule, presidential in character. Despite the shared or collective formation of a coalition government in Lesotho, Thabane was on a mission to stamp his personality, hire pliable employees and impose his preferences on the government. This move was somehow in contrast to Mackintosh's original proposition that:

The country [Britain] is governed by a prime minister who leads, coordinates and maintains a series of ministers, all of whom are advised and backed by the Civil Service. Some decisions are taken by the prime minister alone, some in consultation between him and the senior ministers, while others are left to the heads of departments, the cabinet, cabinet committees, or the permanent officials ... (Mackintosh, 1962:451-2)

A shift from a one-party government to a coalition government with a Prime Minister having a monolithic approach to power changed the political discourse greatly. The Attorney General as evidenced in the case of the *Attorney General v King*, was opposed to such a capacious notion of the powers of a Prime Minister. In the same way, Watts observed that critics of this kind of prime ministerial concentration of power long pointed to its dangers and noted that former left-wing MP and ex-minister, Tony Benn, was specific in his challenge:

The wide range of powers ... exercised by a British Prime Minister ... are now so great as to encroach upon the legitimate rights of the electorate, undermine the essential role of Parliament, [and] usurp some of the functions of collective Cabinet decision making... In short, the present centralisation of power into the hands of one person has gone too far and amounts to a system of personal rule in the very heart of our system of ... parliamentary democracy (Watts, 2006:131).

One other episode where the Attorney General, as the chief legal advisor of government, was confronted with conflicting governmental authorities with the Prime Minister, Motsoahae Thabane, at the forefront was the purported dismissal of Charles Putsoane as the Chief Delegate to the Lesotho Highlands Water Commission in 2015. Putsoane's dismissal added to the list of Thabane's emissive purging of government officials perceived to be aligned to his political opponents.

This enraged Deputy Prime Minister Metsing and the Water and Energy Minister, who prepared a robust response to Thabane's action. Among other things, the argument contained the following:

That Prime Minister does not have the authority to fire Putsoane because he does not report to him but the ministry and that the Prime Minister is interfering with the operations of the ministry. Thabane's decision contradicts the Maseru Declaration and decided without consulting the LCD as required by the agreement by the coalition partners (*The Post*, 2015:4).

The two offices of the Prime Minister and the Deputy Prime Minister clashed over several of Thabane's decisions to fire several government officials. Thabane had fired the then Communication Minister, Selibe Mochoboroane, who remained in Office despite being fired for allegedly disrespecting the king. The Deputy Prime Minister also opposed the Prime Minister's dismissal of army commander Lieutenant General Kamoli. Despite the allegation levelled against him, Thabane was adamant that it was within his constitutional powers to change government personnel.

4 Reforms debate on the office of the Attorney General

The era of hung parliaments and the unstable coalition governments has changed Lesotho's constitutional democracy. With the change in political dynamics comes a change in the constitutional landscape. The changes have been so drastic that the country experienced instability which threatened the foundations of its democracy. Under the auspices of the Southern African Development Community (SADC) and development partners, the country had to undertake constitutional, institutional and security sector reforms (SADC Observer Mission to Lesotho (SOMILES) Report, Lesotho Reforms Roadmap, 2016).

While scholars primarily focused on the authority of the Prime Minister in a coalition government, the powers of the King, parliament and the judiciary, the reform of the Office of the Attorney General has not received much academic attention. This chapter asserts that reforming the Office of the Attorney is a crucial response to the constitutional requirement that public functionaries' opinion should be purely based on the law free of political undertones and influence. The essence of the constitutional reform of the role and Office of the Attorney General arises from at least two controversial cases: *The Attorney General v the King, Prime Minister, Executive and Judiciary* episode (2015); and *Mothejoa Metsing v Minister Responsible for Public Service and Others*, (2017). These two cases shall be used in this chapter as illustrations strategically to show the need to reform the Office of the Attorney General in the wake of coalition politics in Lesotho. The main objective is to illustrate that the Office of the Attorney General was used as a political tool for politicians in order to gain political advantage over other groups.

