

# Judicial Review of the Legislative Process in Lesotho: Lessons from South Africa

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## Abstract

The *Constitution of Lesotho*, 1993 has a supremacy clause which ordinarily empowers the judiciary to review the actions of other branches of government. However, the judiciary in Lesotho seems to treat the legislative process with deference. This deference seems to be based on the old common law notion of the non-intervention of the judiciary in the legislative process. The notion has its roots in the British constitutional system. The *Constitution of Lesotho* has even protected this doctrine through a constitutional ouster clause in section 80(5). The main question which this paper seeks to answer is whether indeed the common law notion of non-intervention in the legislative process is part of the constitutional law of Lesotho. In the end, the paper uses South African jurisprudence on the review of the legislative process to make a case that Lesotho can use the supremacy clause in the constitution and other constitutional doctrines such as the rule of law and legality to break with the common law notion of non-interventionism.

## Keywords

Lesotho; *Constitution of Lesotho*; judicial review; legislative process; South Africa.

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## 1 Introduction

The *Constitution of Lesotho*, 1993 like the *Constitution of the Republic of South Africa*, 1996 cherishes the notion of constitutional supremacy.<sup>1</sup> That notwithstanding, the notion exists against the strong backdrop of the British-based design of the institutions of government. Consequently, British constitutional theory undergirds constitutional design in Lesotho.<sup>2</sup> Despite the many influences that the South African law has had on Lesotho law generally,<sup>3</sup> constitutional law – due to the strong English influence – remains defiant. One of the areas which remains faithful to the English concept of inter-branch relationship is the review of parliamentary work in general, and the legislative process in particular, by the courts of law.<sup>4</sup> The English law is almost settled, and it has been widely exported to the broader commonwealth family of constitutions,<sup>5</sup> that due to the time-honoured doctrine of parliamentary sovereignty, the work of parliament may not be vitiated by any authority; not even by a court of law. This rule has been the subject of long and sometimes contradictory scholarly and judicial engagement.<sup>6</sup> However, the classical analysis of it remains that of the British scholar, Dicey.<sup>7</sup> In his formulation, the notion of parliamentary sovereignty involves three "traits". The first one is the omnipotence of parliament; "the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws".<sup>8</sup> The second one is that there is one corpus of law. The idea of having a distinction

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<sup>1</sup> Section 2 of the *Constitution of Lesotho*, 1993 (hereafter *Constitution of Lesotho*) provides that "[t]his Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void". The supremacy clause in the *Constitution of the Republic of South Africa*, 1996 (hereafter the *South African Constitution*) is embodied under s 2 too. The legal effect of constitutional supremacy has been the subject of several formative judgements, to wit; *In re Certification of South Africa* 1996 4 SA 744 (CC); *S v Makwanyane* 1995 6 BCLR 665 (CC); *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC).

<sup>2</sup> See Palmer and Poulter *Legal System of Lesotho* 223; 'Nyane "Development of the Constitution of Lesotho" 121; 'Nyane 2014 *Lesotho LJ* 59.

<sup>3</sup> Lesotho shares the Roman-Dutch common law with South Africa. See Beardsley 1970 *J Afr L* 198; Palmer 1969 *J Afr L* 127. However, the development of common law in South Africa is much more advanced than in Lesotho, and Lesotho depends disproportionately on advancements in South Africa.

<sup>4</sup> See s 80(1) of the *Constitution of Lesotho*. The section is the mirror-image of s 2(1) of the *United Kingdom Parliament Act* of 1911 as amended in 1949 by *United Kingdom Parliament Act* of 1949.

<sup>5</sup> De Smith *New Commonwealth and its Constitutions* 543.

<sup>6</sup> Goldsworthy *Parliamentary Sovereignty* 30; Delaney 2013 *Nw U L Rev* 543; Barber 2011 *ICON* 144; Tucker 2011 *OJLS* 72.

<sup>7</sup> Dicey *Study of the Law of the Constitution* ch II.

<sup>8</sup> Dicey *Study of the Law of the Constitution* 83.

between constitutional law and other ordinary law, so that the former becomes the "higher law", is alien to the classical English design. He posited that:<sup>9</sup>

There is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional.

The third one, which is more closely related to the subject under investigation here, is the non-reviewability of parliament; "the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional".<sup>10</sup> In terms of this tenet, the work of parliament is immune to review and sacrosanct, whether substantively or procedurally.

Whether this classic formulation is or has ever been part of Lesotho's constitutional law is a matter of controversy; regard being had to the fact that Lesotho has always had a written constitution since independence in 1966 – even prior to that date<sup>11</sup> – which embodied the supremacy clause.<sup>12</sup> The judicial attitude is divided on this aspect. In the case of *Khaketla v Honourable Prime Minister*,<sup>13</sup> which was decided in 1985 when the Constitution was still suspended,<sup>14</sup> the court declined to nullify the law, citing the doctrine of parliamentary sovereignty. In a similar manner, the court in the case of *Tsang v Minister of Foreign Affairs*<sup>15</sup> reiterated the position in the *Khaketla* case. But the Court of Appeal, in a much more convincing decision in the case of *Attorney General v Swissbourgh Diamond Mine*,<sup>16</sup> confirmed the finding of the High Court that parliamentary sovereignty, at least in its classical formulation, is not part of Lesotho's constitutional law. As a result of this decision, the courts in Lesotho have declared certain pieces of legislation unconstitutional with relative ease.<sup>17</sup> Whilst they are now almost comfortable with the substantive review of parliament and the

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<sup>9</sup> Dicey *Study of the Law of the Constitution* 85.

<sup>10</sup> Dicey *Study of the Law of the Constitution* 85.

<sup>11</sup> See the *Basutoland Constitutions* of 1959 and 1965.

<sup>12</sup> Section 2 of the *Lesotho Constitution* of 1966 embodied the supremacy clause.

<sup>13</sup> *Khaketla v The Honourable Prime Minister* (CIV/APN/145/85) [1985] LSCA 118 (24 July 1985) (hereafter the *Khaketla* case).

<sup>14</sup> The 1966 *Constitution of Lesotho* was suspended in 1970. For the detail on the suspension of that Constitution, see *Khaketla Lesotho 1970* 103; Macartney 1973 *Government and Change* 473.

<sup>15</sup> *Tsang v Minister of Foreign Affairs* 1993-94 LLR-LB 45 (HC) (hereafter the *Tsang* case).

<sup>16</sup> *Attorney General v Swissbourgh Diamond Mine* LAC (1995-99) 214 (hereafter the *Swissbourgh Diamond Mine* case).

