

Standing to litigate in the public interest in Lesotho: The case for a liberal approach

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Summary: *In Lesotho, standing to litigate is still based on the private law doctrine of locus standi in judicio. This doctrine requires the person who institutes an action in a court of law, regardless of whether it is in the private or public interest, to satisfy the court that he or she is directly and substantially interested in the outcome of the decision. Section 22(1) of the Constitution of Lesotho provides that any person who alleges that the Bill of Rights in the Constitution has been violated 'in relation to him' may approach the court of law for redress. Although the Constitution is silent about the enforcement of the other non-Bill of Rights parts of the Constitution, the courts have readily invoked section 22(1) to exclude litigants who are not 'directly and substantially' interested in the outcome of the case. This restrictive approach notwithstanding, a more liberal approach has been adopted in pockets of public law decisions of the superior courts in Lesotho. The purpose of this article is to amplify this liberal approach. The article argues that constitutional democracy in Lesotho will benefit from a liberal approach as opposed to a restrictive approach to standing. This is supported by a discernible movement in modern-day public law towards a more liberal approach to standing.*

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1 Introduction

In 1993 Lesotho adopted a new Constitution and ushered in a new constitutional order, thereby supposedly breaking the chain of authoritarian rule and military juntas that had characterised Lesotho's constitutional development since the constitutional breakdown of 1970.¹ Given the history of constitutionalism in the country – which is peppered with constitutional breakdowns, violations of human rights and persistent political instability – the new constitutional dispensation was expected to be more liberal and more tolerant of diversity.² In other words, in 1993 the Lesotho judiciary was expected to move with 'a rapid oscillation'³ from the old traditions to its new judicial role and approach that would involve recognising and applying constitutional values in all litigation.⁴ On the contrary, for nearly three decades since 1993 Lesotho's superior courts have 'stood in trial' over the standing of individuals or voluntary organisations seeking to litigate in the public interest, in general, and on constitutional questions, in particular,⁵ the courts have unconscionably preferred the restrictive approach to standing. To a great extent, and much to the chagrin of modern-day constitutionalism, this restrictive approach to standing is inspired by the Constitution itself. Section 22(1) of the Constitution provides that any person who alleges that the Bill of Rights in the Constitution

1 See M Khaketla *Lesotho 1970: An African coup under the microscope* (1972); WJA Macartney 'The Lesotho general election of 1970' (1973) 8 *Government and Opposition* 485; TH Mothibe 'Lesotho: The rise and fall of military-monarchy power-sharing 1986-1990' (1990) 20 *Africa Insight* 242.

2 V Shale 'Political parties and instability in Lesotho' in M Thabane (ed) *Towards an anatomy of political instability in Lesotho 1966-2016* (2017); K Matlosa & NW Pule 'The military in Lesotho' (2001) 10 *African Security Review* 62-74; H Nyane 'Development of constitutional democracy: 20 years of the Constitution of Lesotho' (2014) 21 *Lesotho Law Journal* 59.

3 *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B) 243-245; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 (2) SA 1 (CC) para 82; E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

4 M Cappelletti *The judicial process in comparative perspective* (1989) 236.

5 For the notion of how a court sitting at trial is also standing trial, see A Barak 'Justice Matthew O Tobriner memorial lecture: The role of a Supreme Court in a democracy' (2001-2002) 53 *Hastings Law Journal* 1216. He states: 'I see my role as a judge as a mission. Judging is not merely a job. It is a way of life. An old Jewish Talmudic saying regarding judges is the following: "You would think that I am granting you power? It is slavery that I am imposing upon you." But it is an odd sort of slavery, where the purpose is to serve liberty, dignity and justice. Liberty to the spirit of the human being; dignity and equality to everyone; justice to the individual and to the community. This is the promise which accompanies me to the courtroom daily. As I sit at trial, I stand on trial.'

has been violated 'in relation to him' may approach a court of law for redress.⁶ Although the Constitution is silent about standing in the enforcement of other parts of the Constitution,⁷ the courts have readily invoked section 22(1) to exclude litigants who are not 'directly and substantially' affected by the case being brought before the court.⁸ This restrictive approach notwithstanding, a fairly liberal approach has been preferred in pockets of public law decisions of the Lesotho courts.⁹

Section 22(1) of the Constitution codifies the common law normative position on the rules of standing.¹⁰ Ironically, this has made it possible for an individual in his or her private capacity – who under common law was limited to raising private law-based questions regarding the violation of his or her private law rights or interests – to bring public law issues (constitutional questions) before a court of law. The enforcement of the Constitution, in general, and the Bill of Rights, in particular, is a matter for public law since it

6 See sec 22(1) of the Constitution of Lesotho 1993.

7 In other parts of the Constitution it can be inferred that the Constitution is wedded to the restrictive approach to standing. Eg, sec 45(5) provides that '[w]here any person has been designated to succeed to the office of King in pursuance of subsection (1) or (2), any other person who claims that, under the customary law of Lesotho, he should have been so designated in place of that person may, by application made to the High Court within a period of six months commencing with the day on which the designation was published in the Gazette, apply to have the designation varied by the substitution of his own name for that of the first mentioned person, but, save as provided in this Chapter, the designation of any person for the purposes of this section shall not otherwise be called in question in any court on the ground that, under the customary law of Lesotho, the person designated was not entitled to be so designated' (our emphasis).

8 *Mosito v Letsika* (C OF A (CIV) 9/2018) [2018] LSCA 1 (26 October 2018). See also *Justice Maseshophe Hlajoane v Letsika* (C OF A (CIV) 66/2018) [2019] LSCA 27 (1 February 2019) para 57, where the Court stated: 'The law on *locus standi* in this country does not permit any constitutional litigation outside section 22(1) of the Constitution. In this case the respondent had no sufficient interest to pursue litigation pursuant to section 125 of the Constitution.'