The recent appointment of Advocate Rapelang Motsieloa as the Attorney General with effect from 10 June 2021 was criticised by the Lesotho Congress for Democracy (LCD). The criticism was on the basis that it would be in the interest of openness and transparency that appointment into key government institutions such as the Attorney General, the army, police and the judiciary be deferred until after the implementation of the multi-sector reforms recommended by SADC in 2016 (Kabi, 21 June 2021). Speaking to *Sunday Express*, Apesi Ratséle from the LCD indicated that the Advocate Motsieloa's appointment lacked transparency and was seen as a reward to Prime Minister Majoro's political allies instead of the most deserving candidates (Kabi, 21 June 2021).

4.1 The Attorney General v the King, Prime Minister, Executive and Judiciary episode (2015)

As a protector of public interest, the Attorney General stands as one of the principal gatekeepers of Lesotho's constitutional democracy like in all states that were colonised by Britain (*Thorson v Attorney General of Canada*, 1975). However, the Constitution has had to operate in a much-polarised space bred by coalition politics. The Attorney General has not been immune to this toxic landscape where politicians within the same government adopt strategies and schemes to maximise their power and authority to have greater influence. By capturing key constitutional offices, the politicians hope to gain a competitive advantage.

In 2014, the ABC, LCD and BNP coalition government began to show signs of a great rift. The Deputy Prime Minister Metsing accused the Prime Minister of turning the tripartite coalition into a Prime Ministerial Government where the Prime Minister centralised power unto himself and made significant decisions with constitutional ramifications without any consultations. While the Prime Minister went for a command and control strategy attempting to patronise the government, his Deputy forged strategic alliances with holders of those statutory and constitutional positions whom the Prime Minister wanted out.

The Attorney General and his subordinate, the Director of Public Prosecutions, were some of those whom the Deputy Prime Minister held the fort for when the coalition was cracking. The Deputy Prime Minister was opposed to the move by the Prime Minister to force these constitutional repositories of power out of Office. Like in the Lieutenant General Kamoli and Prime Minister Thabane debacle when Thabane sought to oust Lieutenant General Kamoli and have him replaced with Brigadier Maaparankoe Mahao who was seen as a Thabane loyalist, the Honourable Deputy Prime Minister put political weight behind the Attorney General's struggle to retain his position.

After numerous correspondences between the Attorney General's legal representatives and the Government Secretary as an agent of the Prime Minister, the Prime Minister used force at his disposal to throw the Attorney General out of office. This followed after the Attorney

General and the Director of Public Prosecutions were served with letters asking them to go on special leave pending the finalisation of their cases (Mohloboli, 2014). In an affidavit to the High Court, the Attorney General alleged as follows:

The applicant says the bearer of the letter was in the company of five police officers, one of whom he identified as Senior Inspector Chechile, who told him to vacate Office immediately under pain of physical force should he resist. He vacated the office to avoid being physically manhandled out of his office. Senior Inspector Chechile, the applicant, says he then took away his office keys from his secretary and subsequently a new set of locks were installed in his office.

To regain control of his office, the Attorney General launched a case of spoliation alleging wrongful deprivation of the possession by the Prime Minister. The *mandament van spolie* or “spoliation order” is a common law remedy that the Attorney General sought as a shield against the Prime Minister’s “self-help” tactic. The Attorney General was of the view that the Prime Minister and his agents were taking the law into their own hands and exercising their “power” arbitrarily. The Attorney General lost the case on the basis that:

The Office of the Attorney General is an Office in the public service. The incumbent of the Office, for the time being, is, as such, merely a servant. He enjoys certain benefits as such an incumbent. He does not hold the Office on his behalf but on behalf of the public that he serves, which in turn is represented by the government (*Makhethe KC v Prime Minister*, 2015).

However, the Attorney General later continued with his duties when the Court of Appeal in *Thetsane v Prime Minister* (2014) ruled in favour of the Director of Public Prosecutions, who was similarly placed as the Attorney General. By way of brief background, the Right Honourable Prime Minister sought to force both the Attorney General and the Director of Public Prosecutions to vacate their respective offices because they had passed the retirement constitutional prescription age of 55 for public servants in their offices.

The legal repercussions were the same for both the Attorney General and the Director of Public Prosecutions. The High Court sitting as the Constitutional Court dismissed the application. The Director of Public Prosecutions challenged the decision of the High Court and the Court of Appeal ruled in his favour. It was held that DPP was entitled to elect to retire at the age of 60 years in terms of section 26(4)(b) of the Public Service Act.