<sup>17</sup> See *Attorney General v Mopa* LAC (2000-2004) 427; *Peta v Minister of Law, Constitutional Affairs and Human Rights* (CC 11/2016) [2018] LSHC 3 (18 May 2018).

review of administrative decisions,<sup>18</sup> the review of a legislative process continues to be unsettled. The question is further complicated by the Constitution, which makes the parliament a master of its own procedure.<sup>19</sup> The same Constitution compounds the matter even further by capping it with an ouster clause; that once the Speaker of parliament has certified that the procedure for enacting any piece of legislation has been followed, such certification may not be questioned in any court of law.

As such, the question of whether a court of law can review the legislative process in Lesotho continues to haunt constitutional scholarship in the country. Much as the question is relatively settled in South Africa, the courts in Lesotho seem to take a deferential approach to the question.<sup>20</sup> Influenced by the common law non-interventionist approach to the internal legislative process, and the tapestry of the *Constitution of Lesotho*, the courts seem to respect the parliament as it relates to the internal affairs of parliament.

Hence, the purpose of this paper is to denounce this approach as being contrary to the broader schematisation of the *Constitution of Lesotho* anchored by the devices of constitutionalism such as the rule of law, legality, the separation of powers and, indeed, the hallowed notion of the independence of the judiciary. The paper uses some lessons from South Africa, where the judiciary has unequivocally jettisoned the notion of parliamentary privilege and has employed devices such as legality and the rule of law to justify its unrestrained intervention in the so-called "internal affairs" of parliament. The paper methodically scrutinises decided cases in Lesotho and South Africa in the context of the broader constitutional designs of each country. The usual caution that accompanies comparative constitutional studies is issued, that one should not blindly presume that South African constitutional jurisprudence can be transplanted *mutatis mutandis* into Lesotho. The paper starts off by re-problematising the theory on which the review of the legislative process is based, and proceeds to

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<sup>18</sup> *Chalatse v The Acting Chief Justice* (C of A CIV NO/63/2014) [2015] LSCA 19 (7 August 2015); *Raphuthing v Chairman of the Disciplinary Hearing* C of A (CIV) 45/2014 [2015] LSCA 2 (7 August 2015).

<sup>19</sup> See s 80(5) of the Constitution. Also see Lesotho Constitutional Court decision in *Transformation Resource Centre v Speaker of the National Assembly* (Constitutional Case No 4 of 2017) [2017] LSHC 23 (30 November 2017) (hereafter the *Transformation Resource Centre* case).

<sup>20</sup> In the *Transformation Resource Centre* case paras 20 and 21, the court said, "This brings me to [applicants'] second proposition ... that the Standing Orders of the National Assembly ... provide for peremptory procedural requirement for public participation... . It rests on the fallacy that the internal rules of parliament made pursuant to section 81(1) have constitutional force and, therefore any irregularity in following them is violation of a peremptory constitutional procedure. This proposition raises issues which have implication for the separation of powers and the jurisdiction of courts to enforce internal rules of parliament."

study the judicial approaches to the review of the legislative process in each of the two countries under study herein.

## 2 Revisiting the theories of judicial review of legislative process

### 2.1 Demarcation of judicial review of legislative process

Judicial review as a device used by courts to supervise administrative, executive or judicial actions has become a very complex notion which takes various forms.<sup>21</sup> Whatever form it takes, the notion of judicial review still depends on the broader constitutional design of a country. In relation to judicial review, countries fall into two loose families – the Westminster family and the American family. The Westminster models follow the predominantly "weak" judicial review system, due in large part to their notion of parliamentary sovereignty,<sup>22</sup> which is known for its animosity towards any form of check on the power of parliament which, in those designs, permeates almost all aspects of governmental power. It is adroitly captured by Allan and Thomson thus:<sup>23</sup>

In some countries ... the judges are permitted to review legislation in order to establish whether it complies with the ... constitution. In the United Kingdom, the absence of a written constitution with the status of a high law and the doctrine of parliamentary supremacy prevent the judge from exercising this role.

In the Westminster-based model the court's power of review is limited to the way in which the power conferred by parliament is exercised, otherwise known as the doctrine of *ultra vires*.<sup>24</sup> That is basically judicial review in the

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<sup>21</sup> Hoexter *Administrative Law* 109.

<sup>22</sup> Harel and Shinar 2012 *ICON* 950. At 952 and 953 the authors contend that jurisdictions including the UK, Canada, New Zealand, and several states and territories of Australia have adopted schemes that can be characterised as forms of constrained judicial review, and on the other hand they argue that in the American style, "judicial review [is] also known as strong judicial review. Under that view, the judiciary is the 'ultimate expositor' of constitutional meaning, having the final say over constitutional interpretation". Also see Arenson 1996 *Deakin L Rev* 37.

<sup>23</sup> Allen and Thomson *Cases and Materials* 541.

<sup>24</sup> See *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111. The overriding justification for judicial intervention is the doctrine of *ultra vires* – the doctrine that power (*vires*) must be exercised within the confines of the law set out by parliament. As Hoexter pointedly contends at 111, "The doctrine ... is tied to constitutional fundamentals associated with the Westminster system: separation of powers, parliamentary sovereignty and the rule of law .... The legislature is the supreme lawmaker, while the function of the courts is to apply the law made by it".

administrative-law sense; "the power of the courts to scrutinise and set aside administrative decisions on the basis of certain grounds".<sup>25</sup>

Judicial review in the constitutional designs that follow the American model adopts a somewhat different approach. Since the decision in *Marbury v Madison*,<sup>26</sup> the American model of judicial review has been growing rapidly, to the extent that it has even taken on the form of being a threat to majoritarianism.<sup>27</sup> Some scholars have even dared to call it the basis for "judicial supremacy".<sup>28</sup> The American model is anchored on "strong review"; that "the judiciary is the 'ultimate expositor' of constitutional meaning, having the final say over constitutional interpretation".<sup>29</sup>

Nevertheless, despite these marked differences in the models of judicial review in the Westminster and American models, there seem to be some commonalities when it comes to the judicial review of the legislative process. The review of the legislative process is different from substantive review in that the latter is by and large concerned with the compliance of the legislation with the Constitution.<sup>30</sup> Many a time, substantive review has to do with the question of whether a certain constitutional norm has been violated; invariably whether a "certain statute infringes upon individual liberties or rights guaranteed in the Bill of Rights".<sup>31</sup> It is less concerned about the propriety of the process that was followed in enacting the statute in question. It differs from procedural review in that procedural review is a "form of judicial review in which courts: either a) determine the validity of statutes based on an examination of the procedure leading to their enactment; or b) oversee the adherence to procedural rules whilst the legislative process is going on."<sup>32</sup>

In this aspect of process there is similarity between the Westminster and American models. Both of them, albeit to varying degrees, accord some measure of deference to the internal processes of parliament. The courts are, as a general rule, not expected to interfere with the internal processes of parliament, even when there is an allegation of impropriety or illegality.<sup>33</sup>

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<sup>25</sup> Hoexter *Administrative Law* 109.