9 *Lesotho Police Staff Association (LEPOSA) v Commissioner of Police* [2018] LSHC 13 (15 March 2018); *Mokhothu v Speaker of the National Assembly* (Constitutional Case 20/2017) 2017 LHC 20 (21 February 2018). In some instances the courts have proceeded to hear the merits of the case of an applicant who would ordinarily not have standing to litigate. See, eg, *Khathang Tema Baitsukuli v Maseru City Council* (C OF A (CIV) 4/2005); *Mofomobe & Another v Minister of Finance & Another*; *Phoofolo KC & Another v The RT Hon Prime Minister & Others* (C OF A (CIV) 15/2017 CONST./7/2017 C OF A (CIV) 17/2017) [2017] LSCA 8 (12 May 2017).

10 L Chiduzwa & PN Makiwane 'Strengthening *locus standi* in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroomse Elektroniese Regsblad* 1. Referring to the same provision under the 1980 Constitution of Zimbabwe, the authors correctly observe that 'the *Lancaster House Constitution* adopted the traditional common law approach to standing. Under this approach it was required that an individual must have a "personal, direct or substantial interest" in a matter in order to have standing' (2).

affects the public interest or collective interest of a large number of persons.¹¹

The purpose of this article is to amplify the liberal approach that is already being preferred in some decisions of superior courts in Lesotho. The article contends that constitutional democracy in Lesotho will benefit from a liberal approach as opposed to a restrictive approach to standing. Modern-day public law has moved towards a more liberal approach to standing. As the Trinidad and Tobago Court of Appeal stated in *Dumas v Attorney General of Trinidad and Tobago*:¹²

[T]he issue of standing in relation to the vindication of the rule of law, where there is alleged constitutional default, assumes great significance given the constitutional ethic of civic republicanism – that emphasises the responsibility, even duty, of citizens to participate in creating and sustaining a vibrant democracy and in particular in upholding the rule of law.

The Court asked the pertinent question, which this article seeks to investigate further in relation to Lesotho, whether it is right that

a person with an otherwise meritorious challenge to the validity or *vires* of the exercise of a constitutional power [can] ... be turned away by the gatekeepers of the courts on the basis that his rights or interests are not sufficiently and directly affected by the impugned decision.¹³

The article comprises three parts. The first revisits the evolution of the doctrine of *locus standi* and its application in Lesotho. The second discusses the emergence of a liberal approach to standing in public law litigation and faint signs of this approach in Lesotho. The third examines the benefits of a liberal approach to standing and how it can be applied in Lesotho under the current constitutional framework. The article concludes by recommending both interpretive and reformist changes in Lesotho.

11 P Bowal 'Speaking up for others: *Locus standi* and representative bodies' (1994) 35 *Les Cahiers de Droit* 908.

12 *Dumas v Attorney-General of Trinidad and Tobago* Civil Appeal P 218 of 2014 para 43 (*Dumas*) Trinidad and Tobago Court of Appeal decision (22 December 2014), http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2014/jamadar/CvA_14_P218DD22dec2014.pdf (accessed 10 April 2020) (confirmed by the Privy Council in *Attorney General v Dumas* [2017] UKPC 12).

13 In attempting to answer this question, the Court stated at para 48: 'To answer this question affirmatively, would be to assume that the primary function of the public law court's jurisdiction is to redress individual or specific grievances, and not general grievances concerned with the maintenance of the rule of law in a democracy. And also, that the primary focus of public law is to address individual rights and not public wrongs arising out of constitutional duty and responsibility.'

2 Evolution of the common-law doctrine of *locus standi*

The doctrine of *locus standi* is central to litigation in general. It relates to whether a person has capacity or standing to launch legal proceedings.¹⁴ It often is differentiated from the claim or the right to be adjudicated upon. Questions related to *locus standi* often are procedural and preliminary: They are determined before the claims or the rights in question.¹⁵ *Locus standi* is a doctrine of great antiquity the genesis of which may be traced back to the 'common law of the *laissez faire* dominated England',¹⁶ during an era 'when private law dominated the legal scene and public law had not yet been born'.¹⁷ At the time, the king exercised the legislative, executive and judicial functions of the state, and the king's subjects were left free to conduct all their activities, provided they obeyed the law. Any disputes between subjects were based on private law and to a large degree were regulated by 'privity of contract'. The *laissez faire* principle was inviolable and the king interfered in the private space only in extremely limited circumstances. To have access to the king's court, it was necessary for a private actor to establish an injury or threat of injury to his body, mind, property or reputation arising from the violation of these legally-protected interests,¹⁸ and to show that he qualified as a 'person aggrieved'.¹⁹ As access to court was conditional on a violation of or threat to personal rights and interests, the judicial remedy, in turn, was predicated on the proof of the violation of or threat to those rights and interests; hence the phrase *ubi jus ibi remedium*.²⁰ In terms of this corrective justice paradigm, the courts' intervention on behalf of a plaintiff was predicated on the wrongdoer-victim and wrong-relief correlativity. The courts' focus, on this baseline, was on the immediate relationships of the parties as

14 Herbstein & Van Winsen *The civil practice of the Supreme Court of South Africa* (1997); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T).

15 In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 3 BCLR 251 (CC) para 34 the Constitutional Court of South Africa said the following about standing: '[A]n own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: A successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings"'.¹⁹

16 KS Mohan 'Public interest litigation and *locus standi*' (1984) *Cochin University Law Review* 527.

17 *SP Gupta v Union of India* 1982 AIR 149 para 18.

18 *Gupta* (n 17) para 14.

19 *Re Sidebotham, Ex parte Sidebotham* 28 WR 715 (CA); *In re Reed, Bowen & Co Ex parte Official Receiver* 19 QBD 174.