The case presented another dilemma – a situation where two or more institutions that the Attorney General should represent were on the opposite side of the legal battle. The Director of Public Prosecutions brought the application in his official capacity against the Prime Minister. The Office of the Attorney General whose occupant stood to benefit in his official capacity if the case was to fall in favour of the Applicant was cited as the 5th Respondent. The conflict of interest explicit in the matter is worth exploring

in the context of coalition governments but it would comprise a different chapter. Such cases in a coalition government have placed the Attorney General at the centre of an ethical dilemma as a lawyer.

It has to be noted that the Deputy Prime Minister morally and politically supported the Attorney General and the Director of Public Prosecutions against the Prime Minister. Two of the most important offices of His Majesty's Government were divided among the coalition partners. What admittedly placed the Director of Public Prosecution within the Deputy Prime Minister's camp were the withdrawals of the corruption charges laid in August 2014 which were preferred against the Deputy Prime Minister Metsing and Selibe Mochoboroane from the Lesotho Congress for Democracy (LCD) who was then the Minister for Communications, Science and Technology.

The withdrawal of the charges against the Deputy Prime Minister and his cohort from the same political party increased the rift in the division of the public service by the two main coalition partners. The Attorney General who, according to the Constitution exercises ultimate authority over the Director of Public Prosecutions, and the Director of Public Prosecutions along with other repositories of power as the army commander were pitted to be in the Deputy Prime Minister's camp against the Prime Minister.

Following the altercations between the Prime Minister, who was bent on replacing the cabinet with the Prime Ministerial Government against the officers supported by the Prime Minister's coalition partner on one side, came one last ground-breaking episode. The Attorney General unprecedentedly launched an application against the Head of State in the King, the Head of the Executive arm of government in the Prime Minister, and the President of the Court of the Appeal, the highest Office in the judiciary in terms of hierarchy.

The Attorney General was supported by the Deputy Prime Minister through an Affidavit. The Attorney General initially cited improper motives and lack of *bona fides* on the part of the Prime Minister and principally that section 124(1) of the Constitution should be read with section 88(2) of the Constitution. The allegations of improper motives and lack of *bona fides* had connotations on assessing the legitimacy of the conduct of the Prime Minister in terms of the "supposed" duty of fairness and moral considerations towards his coalition partners and necessary consultations.

The point was not pursued further in court and was jettisoned in court. Perhaps the point was not pursued because instead of advancing legal points, the point would have led to a political enquiry into the motives and *bona fides* of the decision of the Prime Minister. The Attorney General was never approached by the Prime Minister to advise on the appointment of Kananelo E. Mosito as the President of the Court of Appeal.

Bypassing the Attorney General whom the Prime Minister had labelled as aligned to the Deputy Prime Minister who was from a rival political party in the coalition was not a misnomer. The Prime Minister had failed to remove the Attorney General despite earnest attempts to have him retired. Instead of seeking advice from the Attorney General, Prime Minister Motsoahae Thabane had assembled a private team known as the “resource group”, which advised and reportedly controlled ministries under the ABC.

Also, interrogated by government and LDF lawyers, Nkoea Thabane, Motsoahae Thabane’s daughter, admitted before the SADC Commission of Inquiry into the death of former Lesotho Defence Force Commander Maaparankoe Mahao that the Prime Minister consulted the “resource group”. Nkoea Thabane did not want to admit that the Right Honourable Prime Minister, who is also her father, had side-lined the Attorney General and had taken advice from his resource group.

On 11 February 2015, the Deputy Prime Minister, in a press conference pronounced his support for the Attorney General against “the prime minister who has been contravening the constitution of Lesotho and all other agreements he has entered into during the entire duration of the coalition government we formed with him in June 2012” (*Lesotho Times*, 2015). The application was aimed at nullifying a “strategic” appointment which was made without the advice of the Attorney General and consultation of the Cabinet or the Deputy Prime Minister.