<sup>26</sup> *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

<sup>27</sup> Waldron 2006 *Yale LJ* 1346. Bickel *Least Dangerous Branch* 16-17 contends that, "[J]udicial review is a counter-majoritarian force in our system. ... [W]hen the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of representatives of the actual people of the here and now ...."

<sup>28</sup> Harel and Shinar 2012 *ICON* 950.

<sup>29</sup> Harel and Shinar 2012 *ICON* 953.

<sup>30</sup> Bar-Siman-Tov 2011 *BU L Rev* 1915.

<sup>31</sup> Bar-Siman-Tov 2011 *BU L Rev* 1923.

<sup>32</sup> Bar-Siman-Tov 2011 *BU L Rev* 1921.

<sup>33</sup> The point was made rather succinctly and poetically in the case of *British Railways Board v Pickin* [1974] 1 All ER 609 622 as thus, "It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act.

This non-interventionist approach has dominated the court-parliament relationship in both models since time immemorial. However, some modifications are beginning to be introduced in countries like South Africa, where it has been argued that a court of law may intervene in the internal affairs of parliament on the basis of the ascendancy of the notion of legality.

## 2.2 *The origins and rationale for non-interventionism*

The protection of parliamentary privilege is, like most devices of modern day parliamentary practice, a by-product of the sixteenth and seventeenth century struggles between parliament and the crown in England.<sup>34</sup> Privilege is classically a composite concept which protects not only the speeches of members of parliament but also the internal proceedings of parliament.<sup>35</sup> Privilege originated in the sad practice in England whereby the King used to have informers about the proceedings of parliament and the speeches of individual members of parliament, after which those members of parliament who were against the King were targeted with prosecutions and other forms of assaults because of what they had said or done in parliament. The zenith of this struggle between the Tudors and the Crown on the one hand and the House of Commons on the other occurred in 1512 during the case of Richard Strode.<sup>36</sup> This was the case in which Richard Strode, a member of the House of Commons, introduced a series of Bills that were regarded as offensive to the reigning King Henry VIII.<sup>37</sup> He was prosecuted and a heavy fine and imprisonment were imposed on him. The House of Commons was particularly displeased with what happened to Strode and retaliated by enacting the law that became the turning point, and arguably the basis for the notion of parliamentary privilege as it is understood today in parliamentary practice throughout the world. The law annulled and invalidated the Court's decision on Strode. It provided emphatically, and in a rather *ad hominem* manner, that:<sup>38</sup>

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It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry into whether in any particular case those procedures were effectively followed."

<sup>34</sup> Salva 1963 *Philip LJ* 477; May *Erskine May's Treatise* 48; Steele 2012 *Nott LJ* 43.

<sup>35</sup> May *Erskine May's Treatise* 48.

<sup>36</sup> Yankwich 1950 *U Pa L Rev* 960; Cella 1968 *Suffolk U L Rev* 1.

<sup>37</sup> Salva 1963 *Philip LJ* 477.

<sup>38</sup> Hatsell *Precedents of Proceedings in the House of Commons* 86.

All suits, condemnations, executions, fine, amerciements, punishments, connections, grants, charge, and impositions, put or had, or hereafter to be put or had, upon the said Richard, and to every other person or persons afore specified, that now be of this present Parliament, or that of any Parliament, thereafter shall be, for any Bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed and treated or, be utterly void and of none effect.

Although the law was *ad hominem* and retroactive in nature, it also established the rule for the future relationship between parliament and the courts in relation to the internal proceedings of parliament. Nevertheless, despite this definite declaration of privilege, the struggles between parliament and the Crown never abated. In the person of the sovereign, the Crown was still hugely interested in the internal proceedings of parliament.. Parliament finally triumphed over the monarch after the Revolution of 1688.<sup>39</sup> Through the Bill of Rights (1689), the privilege of parliament was sealed through absolute immunisation. The Bill of Rights provided that "the freedom of speech, and debate or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."<sup>40</sup>

In the United States, privilege was received through the doctrine of "enrolled bill" in the case of *Field v Clark*.<sup>41</sup> This case established that in accordance with the principle of privilege of parliament provided in the English Bill of Rights (1689), the signature of the Speaker of the House of Representatives on an "enrolled bill" was conclusive evidence that the Bill had been properly passed, and it might not be called into question or impeached in the courts of law. It was not proper to inquire into the journals of parliament to inquire whether or not the Bill had been properly passed.

It is apparent that the privilege of parliament has developed from its classical beginnings, where it was intended to shield parliament and its members against the Crown. It has grown in its scope and purpose to the stage where today it is protecting members of parliament not only against the monarch or executive, but even against everyone else.<sup>42</sup>

While the original rationale for privilege was to protect parliament and its members against unscrupulous monarchs in England, the notion has acquired many different purposes over time.<sup>43</sup> Okpaluba articulates six justifications for the non-intervention of the courts in internal parliamentary

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<sup>39</sup> Bradley and Ewing *Constitutional and Administrative Law* 54-57.

<sup>40</sup> *Bill of Rights* (1689). The principle was to be reiterated in later cases in England, such as *Edinburgh & Dalkeith Railway v Wauchope* (1842) 8 CI and F710 725; *Lee v Bude & Torrington Railway Co* 1871 LR 6 CP 577.

<sup>41</sup> *Field v Clark* 143 US 649 (1892).

<sup>42</sup> Yankwich 1950 *U Pa L Rev* 960.

<sup>43</sup> See Andrews *Works of James Wilson* quoted in Okpaluba 2015 *CILSA* 188.



processes.<sup>44</sup> They are: a) immunity against prosecution: protection against possible prosecution by an unfriendly executive and conviction by a hostile judiciary; b) immunity from deterrents to the uninhibited discharge of their legislative duty; c) the independence of parliament: the legislature as a key organ of democratic government ought to enjoy absolute independence from outside interference or control; d) the smooth management of parliament: appeals to the courts as to whether the behaviour of a member of the legislature does or does not merit a particular sanction would impair the proper functioning of the chamber by enmeshing it in legal proceedings; e) reciprocity: judicial abstention from interference in parliamentary proceedings guarantees parliamentary abstention from interference in the judicial process; and f) the availability of remedies: a legislature could provide its own remedies for injustice perpetrated against a member by itself or its officers. A member who is dissatisfied with internal decisions can appeal to the voters.<sup>45</sup>

These justifications can be collapsed into two main rationales for parliamentary privilege. The first one is the protection of the freedom of members and the house of parliament from external interference and inhibition. The second one is the hackneyed principle of the separation of powers. Both of these two main justifications are in synch with contemporary concepts of the freedom of speech<sup>46</sup> and the separation of powers.<sup>47</sup>

### **2.3 The "new approach": a departure from non-interventionism**

Despite its antiquity and justification,<sup>48</sup> the notion of parliamentary privilege is showing some signs of attenuation from its classical form, in which the protection was absolute, into a "new model" based on a sensitive balance between legality on the one hand and the separation of powers on the other.<sup>49</sup> This new approach represents a marked departure from the absolute immunity that parliament used to enjoy in its internal proceedings. It is best represented by the dictum of the Constitutional Court of South

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<sup>44</sup> Okpaluba 2015 *CILSA* 183.