20 Literally, where there is a right, there is a remedy. See TA Thomas 'Ubi jus ibi remedium: The fundamental right to a remedy under due process' (2004) 41 *San Diego Law Review* 1633.

opposed to the parties' relationship in the wider context of society and the factoring of the societal concerns and considerations in the decision itself.²¹

With the advent of democratic governance and the growing welfare state, state power began to shift from the king to representatives of the electorate and to institutions of governance exercising statutory powers.²² Public law space also developed but was separated from the already-existing private space by the classical liberal theory of the public-private distinction,²³ thus creating a public-private dichotomy – 'a separation between the state area where political prerogatives prevail, and the private sphere where autonomous persons interact according to their own preferences'.²⁴

In this setting, the private rights and interests of the citizens nonetheless were infringed by the state actors, posing a challenge as to who may question the legality or otherwise thereof before the court. As the exercise of statutory authority clearly was within the public space based on the traditional public-private categorisation, the common law courts had to create a window for private actors to meet the challenge, in the interests of justice and in order to place the state functionaries within the limits set by law. The courts, therefore, granted standing only to persons adversely affected by wrongful and unlawful state-backed law or conduct (aggrieved persons)²⁵ to mount such a challenge.²⁶ Yet another challenge arose where state action affected the general public interest with no clear private actor personally adversely affected. In these cases, only the Attorney-General had the legal authority and standing to protect

21 D Nolan & A Robertson 'Rights and private law' in D Nolan & A Robertson (eds) *Rights and private law* (2012) 23-24. Cane states that according to corrective justice, private law is concerned with the protection and promotion of the value of human autonomy rather than other human values such as community and solidarity. See P Cane 'Rights in private law' in D Nolan & A Robertson (eds) *Rights and Private Law* (2012) 56. See also *Ferreira v Levin* 1996 (1) SA 984 (CC) para 229: '[A]s a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.'

22 Mohan (n 16) 527.

23 ST Maqakachane 'Horizontal application of the Bill of Rights: Comparative perspective' (2018) 26 *Lesotho Law Journal* 1.

24 N Reich 'The public/private divide in European law' in HW Micklitz & F Cafagis (eds) *European private law after the common frame of reference* (2010) 56.

25 *Re Sidebotham* (n 19); *In re Reed* (n 19).

26 Mohan (n 16) 527.

and enforce public rights (public interest).²⁷ Consequently, the Court held that

private rights can be asserted by individuals but ... public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the crown and the Attorney-General enforces them as an officer of the crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights so in general no private person has the right of representing the public in the assertion of public rights.²⁸

From the above it is clear that the rules of standing, as Bowal puts it, are 'a common law construct'²⁹ as they have been developed by the judiciary itself to meet the particular circumstances. The purpose of creating and developing rules of standing by the common law courts was 'to limit access to the courts in public law matters'.³⁰ The rules are employed by the courts as time-management tools to maximise the judiciary's limited resources, a self-defence mechanism designed to preserve and maintain the legitimacy of the courts as an apolitical professional institution³¹ and a self-restraint measure.³² The courts recognise that 'limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so'.³³

The rationale for these limitations on standing include judicial concern about the proliferation of marginal or redundant suits, called 'opening the floodgates of litigation', which overburden limited judicial resources; judicial concern about excluding 'busybodies' and meddlesome interlopers so that only litigants with a personal stake in the outcome of the case get priority in the allocation of judicial resources; and the need for courts, in an adversarial system of adjudication, to have the benefit of contending points of view of the

27 *Gouriet v Union of Post Office Workers* [1978] AC 435; *Attorney-General Ex re McWhirter v Independent Broadcasting Authority* [1973] QB 629; *Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] QB 118; T Longwill 'Standing in environmental interest suits' (1987) *Queensland Institute of Technology Law Journal* 77.

28 *Gouriet* (n 27) 477-478.

29 Bowal (n 11) 908.

30 R Weill 'The strategic common law court of Aharon Barak and its aftermath: On judicially-led constitutional revolutions and democratic backsliding' (2020) 12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296578 (accessed 8 April 2020).

31 NW Barber 'Self-defence for institutions' (2013) 72 *Cambridge Law Journal* 558-577. See also Weill (n 30) 12.

32 DL Haskett '*Locus standi* and the public interest' (1981) 4 *Canada-United States Law Journal* 40.

33 *Attorney-General v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524 para 23 (*Downtown*).

persons most directly affected by the issue (concrete adversaries).³⁴ To different degrees across the common law jurisdictions, however, the common law family courts had to grapple with these limitations in an effort to strike a delicate balance between allowing access to justice and scarce judicial resources,³⁵ taking into account the circumstances peculiar to their specific jurisdictions. The basic premise underlying the rules of standing running through these jurisdictions was the need to balance two conflicting public interests, namely, 'the desirability of encouraging individual citizens to participate actively in the enforcement of the law and the undesirability to discourage the professional litigant and the meddlesome interloper to invoke the jurisdiction of the court in matters that do not concern them'.³⁶

Lesotho is no exception in having to deal with this dilemma. The next part analyses how the judiciary in Lesotho is addressing the issue.

3 Constitutional framework and judicial approach in Lesotho

The Constitution of Lesotho has no express provisions on standing to litigate on constitutional questions that do not fall within the Bill of Rights. It provides, instead, in section 22(1):

If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

This section is based on the common law position on standing. Under Roman-Dutch law, on which the common law of Lesotho is based,³⁷ a private actor must establish a substantial legal interest which is being or is likely to be violated, except in cases where a person was detained, in which case a relative or friend would be granted standing to apply or institute the claim on the latter's

34 *Downtown* (n 33) paras 25-29. See also *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607 631-634 (*Finlay*).

35 *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 243 252 (*Canadian Council of Churches*).

36 H Woolf et al *De Smith's judicial review* (2007) 69-70. See also *Downtown* (n 33) para 23.

37 JE Beardsley 'The common law in Lesotho' (1970) 14 *Journal of African Law* 198; SM Poulter 'The judicial system of Lesotho' (1970) 3 *Comparative and International Law Journal of Southern Africa* 63; S Poulter 'The common law in Lesotho' (1969) 13 *Journal of African Law* 127.

behalf.³⁸ It is clear that this is ‘personal injury, or personal damage standing’ accorded to the persons personally affected by the impugned measure. The test for standing under the common law clearly is pedantic and restrictive in its formulation and application. This common law position on personal injury standing became part of the common law of Lesotho.³⁹

The Lesotho courts generally are loath to liberalise rules of standing in public law.⁴⁰ This trajectory started with *Lesotho Human Rights Alert Group*.⁴¹ In this case a voluntary association sought the release of certain prisoners who, it was alleged, had been unlawfully detained. Both the High Court and the Court of Appeal agreed that the applicant organisation lacked standing. In delivering the unanimous judgment of the Court of Appeal, Tebbutt AJA stated:

To extend to a body such as the applicant, the right to bring actions on behalf of persons unconnected with it and who have no link direct or indirect with it would, however, in my view, in law be extending the exceptional relaxation of the general rule to the liberty of an individual beyond what was intended in regard to such matters in *Wood’s* case. It would be akin to a revival of the ‘*actio popularis*’ which, as I have said, has been no part of our law for over four centuries.