The application was supported by the Deputy Prime Minister through an affidavit that principally contained alleged facts upon which the whole Attorney General’s case rested. The support the Attorney General received from the Deputy Prime Minister who had been his shoulder during the retirement altercations, received severe criticism from some quarters as the Attorney General was branded as a political pawn of the Deputy Prime Minister (*Lesotho Times*, 2015).

Despite the constitutional importance of the case, the politics around it compromised the credibility of the Attorney General as the protector of the public. Due to the factionalism which rocked the coalition government, the integrity of the Attorney General was widely compromised. Capturing key institutions is characteristic of each politician in a coalition government trying to maximise their influence and power to maximise their political position.

The Office of the Attorney General was not the only Office that was rocked by divisions between the Prime Minister and the Deputy Prime Minister. The Honourable Deputy Prime Minister also aligned his forces with the army commander, Lieutenant General Tlali Kamoli, and he is the one who incited Kamoli not to leave the Office. The Deputy Prime Minister,

against Prime Minister's orders, is the one who said Lieutenant General Tlali Kamoli was never dismissed and that he did not support the appointment of Lieutenant General Maaparankoe Mahao as the commander of the Lesotho Defence Force (Mohloboli, 2015).

At the centre of all these conflicting government institutions and Offices, on opposite sides to a legal argument, stands the Office of the Attorney General. A coalition greatly compromises the autonomy and independence of the Attorney General because ministries are strategically divided in terms of each partner's political interest.

4.2 *The Attorney General disrespecting the sub-judice rule (2019)*

Under Cyril Ramaphosa's mediation on behalf of the Southern African Development Community (SADC), Lesotho headed for snap elections set for 28 February 2015. This was after Thabane fully displayed his monolithic powers by proving that political power belongs to him rather than to the government when he prorogued parliament whimsically and unilaterally (Letsie, 2015:87).

Thabane lost the elections in 2015 and this also marked the end of the protracted altercations between the Prime Minister and the Attorney General. Pakalitha Mosisili's seven-party regime took over from former Prime Minister Thomas Thabane's led coalition and Mosisili's administration maintained a good relationship with Attorney General Ts'okolo Makhethhe. Among other things, the Attorney General was at the forefront of assisting the Mosisili–Metsing led coalition in the impeachment of the President of the Court of Appeal, Justice Kananelo Mosito. He also advised Mosisili's administration to neglect parliament after the government through the Minister of Finance, Tlohang Sekhamane, failed to table budgetary estimates in February 2017.

The Attorney General assisted the Mosisili–Metsing led coalition in the impeachment proceedings against Court of Appeal President Justice Kananelo Mosito. In a letter titled *"Immediate resignation as President of the Court of Appeal of Lesotho"* (Lesotho Times, 6 January 2017), Justice Mosito alleged that the then Attorney General Makhethhe had selected 3 (three) judges from the Republic of South Africa and handed their names to the then Prime Minister Mosisili effectively as "hired mercenaries" to ensure his ouster (6 January 2017). In an attempt to stop the impeachment proceedings against him, Justice Mosito accused Attorney General Ts'okolo Makhethhe of going "out of his way" to select three retired judges from South Africa to serve as members of his impeachment tribunal. The Court of Appeal in *Mosito and Others v Letsika and Others* (2018) at para 4 took note of earlier developments that:

during the months that followed the new Prime Minister Pakalitha Mosisili and the then Attorney General Mr. Ts'okolo Makhethhe K.C set in motion a vigorous politico-legal and diplomacy scheme to reverse the appointment of the appellant despite its affirmation in C. of A. (CIV) 13/2015, but unsuccessfully so.

It is worth noting that the same Attorney General had attempted to annul Justice Mosito's appointment suing the King and the Prime Minister assisted by the then Deputy Prime Minister Mothejoa Metsing. However, in 2017 Lesotho headed for another snap election on the 3rd of June. Pakalitha Mosisili's administration was replaced by another coalition led by Motsoahae Thabane.

Barely a month after Thabane's inauguration, the Attorney General, Ts'okolo Makhethhe issued a memo titled "Leave Pending Retirement" and that memo served as a notification that Makhethhe would be on leave of Office pending statutory compulsory retirement from Office (*Lesotho Times*, 2017). The retirement was to be effective from the 1st of November 2017. This made way for Prime Minister Motsoahae Thabane's patronage appointment in the Office of the Attorney General. The Prime Minister appointed Haae Phoofolo as the Attorney General with effect from 8 February 2018. The dignified Office of the Attorney General was compromised through the appointment of a well-known politician.