<sup>45</sup> Okpaluba 2015 *CILSA* 192.

<sup>46</sup> See the cases of *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA) (hereafter the *De Lille* case); *Mazibuko v Sisulu* 2013 11 BCLR 1297 (CC) (hereafter the *Mazibuko* case).

<sup>47</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) (hereafter *Doctors for Life International* case).

<sup>48</sup> Okpaluba 2015 *CILSA* 190; Sakoane 2000 *Lesotho LJ* 39.

<sup>49</sup> Kretzmer 1988 *Tel Aviv U Stud L* 95; Navot 2006 *Israel L Rev* 183.

Africa in the case of *President of the Republic of South Africa v United Democratic Movement*,<sup>50</sup> thus:<sup>51</sup>

Having regard to the importance of the Legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a Court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends the Constitution and has thus achieved the special support required by the Constitution, Courts should be all the more astute not to thwart the will of the Legislature save in extreme cases.

However, it should be noted that the nature of this new approach is far from being clear, as scholars and judiciaries are continuing to grapple with its true nature.<sup>52</sup> Flashes of this new approach are flickering in the majority of jurisdictions,<sup>53</sup> but they are arguably brightest in the United States of

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<sup>50</sup> *President of the Republic of South Africa v United Democratic Movement* 2003 1 SA 472 (CC) (hereafter the *UDM* case).

<sup>51</sup> See the *UDM* case para 31. It would seem that the approach suggested *in casu* is that as a general rule, a court will be slow to intervene in the internal proceedings of parliament. The courts may intervene in "extreme cases", however. Also see Okpaluba and Mhango 2017 *LDD* 1. This approach also became evident in the Israeli Supreme Court Decision in the case of *Sarid v Knesset Speaker* (1981) 36 (2) PD 198. This was the case in which the Speaker of the Knesset (parliament) had changed the times for the sitting of the house from 11 am to 5 am. An opposition member had tabled the motion of no confidence in the House, expecting it to be deliberated and be voted upon, in the morning, as was the tradition. However, it transpired that most members of House allied to government were travelling and could be available only late in the afternoon. As a result, the Speaker postponed the sitting to late in the afternoon. The decision of the Speaker was challenged. The Speaker's defence was that the decision was part of the internal affairs of parliament and thus non-justiciable. The Court agreed but observed at para 9 that, "It seems ... that these opposing considerations of the rule of law, on the one hand, and respect for the Knesset's special standing on the other hand, require a judicial balance, which is based on restraint, yet does not yield to complete impotence. This self-restraint must be based on a standard which will define those areas in which the court will not interfere out of respect for the uniqueness of the Knesset as the people's elected body, and those in which the court will intervene to preserve the rule of law in the legislature."

<sup>52</sup> In the *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) (hereafter called *EFF I* case) para 93, the court attempted, but in vain, to provide some guidelines on the "new approach" thus, "It falls outside the parameters of judicial authority to prescribe to the National Assembly ... what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon".

<sup>53</sup> For Brazil, see Barroso da Graca 2018 *UCL JL and J* 55; for Nigeria see Taiwo 2009 *Malawi LJ* 236; in relation to India see Jain 1967 *JILI* 205, who contends that, "[o]ur

America and South Africa. The United States started to punch some holes earlier in the doctrine of "an enrolled bill", which was entrenched in the jurisprudence of that country, in the case of *Field v Clark*.<sup>54</sup> The essence of the new approach is that the internal processes of parliament should still be respected, as parliament is a co-equal branch of government, but the courts should intervene when the process by which a law is enacted violates the procedure laid out by the Constitution or in some other law. The prime example of the adoption of this approach is the US Supreme Court decision in the case of *Powell v McCormack*.<sup>55</sup> This was a case in which the petitioner was elected to serve in the United States House of Representatives for the 19th Congress. However, the Congress passed a resolution that due to his financial misconduct in the preceding Congress he would not be allowed to sit as a member in the new Congress. He challenged his being disbarred on the ground that it violated Article 1 of the Constitution. The court found that the Constitution provided the requirements for the eligibility of people to be elected to congress – namely, age, citizenship, and residence. Thus, Congress had no power to exclude a person from sitting as a member of congress.<sup>56</sup>

It is now almost settled that when parliament violates internal procedures laid out by the Constitution itself, the courts will intervene. However, in this new approach the courts are battling with the sensitive balance of respecting parliament but at the same time checking that parliament complies with the law relating to its own internal affairs.<sup>57</sup> This challenge, as

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legislatures have undoubtedly plenary powers. But these powers are controlled by the basic concepts of the written Constitution itself which is supreme and sovereign. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any legislature in India".

<sup>54</sup> *Field v Clark* 143 US 649 (1892). And the rule has been fairly established in the US. See the decisions in *Dombrowski v Eastland*, 387 US 82 (1967); *United States v Johnson* 383 US 169 (1966); *Tenney v Brandhove* 341 US 367 (1951); and *Kilbourn v Thompson* 103 US 168 (1881) (hereafter the *Kilbourn case*).

<sup>55</sup> *Powell v McCormack* 395 US 486 (1969).

<sup>56</sup> The Court at 199 quoted with approval the dictum from the *Kilbourn case*, thus: "[e]specially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws because, living under a written constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution, and, if they have not, to treat their acts as null and void".

<sup>57</sup> See the Supreme Court of Israel decision in *Sarid v Knesset Speaker* (1981) 36 (2) PD 198 203. The court said: "It seems to me that the clash of the said values of rule of law, on the one hand, and respect for the unique character of the Knesset, on the other, require forging a judicial balance based on self-restraint of the judiciary, which does not amount to being totally bound."

will more fully be demonstrated later in this paper, is more pronounced in South Africa.

### 3 Judicial review of the legislative process in Lesotho

The parliamentary procedures in Lesotho are based on the British model of parliamentary practice.<sup>58</sup> As one commentator accurately commented, writing about its similarity to the British model:<sup>59</sup>

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.