However, the Court of Appeal, despite it adopting a restrictive approach to standing, reaffirmed that there are certain exceptions to the *locus standi* doctrine in Roman Dutch law. The Court held that standing may be granted to a private litigant who is not personally affected, in an *interdictum de libero homine exhibendo*.⁴² This is an application for the release of another person who has been

38 Woolf et al (n 36) 69-70.

39 *Lesotho Human Rights Alert Group v Minister of Justice and Human Rights* LAC (1990-1994) 652.

40 In *Hlajoane v Letsika* (n 8) para 33 the Court of Appeal reaffirmed its stern approach that opposes the liberalising stand, which has been repeated in successive cases thus: ‘In my view, the issue of *locus standi* was put to bed and it need not be repeated. The view that I take is that following our decisions in *Mofomobe* and *Mosito*, the respondents had no *locus standi* and the Court below ought not to have entertained the application. Technically, that disposes of the second ground of appeal.’

41 *Lesotho Human Rights Alert Group* (n 39).

42 As above. The Court held: ‘In an application *de libero homine exhibendo*, however, which is part of the Roman-Dutch Law, the South African courts have held that, where the liberty of a person is at stake, the *locus standi* of a person who brings an application or action on behalf of a detained person should not be narrowly construed but, on the contrary, should be widely construed because the illegal deprivation of liberty is a threat to the very foundation of a society based on law and order (see *Wood v Odangwa Tribal Authority* 1975 (2) SA 294 (AD) 310F-G)). Persons other than the detainee could thus bring an action for his release on the detainee’s behalf.’

unjustly detained.⁴³ Standing could also be granted in exceptional circumstances justified by humanitarian considerations.⁴⁴

The superior courts exhibited their restrictive approach to standing in public law in *Khauoe v Attorney-General*.⁴⁵ In this case an individual attorney challenged an irregular succession to the office of King.⁴⁶ Although the Court accepted that the question he was raising was 'paramount', it dismissed the case on the basis that he had no *locus standi*. The Court reasoned that '[a] person who wants to institute an action must only sue on his own behalf. The right or interest which he seeks to enforce or to protect must be available to him personally'.⁴⁷ The Court of Appeal has maintained its restrictive approach in later cases.⁴⁸ Its most recent decision on standing, *Hlajoane v Letsika*,⁴⁹ may be regarded as the current position of the courts on standing in public law.

Despite the narrow approach of the Court of Appeal, the High Court in a number of cases has adopted a liberal approach to standing.⁵⁰ In *Development for Peace Education v Speaker of the National Assembly*⁵¹ two non-governmental organisations (NGOs) challenged the validity of an Act of Parliament on the ground, among others, that they were denied participation in the enactment process, which contravened section 20 of the Constitution. The Court agreed that, in terms of section 20, every citizen has a right to participate in government,⁵² which includes the right to vindicate this right in the courts of law,

43 Wood (n 42). This action was comparable to the English *habeas corpus*. See JA van der Vyver 'Actiones populares and the problem of standing under Roman, Roman-Dutch, South African and American law' (1978) *Acta Juridica* 193.

44 Van der Vyver (n 43) 197.

45 *Khauoe v Attorney-General* (CIV/APN/53/95) [1995] LSHC 100 (12 September 1995), <https://lesotholii.org/ls/judgment/high-court/1995/100> (accessed 10 April 2020).

46 The applicant, Khauoe, applied to the High Court for a declaration of invalidity of the Office of the King (Reinstatement of Former King) Act 1994. The Act sought to reinstate King Moshoeshoe II who, in 1992, had been dethroned and exiled by the Military Council, and at the same time to enthrone his son, Mohato Seeiso, who became King Letsie III, in the former's absence.

47 *Khauoe* (n 45).

48 *Hlajoane v Letsika* (n 8); *Mosito v Letsika* (n 8); *Mofomobe* (n 9).

49 *Hlajoane v Letsika* (n 8).

50 In terms of the Constitution of Lesotho, the Court of Appeal is the apex court while the High Court is the second highest court in the court structure. See sec 118 of the Constitution of Lesotho 1993.

51 *Development for Peace Education v Speaker of the National Assembly Constitutional Case 5/2016* (unreported).

52 Sec 20 of the Constitution of Lesotho provides: '(1) Every citizen of Lesotho shall enjoy the right – (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot; (c) to have access, on general terms of equality, to the public service. (2) The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution.'

both individually and collectively. The High Court, sitting as the Constitutional Court, agreed and reasoned that

for purposes of this judgment, we assume that the applicants truly have *locus standi* not so much as juristic persons but ‘as a collective or associations of citizens of Lesotho’ whose principal aim is to ensure peace, human rights and democratic governance, and that every citizen, either individually or collectively, has a fundamental right under *section 20* of the Constitution of Lesotho to take part in the conduct of public affairs of Lesotho.⁵³

In *Lesotho Police Staff Association (LEPOSA) v Commissioner of Police*⁵⁴ the High Court permitted the police association to litigate in a case where it was challenging promotions in the police service that allegedly were unlawful. The Court rejected the procedural point of the association’s lack of *locus standi* on the basis of the principle of legality.⁵⁵ In *Mokhothu v Speaker of National Assembly*⁵⁶ two opposition political parties in Parliament – the Democratic Congress (DC) and the Popular Front for Democracy (PFD) – had joined an application by the first applicant, the official leader of the opposition. They were challenging the decision of the Speaker of the National Assembly to deprive the first applicant of his status and benefits as the official leader of the opposition. The standing of the two political parties was challenged. The High Court, sitting as the Constitutional Court, dismissed the challenge to the standing of the political parties on the basis that ‘political parties are not just vehicles for electioneering and conveyor belts to parliament. They are legal *personae* with rights and responsibilities in the constitutional and statutory scheme of things’.⁵⁷

In its most recent decision in *All Basotho Convention v The Prime Minister*⁵⁸ the High Court prevaricated on the question of standing. In this case the All Basotho Convention (ABC) and the Basotho National Party (BNP), the two political parties in the governing coalition, and

53 *Development for Peace Education* (n 51) para 39 (emphasis in original).