By way of background, in 2012, Advocate Haae Phofolo stood elections as a candidate for Thabane's led All Basotho Convention (ABC) at Maseru Central Number 32 Constituency. Phoofolo won and was the representative of the constituency in the National Assembly. Prime Minister Motsoahae Thabane appointed Phoofolo as the Minister of Justice, Human Rights, Correctional Service and Law and Constitutional Affairs.

Upon assuming Office, advocate Haae Phoofolo advised the government against giving Motsoahae Thabane's nemesis, who ultimately brought down the 2012 coalition, Mothejoa Metsing, pension benefits for the position of Deputy Prime Minister, which he assumed over two different regimes. On 24 August 2017, Mothejoa Metsing filed an urgent application to prevent the government from denying him the pension benefits (Tefo, 2017).

Essentially, Metsing argued that he served sixty consecutive months over two regimes from 2012 to 2017 and as such, was entitled to benefits in terms of section (1)(b) of the Prime Minister and Deputy Prime Minister (Retirement and Spouses' Benefits Act) of 2011 (*Lesotho Times*, 2017). On behalf of the Government, Attorney Mosotho indicated that all ministers vacate Office before 17 March 2015 when the Thabane-led coalition was replaced by Mosisili's seven-party coalition. At the time, Metsing had served 31 months as the Deputy Prime Minister. Between 17 March 2015 and 3rd June 2017, Metsing served about twenty-nine months. Attorney Mosotho argued that Metsing did not qualify for any benefits. On 8 December 2017, Justice Monaphathi reserved judgement, having heard representations from both parties (*Lesotho Times*, 2017). Surprisingly, while the parties were awaiting judgement in 2019, the Attorney General instructed the Treasury to give to Metsing the benefits whose contention was still before the High Court.

5 Conclusion and recommendations

It has been demonstrated that the Office of the Attorney General as a constitutional office remains highly compromised under coalition governments. The chief duty of the Attorney General is to provide legal advice to the government – it is a fact that each element of legal advice has political ramifications. Coalitions have been demonstrated to effectively be divided governments; hence, if the Attorney General's Office remains in its current state it will always be a scramble for control of the Office of the Attorney General, for whoever controls the Attorney General effectively controls the law. It is therefore imperative that the Office of the Attorney General is reformed if it is to remain, even in the advent of coalition governments in Lesotho. The recommendations below will categorise how the Office may be reformed to ensure it remains sustainable and beneficial to Basotho. The first recommendation is that the Office of the Attorney General is essentially a political office under the guise of a neutral functioning public office. Therefore, it is imperative to establish a reformed office of the Attorney General that is outside the Public Service. Under the current dispensation, the Attorney General is appointed by the King acting on the advice of the Prime Minister (section 140(1)). It is, therefore, necessary to adopt a transparent process of appointment consisting of an open call for applications for the position. After that, an independent panel will shortlist candidates and public interviews will be conducted by the panel composed of representatives from civil society organisations, academia and government ministries. This panel shall then make a binding recommendation to the Prime Minister, which will be forwarded to the King.

The second recommendation addresses a debate as to whether the Attorney General can sue the government. The Court of Appeal in the case of *Attorney General v The King and others*, left the matter open. It is, therefore, necessary to reform the Office of the Attorney General such that it can sue the government on matters of public interest. Section 98(2)(c) of the Constitution charges him with the responsibility to protect and uphold the Constitution. In coalition governments, the Constitution tends to find itself threatened by the government as happened when Prime Minister Thabane withdrew from Government and the Speaker announced that a new government would be formed (Mosae, 2020). This was done for political expediency and it flew in the face of the Constitution which stipulates how a Prime Minister may be removed from Office. It is on such occasions where the Attorney General should be mandated to sue on behalf of the public to ensure the Constitution is upheld.

Lastly, this chapter proposes that those eligible for appointment must not have any on-going political affiliation before and after appointment. This principle should not be implied but be clearly stated in the Constitution. This is a salient principle which shall enhance the confidence of the public in an Office designated to be the protector of public interest.

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