The general reticence of Lesotho's judiciary to review the legislative work of parliament started prior to the 1993 Constitution, when the courts almost invariably declined to exercise either substantive or procedural review. The maiden case of this approach was the case of *Khaketla v The Honourable Prime Minister*.<sup>60</sup> The case arose out of the run-up to the much derided 1985 election.<sup>61</sup> *In casu*, with a view to minimising the participation of the opposition, the government amended the electoral law to increase both the number of people required for the endorsement of a candidate and the fee for the registration of a candidate.<sup>62</sup> The applicant challenged the law on the basis, amongst others, that it violated the right to vote and to be voted for, as enshrined in the *Human Rights Act*.<sup>63</sup> The court frowned upon such a prayer and remarked that in terms of Lesotho's constitutional law "however unjust, arbitrary or inconvenient any legislation may be, it must be given its full effect. It is not the province of the Court to scan its wisdom or policy and the Court must take the statute as it finds it".<sup>64</sup> This approach was replicated in the 1992 decision of the High Court in the case of *Tsang v Minister of*

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<sup>58</sup> Palmer and Poulter *Legal System of Lesotho* 305-316. In the case of *Law Society of Lesotho v Ramodibedi* (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003) Maqutu J at para 7 shared a similar view thus, "[i]t seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again when constitutional problems arise Britain is our first reference point".

<sup>59</sup> Macartney 1970 *Parliamentary Affairs* 121.

<sup>60</sup> *Khaketla* case 19.

<sup>61</sup> D'Oliveira 1986 *Africa Insight* 6.

<sup>62</sup> *Electoral Amendment Act* 10 of 1984.

<sup>63</sup> *Human Rights Act* 24 of 1983. It is important to note that from the time that the 1966 (independence) Constitution was suspended in 1970, the *Human Rights Act* (1983) was the only law that embodied high constitutional norms against which the actions of government could be measured.

<sup>64</sup> *Khaketla* case 19.

*Foreign Affairs*.<sup>65</sup> However, the tenability of the principle enunciated in these two cases was convincingly refuted by Mahomed JA in the Court of Appeal decision in *Attorney General v Swissbrough Diamond Mine*.<sup>66</sup> The Court of Appeal said:<sup>67</sup>

The doctrine of parliamentary sovereignty, which had its origin in English law ... never properly became part of the common law of South Africa or Lesotho and that it had merely been imposed and maintained as a matter of political expediency ... .

On the legislative process, the 1993 *Constitution of Lesotho*, like most Commonwealth constitutions,<sup>68</sup> provides that subject to the Constitution each House of Parliament may regulate its own procedure and may in particular make rules for the orderly conduct of its own proceedings.<sup>69</sup> The parliament in Lesotho is bicameral.<sup>70</sup> However, a bill originates in the National Assembly.<sup>71</sup> Due to its ancestral relationship with the British parliamentary practice, the parliamentary procedure is shielded from judicial review through an ouster clause.<sup>72</sup> Section 80(5) of the *Constitution* provides that "a certificate given by the Speaker of the National Assembly under this section shall be conclusive for all purposes and shall not be questioned in any court".<sup>73</sup> The opinion of the judiciary in Lesotho is divided about the legal effect of this clause. In the case of *Development for Peace*

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<sup>65</sup> *Tsang* case 145. The court therein decreed that the "[t]he law of Lesotho is the same as the law of England and Republic of South Africa. An Act of Parliament is supreme. Once it has been properly passed by the Military Council the courts must give effect to it".

<sup>66</sup> *Swissbrough Diamond Mine* case 214.

<sup>67</sup> *Swissbrough Diamond Mine* case 225.

<sup>68</sup> For the analysis of the *Zimbabwean Constitution* on the similar provisions see the case of *Biti v Minister Justice Legal and Parliamentary Affairs* 2002 ZWSC 9 (27 February 2002).

<sup>69</sup> Section 81(1) of the *Constitution of Lesotho*. S 81(3) provides for the power to confer privileges thus, "[p]arliament may, for the purpose of the orderly and effective discharge of the business of the two Houses, make provision for the powers, privileges and immunities of those Houses and the Committees and the members thereof (including any person who is President or Vice-President or Speaker or Deputy Speaker of either House, having been elected from among persons who were not members thereof."

<sup>70</sup> Section 54 of the *Constitution of Lesotho*.

<sup>71</sup> Section 78(2) of the *Constitution of Lesotho*.

<sup>72</sup> The clause is apparently not the only constitutional clause under the 1993 *Constitution of Lesotho*. Also see s 91(5), which provides that "... where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into in any court."

<sup>73</sup> This clause is common in many constitutions that follow the classic parliamentary practice. *Salva* 1963 *Philip LJ* 477.

*Education v Speaker of the National Assembly*<sup>74</sup> the Constitutional Court<sup>75</sup> refused to penetrate the clause to investigate whether in the enactment of the *Human Rights Commission Act*<sup>76</sup> the National Assembly complied with section 80(3) of the Constitution. The court dismissed the application and reasoned that:<sup>77</sup>

It should at all times be recognised that the Parliament of Lesotho has the power under the Constitution to make laws and to regulate its own procedure and processes and in particular to make rules for the orderly conduct of its own proceedings. This is a fundamental aspect of its legislative power vested in it by the Constitution and one that is indeed expressive of the doctrine of 'separation of powers'.

However, in the most recent decision in *Mokhothu v Speaker of the National Assembly*,<sup>78</sup> the same court categorically demonstrated its willingness to pierce through the ouster clause if the law has been violated. In this case the applicant was deprived of his status as the official leader of opposition after his party lost one member of parliament to the government. The speaker did this despite the fact that the other opposition parties had written to assure the speaker that they supported the first applicant as the official leader of opposition. The decision of the speaker was made by way of a ruling on a point of order that was raised by the Minister of Forestry.<sup>79</sup> The

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<sup>74</sup> *Development for Peace Education v Speaker of the National Assembly* (No 5/2016) [2017] LSHC 5 (13 March 2017) (hereafter the *Development for Peace Education* case).

<sup>75</sup> It is important to note that the *Constitution of Lesotho* does not establish a superior court called "the Constitutional Court". It is the High Court that has original jurisdiction to adjudicate over constitutional matters. However, the phrase the "Constitutional Court" began to be heard 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 v Law Society* (C of A CIV NO/59/2011) [2012] LSCA 3 (27 April 2012) 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.

<sup>76</sup> *Human Rights Commission Act* 2 of 2016.

<sup>77</sup> *Development for Peace Education* case para 21.