54 *Lesotho Police Staff Association* (n 9).

55 H Nyane ‘The state of administrative justice in Lesotho’ in H Corder & J Mavedzenge (eds) *Pursuing good governance: Administrative justice in common law Africa* (2019) 1.

56 *Mokhothu* (n 9).

57 *Mokhothu* para 20. The approach of treating a juristic person as having standing to litigate on public law, in general, and human rights law, in particular, was settled by the South African Constitutional Court in *Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC) para 57 as follows: ‘It was argued that “everyone” in CP II refers only to natural persons, and that, by extending the rights to juristic persons, the rights of natural persons are thereby diminished. We cannot accept the premise: Many “universally accepted fundamental rights” will be fully recognised only if afforded to juristic persons as well as natural persons.’

58 Constitutional Case 6 of 2020 (not yet reported).

the Democratic Congress (DC), which is an official opposition party in Parliament, challenged the unilateral prorogation of Parliament by the Prime Minister. The standing of the three political parties was challenged on the basis that their interest was 'political rather than legal'. The Court, rather strangely, accepted the capacity of the two political parties in government and rejected that of the party in opposition.⁵⁹ The Court justified its seemingly selective approach to standing by stating that the coalition agreement, in terms of which the government had been formed, placed an obligation on the Prime Minister to consult coalition partners. The Court stated:⁶⁰

The Court is of the view that construed this way, the cause of action raises a novel but important constitutional complaint. The complaint is not of mere academic interest. Viewed objectively, it has implications for the stability and smooth operation of coalition governments which voters have a huge interest in. For this reason, the Court accepts that the political parties have *locus standi*.

As indicated earlier, these decisions are faint signs of the High Court, both in its ordinary jurisdiction and constitutional jurisdiction, trying to adopt a more liberal approach to standing. However, pockets of decisions from the High Court remain that still demonstrate that the High Court is not completely out of the entrapment of the restrictive approach to standing. For instance, in the case of *David Mochochoko v The Prime Minister & Others*⁶¹ the High Court denied a taxpayer standing to challenge a glaring illegality in the use of public funds. The background is as follows: In response to the global Coronavirus pandemic, the government of Lesotho established a temporary structure to deal with the virus. The structure was called the National Emergency Command Centre (NECC). Despite its noble intentions, the structure was not established by law and yet it was managing large sums of public funds in its work. This was contrary to section 111 of the Constitution.⁶² The applicant sought to challenge this

59 *All Basotho Convention* (n 58) para 12, where the Court unconvincingly reasoned that '[t]he respondents' objection to the *locus standi* of the ABC and the BNP is, therefore, dismissed. As regards the DC, it is not a signatory to any coalition agreement. Its leader is the shadow Prime Minister functioning in opposition to the coalition government of which the ABC and BNP are a part. Thus, its interest in these proceedings is political and not legal. It does then not have *locus standi*.' The view of the Court is overly selective. An official party in Parliament certainly has an interest in the legality of the prorogation of Parliament.

60 *All Basotho Convention* (n 58) para 11.

61 CIV/APN/141/2020 (unreported).

62 Sec 111 Constitution of Lesotho: '(1) No moneys shall be withdrawn from the Consolidated Fund except – (a) to meet expenditure that is charged upon the Fund by this Constitution or by any Act of Parliament; or (b) where the issue of those monies has been authorised by an Appropriation Act or by an Act made in pursuance of section 113 of this Constitution. (2) Where any monies are charged by this Constitution or any Act of Parliament upon the Consolidated Fund or any other public fund, they shall be paid out of that fund by the Government of Lesotho to the person or authority to whom payment is due. (3) No money shall

illegality in his capacity as a taxpayer. The High Court denied him standing. The basis for the Court's decision was that

[t]he applicant is suing the Executive Government (*sic*) as a citizen of this country to compel it to act in accordance with the Act is not enough to satisfy the requirement that he must have a direct and substantial interest in the outcome of this case. *It is true that the government acted outside the boundaries of the Act, but that does not entitle him to sue to compel government to act within it. Parliament should have acted and exercised its oversight powers, not the applicant.*⁶³

The Court stated that '[e]ven if monies are being spent wastefully or illegally at the NECC, that does not entitle the taxpayer to sue'.⁶⁴

In a similar manner, in *Seq International (Pty) Ltd v Lesotho Millennium Development Agency*,⁶⁵ the High Court denied standing to a company that was alleging discrimination in the procurement policy of a statutory body. Surprisingly, the applicant company was alleging that it had been prevented from bidding by an allegedly discriminatory policy. The Court ruled that since the company had not applied for consideration, it did not have the standing to challenge the procurement policy in question.

It would seem that in both *Mochochoko* and *Seq International* a restrictive approach to standing was used by the court as a technique for merit avoidance. The merit avoidance technique is an approach the courts use to avoid the merits of the case for several reasons. It may be that the question to be decided is not justiciable or that a decision on the merits may have far-reaching consequences either for the court or for society as a whole. In most cases courts use this technique to avoid politically-contentious questions on the merits; in keeping with the 'political question' doctrine.⁶⁶ The courts, therefore, use *ex ante* techniques such as lack of jurisdiction, lack of standing or non-justiciability as a strategy to decline to decide on the merits.⁶⁷ As Fouchard contends, '[m]erits-avoidance techniques concern the question of whether the Court proceeds to a review of

be withdrawn from any public fund other than the Consolidated Fund unless the issue of those monies has been authorised by or under any law.'

63 *Mochochoko* (n 61) para 8 (our emphasis).

64 As above. The Court relied on the old decision of *Dalrymple & Others v Colonial Treasurer* 1910 TS 372. On how the principles governing standing have drastically changed since the *Dalrymple* case, see C Plasket 'The globalisation of class actions' (2009) 622 *The Annals of the American Academy of Political and Social Science* 256.

65 Const/04/2020 (unreported).

66 J Odermatt 'Patterns of avoidance: Political questions before international courts' (2018) 14 *International Journal of Law in Context* 221; FW Scharpf 'Judicial review and the political question: A functional analysis' (1966) 75 *Yale Law Journal* 517.