<sup>78</sup> *Mokhothu v Speaker of the National Assembly* (Constitutional Case No 20/2017) 2017 LHC 20 (21 February 2018) (hereafter the *Mokhothu* case). Also in the case of *All Basotho Convention v Speaker of the National Assembly* (CIV/APN/406/2016) [2017] LSHC 1 (23 February 2017), the court declared that the Speaker did not have the power to make a pronouncement of the vacancy of a seat of Parliament. The Speaker *in casu* had declared vacancies in the National Assembly in a situation where certain members of parliament failed to attend the necessary number of sittings of the National Assembly as provided for in s 60(1)(g) of the Constitution. The case did not deal with the review of the internal proceedings of parliament *per se*, but it is one of the rare occasions in Lesotho where the judiciary stood firm and reviewed the decisions of parliament or its officials.

<sup>79</sup> The Minister rose on a point order and said, "... I consider that one quarter of this House's Membership consists of 30 Members, what then with the recent drastic changes (i.e. floor-crossing)? To me, there is no political party with the 1/4 (30

Speaker's defence was that the ruling was an internal proceeding and that it was protected by privilege as codified by the ouster clause in section 80(3) of the Constitution. The court rejected the argument and upheld the application. It reasoned that:<sup>80</sup>

Parliament is a creature of the Constitution. It is conferred with powers under section 81(1) to make rules to regulate its own procedure and orderly conduct in each House. That power is 'subject to the provisions of this Constitution. These quoted words indicate that the rule-making power of Parliament is not absolute but limited by the provisions of the Constitution. Thus, this Court has jurisdiction and power to declare the Speaker's rulings, rules, practice or usage of Parliament invalid if inconsistent with or violative of any part of the Constitution.

Here the court is trying to align itself with the modern interventionist approach to internal parliamentary proceedings. However, the most inhibiting aspect of Lesotho's constitutional law is that the Constitution protects the internal proceedings of parliament through a conclusive certificate of the Speaker of the National Assembly. Although the court makes a generalised statement in *Mokhothu's* case that the court will declare the "Speaker's rulings, rules, practice or usage of Parliament invalid if inconsistent with or violative of any part of the Constitution", it did not address itself to the effect of section 80(3) of the Constitution, which embodies the ouster of the courts.<sup>81</sup> A dedicated interpretation of this section by the court could have helped shape the jurisprudence around the clause, and to definitively overrule the previous decisions which follow the non-interventionist approach.<sup>82</sup>

#### 4 Review of legislative process in South Africa

Prior to the 1994 politico-legal transition,<sup>83</sup> South African constitutional law was overshadowed by parliamentary sovereignty.<sup>84</sup> The general attitude of the courts was that the courts would ordinarily not overturn the work of

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Members) majority to qualify for the Official Leader of the Opposition. Can you kindly guide us on the proper procedure in this regard?"

<sup>80</sup> *Mokhothu* case para 14. For this approach the Court relied on the Namibian Supreme Court decision in *Federal Convention of Namibia v Speaker, National Assembly of Namibia* 1994 1 SA 177 (Nra HC) and the South African Supreme Court Decision in the *De Lille* case.

<sup>81</sup> It should be noted that this is a constitutional ouster clause; not an ordinary statutory ouster clause.

<sup>82</sup> See the Nigerian case of *The Resident, Badan Province v Memudu Lagunju* 14 WACA 549.

<sup>83</sup> Mureinik 1994 SAJHR 31; Ramaite *Role of the Judiciary* 150.

<sup>84</sup> *Poovalingam v Rajbansi* 1992 1 SA 283 (A). The court *in casu* admitted that there is a "close bond between [South African] law and English law on the subject of parliamentary privilege". Laubscher 1981 SALJ 529; Daniels and Brickhill 2006 *Penn St Int'l L Rev* 371.

parliament.<sup>85</sup> Both the substantive and the procedural review of parliament were ordinarily not available. However, there were exceptional occasions when the judiciary, as in England,<sup>86</sup> used procedural impropriety as a ground for overturning an Act of parliament.<sup>87</sup> As early as 1937 the court in the *Ndlwana v Hofmeyr*<sup>88</sup> case declined jurisdiction to enquire into legislation that had in effect been unprocedurally enacted. The law had been enacted by two Houses sitting together and not bi-camerally as the law prescribed.<sup>89</sup> However the court expressly, and rather bizarrely remarked that even if the procedure had been flouted in the legislative process, "the question then is whether a Court of Law can declare that a Sovereign Parliament cannot validly pronounce its will unless it adopts a certain procedure in this case a procedure impliedly indicated as usual in the South Africa Act?"<sup>90</sup> The court proceeded to provide the answer for the question that "Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit. The procedure express or implied in the South Africa Act is so far as Courts of Law are concerned at the mercy of Parliament like everything else."<sup>91</sup> In adopting this absolute non-interventionist approach the court was following the decision in *R v Ndobe*.<sup>92</sup> The subsequent decisions in the *Harris*<sup>93</sup> cases expressly deviated from those in the *Ndlwana* and *Ndobe* cases. The court adopted an interventionist approach where the parliament had violated the procedure laid out by the *South Africa Act* to enact the *Separate Representation of Voters Act, 1951*.<sup>94</sup> The court unequivocally departed from *Ndlwana*.<sup>95</sup> Despite the approach taken in the *Harris* cases, the court in *Collins v Minister of the Interior*<sup>96</sup> unexpectedly declined to intervene in a case where the law was passed bi-camerally when

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<sup>85</sup> Cowen 1952 MLR 282.

<sup>86</sup> *R (Jackson) v Attorney General* [2006] 1 AC 262. See further Craig "Sovereignty of the United Kingdom Parliament" 359; Eekelaar 1997 LQR 185.

<sup>87</sup> *Harris v Minister of the Interior* 1952 2 All SA 400 (A) and *Collins v Minister of the Interior* 1957 1 All SA 227 (A) (hereafter the *Collins* case).

<sup>88</sup> *Ndlwana v Hofmeyr* 1937 AD 229 (hereafter the *Ndlwana* case) 237. See also Griswold 1953 Harv L Rev 864.

<sup>89</sup> Section 35(1) of the *Union of South African Act, 1909*.

<sup>90</sup> *Ndlwana* case 238.

<sup>91</sup> *Ndlwana* case 238.

<sup>92</sup> *R v Ndobe* 1930 AD 484.

<sup>93</sup> *Harris v Minister of the Interior* 1952 2 All SA 400 (A); *Minister of the Interior v Harris* 1952 4 All SA 376 (A).

<sup>94</sup> *Separate Representation of Voters Act* 46 of 1951. Also see Griswold 1953 Harv L Rev 864.

<sup>95</sup> In *Harris v Minister of the Interior* 1952 2 All SA 400 (A) 423 the court said, "The question now arises whether this Court ought to depart from *Ndlwana's* case. Earlier in this judgment I have referred to a number of cases which show that there may be circumstances in which the Court ought to depart from its previous decision. There is no doubt in my mind that this is essentially a case where this Court is bound, on it having been shown that its previous decision was wrong, to depart from that decision".

<sup>96</sup> *Collins* case 227.



it was supposed to be passed uni-camerally in terms of the *South African Act*; and its purpose was clearly the same purpose which the parliament unsuccessfully sought to attain in the *Harris* case. The court ruled that "[i]f a Legislature has plenary power to legislate on a particular matter no question can arise as to the validity of any legislation on that matter and such legislation is valid whatever the real purpose of that legislation is".<sup>97</sup>

The 1996 Constitution of South Africa seems to have made a clear break from a past which was based on parliamentary sovereignty and accepted a new system based on constitutionalism.<sup>98</sup> While the Constitution seems to have retained the common law notion of parliamentary privilege,<sup>99</sup> it has also made two fundamental modifications of the concept. The first one is that it has removed the ouster clause that usually precludes judicial scrutiny of the legislative process. The second one is that the common law on parliamentary privilege has been constitutionalised; thus, any aspect of the concept which has not been codified in the Constitution is not permissible.<sup>100</sup> This approach was adopted in the landmark decision in *The Speaker of the National Assembly v Patricia De Lille*.<sup>101</sup> The case involved the suspension of a member of parliament through a resolution of the National Assembly on the basis that her speech in parliament was "un-parliamentary". She had alleged that her party had information pertaining to twelve members of the "other side of the House (the ANC) who had been accused of having been spies for the apartheid regime". She was suspended for fifteen parliamentary working days. She challenged the suspension. The Speaker, in her argument, wanted to claim the protection of parliamentary privilege. The court rejected that line of argument and said that the "enquiry must crucially rest on the Constitution of the Republic of South Africa...[not] a tortuous process of discovery of some obscure rule in English Parliamentary law and custom justifying the suspension of a member of Parliament."<sup>102</sup> In the end, Mahomed CJ found that "there is nothing which provides any constitutional authority for the Assembly, to punish any member of the Assembly, for making any speech, through an order suspending such member from the proceedings of the Assembly".<sup>103</sup>

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<sup>97</sup> *Collins* case 231.

<sup>98</sup> Mureinik 1994 *SAJHR* 31.

<sup>99</sup> Section 57 of the Constitution provides that: "(1) The National Assembly may - (a) determine and control its internal arrangements, proceedings and procedures; and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement". Also see s 58.

<sup>100</sup> On the relationship between common law and the Constitution in South Africa, see Friedman 2014 *SAJHR* 63.

<sup>101</sup> See *De Lille* case.

<sup>102</sup> *De Lille* paras 14 and 20.

<sup>103</sup> *De Lille* para 29.

The approach of the court in *Patricia De Lille* became the trailblazer. In the *Doctors for Life International* case, the Constitutional Court reiterated that there is no express constitutional provision that precludes a court in South Africa from intervening in the legislative process. The court brought in the notion of the "sensitive balance", however. It said:<sup>104</sup>

What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

This approach is slightly different from the one suggested in the *UDM* case of non-intervention "save in extreme cases".<sup>105</sup> With the approach in South Africa now fairly well established that the courts can intervene in the legislative process, the courts are now grappling with the notion of the "sensitive balance" as provided for in the *Doctors for Life International* case. The Constitution and the rule of law occupy one side of the scale, while the separation of powers occupies the other. The court grappled with this balance in the *Mazibuko* case. This is the case that concerned the tabling of a motion of no confidence in the President. The applicant, as a leader of the opposition in Parliament, gave notice in the National Assembly of a motion of no confidence in the President in terms of section 102(2) of the Constitution. The motion was frustrated by parliament committees so that it was ultimately not tabled before the National Assembly. The applicant then approached the High Court on an urgent basis, seeking an order directing the Speaker to take the necessary steps to ensure that the motion of no confidence was debated and voted upon as a matter of urgency. The vexed question was whether a court could direct a Speaker to place a motion on a parliamentary roll when there was no consensus in the committees. The court was sharply divided<sup>106</sup> over this question. The majority judgement authored by Moseneke DCJ found that the speaker does not have such residual powers,<sup>107</sup> but disagreed with the respondents' argument that "[i]f

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<sup>104</sup> See *Doctors for Life International* case 1427.

<sup>105</sup> *UDM* case para 31. The "non-intervention save in extreme cases" approach does not seem to be an approach different from the sensitive balance approach, though. The only difference is that in the former, the scale is tilted in favour of non-intervention, while in the latter it is balanced.

<sup>106</sup> The court comprised 10 justices and the division was in the ratio of 6:4. The majority comprised Moseneke DCJ with Froneman, Khampepe, Nkabinde, Skweyiya and Van der Westhuizen JJ concurring, while the minority comprised Jafta J, Mogoeng CJ, Zondo J and Mhlantla AJ.

<sup>107</sup> The court seems to have attempted the balancing exercise thus (para 31 of the *Mazibuko* case): "Section 57(1) of the Constitution vests in the Assembly the power to determine and control its internal arrangements, proceedings and procedures, and it may make rules and orders concerning its business. Should the Speaker choose to make a ruling on the business of the Assembly, it would always be subject to the

there is no political agreement on the scheduling of the motion, then that is the end of the matter and the motion will not be scheduled or debated."<sup>108</sup> He agreed with the court *a quo* (the High Court) that:<sup>109</sup>

... a vital constitutional entitlement to move a motion of no confidence in the President cannot be left to the whim of the majority or minority in the Programme Committee or any other committee of the Assembly. It would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that Committee.

The court in turn invalidated Chapter 12 of the Rules of the National Assembly to the extent that it does not provide for enforcement of the right to exercise the power to have a motion of no confidence in the President "scheduled for a debate and voted upon in the National Assembly within a reasonable time, or at all."<sup>110</sup> The minority judgement held a different view. In fact, it invoked the political question doctrine<sup>111</sup> wherein Jafta J, writing for the minority, contended that "[p]olitical issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution."<sup>112</sup>

The "sensitive balance" seems to be haunting the courts in South Africa, and it continues to sharply divide judicial and scholarly opinion.<sup>113</sup> The most recent decision on the review of parliamentary process where the division of judicial opinion further manifested itself was in the case of *Economic Freedom Fighters v Speaker of the National Assembly*.<sup>114</sup> The central question in this case was whether the National Assembly had breached its obligation to put in place "mechanisms and a process" for the

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overriding authority of the Assembly, which is the ultimate master of its own process, subject to the usual caveat that its processes are consistent with the Constitution and the law."

<sup>108</sup> *Mazibuko* case para 54.

<sup>109</sup> *Mazibuko* case para 57.

<sup>110</sup> *Mazibuko* case para 88.