67 EF Delaney 'Analysing avoidance: Judicial strategy in comparative perspective' (2016) 66 *Duke Law Journal* 1.

the merits at all, and tend to follow a binary, black-or-white logic'.⁶⁸ The merit-avoidance strategy was more pronounced in *Mochochoko* where a decision on the merits would mean that the government's creation of the National Emergency Command Centre to combat the Coronavirus and the large sums of money already spent by the government on an 'illegal' institution would be a nullity. The Court denied the applicant standing despite its own admission that '[i]t is true that the government acted outside the boundaries of the Act'.⁶⁹

The *Mochochoko* and *Seq International* cases notwithstanding, there are glimmers of a more liberal approach to standing in the High Court, as epitomised by cases such as *Lesotho Police Staff Association, Development for Peace Education, Mokhothu* and *All Basotho Convention* discussed above. However, because of the doctrine of judicial precedent,⁷⁰ decisions of the higher court – which is the Court of Appeal in Lesotho – still take precedence.⁷¹ Hence, the prevailing judicial attitude towards standing in public law cases in Lesotho is the one held by the Court of Appeal. Nevertheless, as is argued here, the High Court's approach is more in keeping with contemporary trends in public law litigation.⁷² As will be demonstrated below, contemporary theories of constitutionalism favour a liberal approach to standing, as opposed to a restrictive approach.

4 Theoretical justifications for a liberal approach to standing

Both the constitutional frameworks and judicial approaches of many common law countries, to varying degrees, have liberalised standing rules.⁷³ Many artefacts of modern-day constitutionalism account for this trend but two theories reign supreme: the theory of the role of the court in modern democracy and the theory of the supremacy of the constitution. These theories, as will be demonstrated, both

68 F Fouchard 'Allowing "leeway to expediency, without abandoning principle"? The International Court of Justice's use of avoidance techniques' (2020) 33 *Leiden Journal of International Law* 767-771.

69 *Mochochoko* (n 61) para 8.

70 JW Salmond 'Theory of judicial precedents' (1900) 16 *Law Quarterly Review* 376.

71 Sec 123(1) of the Constitution provides: 'There shall be for Lesotho a Court of Appeal which shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law.' For the application of the doctrine of judicial precedent in Lesotho, see *Lepule v Lepule & Others* (C of A (CIV) 34/2014) [2015] LSCA 29 (22 September 2015).

72 AK Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 407; GR Nichol 'Justice Scalia, standing, and public law litigation' (1992) 42 *Duke Law Journal* 1141; C Harlow 'Public law and popular justice' (2002) 65 *Modern Law Review* 1; CR Sunstein 'Standing and the privatisation of public law' (1988) 88 *Columbia Law Review* 1432.

73 *Canadian Council of Churches* (n 35) 243-252.

apply to public law in Lesotho. The Lesotho judiciary can readily invoke these to join the wave of other common law countries that are liberalising their legal regimes on standing.

4.1 Theory of the role of a court in modern democracy

The modern-day court is starkly different from the court in the past. The emergence of new devices of constitutionalism, such as the rule of law, separation of powers and independence, has given the judiciary greater powers. This is in contradistinction to the old judiciary that operated in the shadow of the supremacy of parliament. The theory on the judicial role in modern democracies – to protect and defend the constitution and democracy itself – is considered the crucible and mainstay for the development of liberal rules of standing in contemporary civil procedure law. Traditionally, courts conceptualised their roles in the administration of justice as limited to the adjudication and resolution of disputes between adversarial parties in which the parties claim that their private rights have been violated or are at risk of violation.⁷⁴ The courts also viewed their role as a narrow one: to search for and implement the intention of parliament in every case in which they were called to adjudicate on public affairs.⁷⁵

In a modern democratic society founded on, among other precepts, participatory democracy, every citizen has a legitimate interest in upholding the constitution and the rule of law.⁷⁶ The courts, in turn, as guardians of the constitution, have the duty and responsibility to ensure that the constitution and the rule of law are upheld.⁷⁷ As McKechnie J correctly observed in *Digital Rights*

74 Haskett (n 32) 41; A Barak 'A judge on judging: The role of a supreme court in a democracy' (2002-2003) 116 *Harvard Law Review* 108.

75 The Court adopted a trailblazing approach in *British Railways Board v Pickin* [1974] 1 All ER 609 622 where it held: 'It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act ... 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 whether in any particular case those procedures were effectively followed.'

76 *Dumas* (n 12) para 103. See also SP Sathe 'Public participation in judicial process: New trends in law of *locus standi* with special reference to administrative law' (1984) 26 *Journal of the Indian Law Institute* 1. The South African Constitutional Court regularly permits associations standing to assert participation in public affairs. See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 5 BCLR 622(CC); *Doctors for Life International v Speaker of the National Assembly & Others* 2006 12 BCLR 1399(CC); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 10 BCLR 968 (CC).

77 *Dumas* (n 12) paras 103 & 128; *Bobb v Manning* [2006] UKPC 22 paras 13 & 14; *Yehuda Ressler v Minister of Defence* HCJ 910/86 para 23 (12 June 1988),

Ireland,⁷⁸ the courts have a constitutional 'duty to prevent the unconstitutional abuse of public power, be it through legislation or otherwise', especially where 'it is clear that a particular public act could adversely affect the constitutional ... rights of the plaintiff, or indeed society as a whole'.⁷⁹ In a constitutional democracy, and in keeping with this constitutional duty, the courts' new-found role goes beyond the traditional adjudication and resolution of disputes. Their new judicial role includes upholding constitutional integrity and defending democracy, the rule of law and legality, thus bridging the gap between law and society.⁸⁰ In order for the courts to fulfil these functions, the liberalisation of standing is unavoidable.⁸¹ In dealing with the theory of the new role of the court and its implications for standing, the Indian Supreme Court in *SP Gupta v Union of India*⁸² stated:⁸³

The courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened ... The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busybody or a meddling interloper but who has sufficient interest in the proceeding.

In *Ferreira v Levin*⁸⁴ the South African Constitutional Court described the courts' 'new' role in a constitutional democracy as requiring that access to courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. O'Regan J noted that it was particularly important that not only those with vested interests should be afforded standing in constitutional challenges where remedies might have a wide impact.⁸⁵ According to Cappelletti, 'the old, formalistic bodies and techniques' that are

<https://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence> (accessed 10 April 2020) (Ressler).

78 *Digital Rights Ireland v Minister for Communication, Marine and Natural Resources* [2010] 3 IR 251.

79 *Digital Rights Ireland* (n 78) para 49.

80 Barak (n 74) 28 36.

81 Mohan captures this shift much more pointedly as follows: 'This new trend drives away the past evils of legal technicality and procedural rigidity. Liberalisation of the need to prove *locus standi* for invoking the jurisdiction of the court is the most notable phenomenon of this change.' See Mohan (n 16) 523.

82 *Gupta* (n 17).

83 *Gupta* para 18.

84 *Ferreira* (n 21).

85 *Ferreira* para 230. There the Court said: '[A]ccess to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.'

'frequently unsuitable for the new role must change, and the courts' must contribute to mould[ing] the law to society's novel needs and aspirations'.⁸⁶ In *Downtown* the Canadian Supreme Court indicated that the increase in governmental regulation and the coming into force of the Charter have resulted in the courts moving away from a purely private law conception of their role and this is reflected in some relaxation of the traditional private law rules relating to standing to sue.⁸⁷

As a result of the new role of the judiciary, maintenance of the rule of law and legality⁸⁸ takes centre stage while the identity and 'rights' of the applicant no longer are all-important criteria. In *Digital Rights Ireland* McKechnie J correlated the constitutional duty of courts to prevent the abuse of public power with the need to liberalise rules on standing, and held that such a duty called for 'a more relaxed approach to standing ... in order for the Court to uphold that duty, and vindicate' personal and public rights and interests.⁸⁹

The liberal rules of standing thus are closely connected to the rule of law, which the courts are obliged to uphold. According to Barak, closing the doors of the court to an applicant who cannot establish a legal right in the matter but who warns of a public body's unlawful action means giving that public body a free hand to act without fear of judicial review.⁹⁰ The result, Barak continues, is the creation of 'dead areas' in which a legal norm exists, but the public body is left free to violate the norm without the possibility of judicial review.⁹¹ Such a situation, Barak concludes, 'may lead in the end to a violation of the legal norm, undermining the rule of law and undermining democracy'.⁹²

The same sentiments were echoed, albeit in different terms, by the Trinidad and Tobago Court of Appeal, which stated that a court that denies access to *bona fide* and legitimate public interest actions for constitutional review, even in non-Bill of Rights challenges, because it is not expressly provided for, fails in its duty and denies its role as the guardian of the constitution.⁹³ In abdicating this responsibility to uphold the constitution where unconstitutional

86 Cappelletti (n 4) 236.

87 *Downtown* (n 33).

88 This concept means that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. See *Downtown* (n 33) para 31.

89 *Digital Rights Ireland* (n 69) para 49.

90 Barak (n 74) 109.

91 As above.

92 As above.

93 *Dumas* (n 12) para 131.

action has occurred, such a court betrays the trust of the people and participates in undermining the rule of law. All these consequences are the antitheses of the role and function of a constitutional court in a democratic society.⁹⁴ Ultimately, the Court of Appeal concluded that

[the] issue of standing in relation to the vindication of the rule of law, where there is alleged constitutional default, assumes great significance given the constitutional ethic of civic republicanism – that emphasizes the responsibility, even duty, of citizens to participate in creating and sustaining a vibrant democracy and in particular in upholding the rule of law.⁹⁵

Without a public interest litigant, public wrongs or injuries cannot be made the subject of litigation, which would be inimical to democracy itself.⁹⁶ Only by liberating the rules of standing, thereby allowing public interest standing, will the courts be able to shepherd the corridors of power.⁹⁷ Barak sums up the connection between the role of the judiciary in a democracy and public interest standing as follows:⁹⁸

How a judge applies the rules of standing is a litmus test for determining his approach to his judicial role. A judge who regards his role as deciding a dispute between persons with rights – and no more – will tend to emphasize the need for an injury in fact. By contrast, a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing.

In Lesotho there are some signs that the courts are trying to subscribe to this theory. In *LEPOSA* the court allowed a police association standing on the basis of legality.⁹⁹ In *Development for Peace Education* the court allowed standing on the basis of public participation enshrined in section 20 of the Constitution. Likewise, in *Mokhothu* the court allowed standing to political parties on the basis of the broader role of political parties in a constitutional democracy.

4.2 Theory of the supremacy of the Constitution

The Constitution of Lesotho is similar to many modern constitutions in that it is undergirded, among other liberal devices, by the

94 *Dumas* (n 12) para 131.

95 *Dumas* para 46.

96 *Thorson v Attorney-General of Canada* [1975] 1 SCR 138 145 (*Thorson*).

97 *Gupta* (n 17) para 18.

98 Barak (n 74) 107.

99 *Lesotho Police Staff Association* (n 9).

notion of constitutional supremacy.¹⁰⁰ As Linington points out, 'the concept of constitutional supremacy necessarily implies the existence of a right to challenge the constitutionality of laws before the courts'.¹⁰¹ This constitutional right has been described, in the context of examining the unconstitutionality of Parliament, as 'the right of the citizenry to constitutional behaviour of Parliament'.¹⁰² In *Thorson v Attorney-General of Canada*,¹⁰³ suing as a taxpayer in a class action, the applicant claimed that the Official Languages Act and the Appropriation Act implementing the Official Languages Act were unconstitutional. This occurred in circumstances where the Attorney-General had refused to mount a constitutional challenge, and where it was clear that without the constitutional challenge instituted by the applicant, the conduct of Parliament would be immune from constitutional review. The issue of the applicant's *locus standi* to raise the constitutionality of the Acts was raised as a threshold question in the court of first instance and was dismissed on appeal. On further appeal to the Canadian Supreme Court, the Court held that

[i]t is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour of Parliament where the issue in such behaviour is justiciable as a legal question. In the present case, I would, as a matter of discretion, hold that the applicant should be allowed to have his suit determined in the merits.¹⁰⁴

The Court thus held that the applicant had standing to raise constitutional questions against the impugned Acts, despite the applicant being a general member of the public, having no special or direct interest in the matter at issue as understood in the traditional sense. There is no reason why the same principle should not apply to the other branches of state: the judiciary, the executive and the administration.¹⁰⁵ In principle, a citizen in a constitutional democracy based on a supreme constitution has a right to constitutional behaviour by all public authorities or bodies. The exercise of this

100 Sec 2 of the Constitution of Lesotho provides: 'This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

101 G Linington 'Reflections on the significance of constitutions and constitutionalism for Zimbabwe' in EV Masunungure & JM Shumba (eds) *Zimbabwe: Mired in transition* (2012) 71.