<sup>111</sup> The doctrine has its roots in American constitutional law. It provides that certain constitutional questions are best left to the elected branches of government and are therefore non-justiciable. Mhango 2014 *PELJ* 2704. Also see Barkow 2002 *Colum L Rev* 237; Choper 2004 *Duke LJ* 1457.

<sup>112</sup> *Mazibuko* case para 83. The minority was persuaded by the dictum in the court *a quo* *Mazibuko v Sisulu* 2013 4 SA 243 (WCC) 256EH thus, "There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every and all political disputes as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication."

<sup>113</sup> See the cases *United Democratic Movement v Speaker, National Assembly* 2017 5 SA 300 (CC). Also see the *EFF I* case para 93; Cachalia 2015 *NYL Sch L Rev* 379.

<sup>114</sup> *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC) (hereafter the *EFF II* case).

implementation of section 89 of the Constitution. The section provides for the impeachment of the President.<sup>115</sup> As in the *Mazibuko* case, the question sharply divided the court by a vote of 7:4. The majority judgement was authored by Jafta J, who found that "section 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section."<sup>116</sup> The court in turn found that the National Assembly had violated that obligation, and directed it to make rules that would facilitate the implementation of section 89 of the Constitution. The minority vehemently disagreed that the court had any role to play in directing the National Assembly to make rules. Mogoeng CJ, concurring in the minority judgement, called the majority judgment "a textbook case of judicial overreach - a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament."<sup>117</sup> The minority judgment's chief argument was that the principle of the separation of powers prohibits the court from going so far as to tell the parliament to make rules.

This dichotomy in the judicial approach is the manifestation of the stage at which the development of the parliament-judiciary relationship has reached in South Africa. The country is grappling with the "sensitive balance". The approach seems to be developing and firming up on a case-by-case basis.

## 5 Conclusion

This paper set out to investigate the judicial review of the legislative process in Lesotho, the principal question being the extent to which superior courts in Lesotho are able to review the internal processes of parliament. Having thus found, the paper sought to establish whether the South African jurisprudence on the subject can provide lessons for Lesotho. It has become apparent from the foregoing discussion that the two countries have different approaches to the judicial review of internal parliamentary processes. Due largely to the influence of British tradition, Lesotho still subscribes to the

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<sup>115</sup> Section 89 of the Constitution provides: "(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of — (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office. (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

<sup>116</sup> *EFF II* case para 196.

<sup>117</sup> *EFF II* case para 223. The Judges in the Majority Judgement did not take the expression "text book case of judicial overreach" kindly. As a result, Jafta J at para 218 retorted that "... what is unprecedented is the suggestion that the construction of the section embraced by the majority here constitutes 'a textbook case of judicial overreach'. The suggestion is misplaced and unfortunate".

classic common law approach. This is the approach that absolutely protects the "internal proceedings" of parliament from scrutiny. The approach has been taken to the constitutional level by section 80(5) of the *Constitution of Lesotho*. The section, as demonstrated above, precludes the courts from enquiring into the certificate of the Speaker confirming that the procedure in enacting a law was properly followed. The courts in Lesotho have largely remained helpless against this ouster.<sup>118</sup> An outlier is the *Mokhothu's* case, in which the court sought to demonstrate that on the basis of constitutionalism and legality it can review the internal proceedings of parliament. But the *Mokhothu* case will scarcely become an authority for the proposition that courts can readily review internal parliamentary proceedings in Lesotho. This is because the case exists alongside the constitutional ouster clause which has not been authoritatively interpreted, as is the case in countries such as Nigeria.<sup>119</sup>

The South African approach, on the other hand, demonstrates a clear break from the approach in the pre-democratic era as epitomised by the *Ndlwana* and *Collins* cases.<sup>120</sup> The case of *De Lille* is the standard bearer of the new approach, which is based on easy intervention of the courts once a constitution or some other law has been violated. The challenge with the new approach in South Africa, though, is that it vacillates between two equally important constitutional fundamentals: the notion of judicial review (based on legality) on the one hand and the separation of powers on the other. This balancing exercise has not yet stabilised. The instability is evidenced by the sharp difference in judicial opinion on the subject as manifested in cases such as *UDM* and the two *EFF* cases.<sup>121</sup> It would seem that the country is building jurisprudence on this new issue on a case-by-case basis.

In the circumstances, it is recommended that Lesotho should introduce a paradigmatic shift similar to that made in South Africa. The first step would be to abolish all vestiges of parliamentary sovereignty in Lesotho; and to remove the ouster clause from section 80(5) of the Constitution. Consequently, the common law notion of parliamentary privilege should be recast within the context of the modern idea of constitutionalism.

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<sup>118</sup> Generally see the *Development for Peace Education and Transformation Resource Centre* case.

<sup>119</sup> See the Nigerian approach to constitutional ouster clauses in cases like *The Resident, Badan Province v Memudu Lagunju* 14 WACA 549; *Governor-in-Council, Western Region of Nigeria v Jonathan Oshunlaja* (1961) 1 SCNLR 303; *Prince Ademuluyi v Brig RA Adebayo* (1968) 2 All NLR 272; *Lakanmi v Attorney General, West* (1971) 1 UILR 201.

<sup>120</sup> Wade 1957 SALJ 160; Dlamini 1988 SALJ 470.

<sup>121</sup> For a critique on the seeming judicial activism in relation to the legislature in South Africa, see Cachalia 2015 NYL Sch L Rev 379.

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*United Kingdom Parliament Act*, 1949

### **List of Abbreviations**

BU L Rev

Boston University Law Review

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CILSA	Comparative and International Law Journal of Southern Africa
Colum L Rev	Columbia Law Review
Deakin L Rev	Deakin Law Review
Duke LJ	Duke Law Journal
Harv L Rev	Harvard Law Review
ICON	International Journal of Constitutional Law
Israel L Rev	Israel Law Review
J Afr L	Journal of African Law
JILI	Journal of the Indian Law Institute
LDD	Law, Democracy and Development
Lesotho LJ	Lesotho Law Journal
LQR	Law Quarterly Review
Malawi LJ	Malawi Law Journal
MLR	Modern Law Review
NYL Sch L Rev	New York Law School Law Review
OJLS	Oxford Journal of Legal Studies
PELJ	Potchefstroom Electronic Law Journal
Penn St Int'l L Rev	Penn State International Law Review
Philip LJ	Philippine Law Journal
Nott LJ	Nottingham Law Journal
Nw U L Rev	Northwestern University Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Suffolk U L Rev	Suffolk University Law Review
Tel Aviv U Stud L	Tel Aviv University Studies in Law
Va L Rev	Virginia Law Review
U Pa L Rev	University of Pennsylvania Law Review
UCL JL and J	University College London Journal of Law and Jurisprudence
Yale LJ	Yale Law Journal