102 *Thorson* (n 96) 138; *Law Society of Lesotho v Minister of Defence and Internal Security & Another* (CIV/APN/111/86) [1988], <https://lesotholii.org/ls/judgment/court-appeal/1988/66> (accessed 10 April 2020).

103 *Thorson* (n 96).

104 *Thorson* 163.

105 On the constitutionality of private power and behaviour, see *Crevier v AG (Québec) & Others* [1981] 2 SCR 220; *Koro-Koro Constituency v National Executive Working Committee, All Basotho Convention* (C of A (CIV) 10/2019) [2019] LSCA 3 (1 February 2019), <https://lesotholii.org/ls/judgment/court-appeal> (accessed 11 April 2020).

right is a means of ensuring that all public bodies are responsible in the exercise of their constitutional powers.¹⁰⁶ Breaches of the provisions of a supreme constitution that are not addressed, revealed and remedied are likely to debase the constitution and erode public trust and confidence in constitutional democracy.¹⁰⁷ Denying the citizenry this right, the authorities exercising public power would be able to act in an unconstitutional fashion with impunity.¹⁰⁸ As Weiler puts it, the citizenry must have the vehicle of 'public action' brought by an individual to enforce their right to constitutional behaviour.¹⁰⁹

Therefore it is clear that the supremacy clause is not only remedial¹¹⁰ and jurisdictional,¹¹¹ it is also a source of liberal public interest standing.¹¹² Public interest litigants may therefore seek to challenge any law or conduct on constitutional grounds not only in their own interests but also where the rights of other persons or the public interest are infringed or threatened.¹¹³ The court's central concern is to uphold the supremacy of the constitution and the rule of law, rather than being concerned with the identity of the applicant and his or her rights in the matter.¹¹⁴ Commenting on public interest standing under section 52(1) of the Canadian Constitution (the supremacy clause, as opposed to section 24(1) of the Canadian Bill of Rights Charter, the Bill of Rights enforcement section) Roach points out that

[a] public interest litigant should not be precluded simply because some more directly affected person could possibly contest the constitutionality of legislation. The rationale for such discretionary public interest standing is the public interest in having constitutional laws. A subsection 52(1) declaration changes the law for all whereas a subsection 24(1) remedy is designed to provide an appropriate and just remedy for a person whose rights have been violated.¹¹⁵

In the context of Lesotho, while *locus standi* under section 22(1) of the Constitution (Bill of Rights enforcement) is restricted to claims for

¹⁰⁶ *Dumas* (n 12) para 118.

¹⁰⁷ *Dumas* para 115.

¹⁰⁸ AF Bayesfky 'International human rights law in Canadian courts' in W Kaplan & D McRae (eds) *Law, Policy and International Justice* (1993) 307.

¹⁰⁹ PC Weiler 'Of judges and scholars: Reflections in a centennial year' (1975) *Canadian Bar Review* 572.

¹¹⁰ *R v Conway* [2010] 1 SCR 765 773; *Nova Scotia v Martin* [2003] 2 SCR 504 529.

¹¹¹ *Cuddy Chicks v CRTO* [1991] 2 SCR 13-14. Also see *Cooper v Canada* [1996] 3 SCR 887.

¹¹² Regarding threshold issues of *locus standi* under the supremacy clause, see *R v Big M Drug Mart* [1985] 1 SCR 295; *R v Ferguson* [2008] 1 SCR 96 paras 45, 58 & 59; K Roach 'Enforcement of the Charter: Subsections 24(1) and 52(1)' (2013) 62 *Supreme Court Law Review* 491-492.

¹¹³ See *Ferreira* (n 21) paras 167, 227 & 229.

¹¹⁴ *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3 paras 14 & 15.

¹¹⁵ Roach (n 112) 491.

personal relief, section 2 of the Constitution (the supremacy clause) lays down liberal rules of standing for private or other litigants to raise constitutional questions of incompatibility of any law or conduct with the Constitution, for either private or public reasons.¹¹⁶ In this regard Linington correctly states that

constitutional challenges framed on the basis of [the supremacy clause] of the Constitution need not allege that the [Bill] of Rights has been infringed. Such an allegation need only be made where the challenge is made in terms of the [Bill of Rights enforcement clause]. That provision is concerned exclusively with the jurisdiction of the courts in respect of the enforcement of the [Bill of Rights]. [The supremacy clause] is broader in that it justifies challenging the constitutionality of any law, regardless of whether or not it is alleged that the impugned law has violated a provision in the [Bill of Rights].¹¹⁷

The practice of the superior courts in Lesotho reveals that the constitutional right to constitutional behaviour has been anecdotally realised and extended to the Law Society,¹¹⁸ a professional body of lawyers, and to some private actors,¹¹⁹ in very limited circumstances. This practice, however, is not rooted in any theoretical or doctrinal basis, but is an intuitive reaction on a case-by-case basis. In several cases the Law Society mounted constitutional challenges against a public authority's unlawful conduct.¹²⁰ In all these cases, the Law Society admittedly could not have established standing on the basis of section 22(1) of the Constitution as it neither purported to be enforcing any Bill of Rights provisions, nor was it acting on behalf of some 'detained person'. The purpose of the Law Society in instituting these cases was to uphold the rule of law and constitutional integrity. It may be argued, therefore, that the Law Society, in addition to its statutory role, had at all material times been granted standing on the basis of the supremacy clause. The fact that the Law Society is a statutory body seized with the stated purposes under its constituting Act was not an answer to the threshold issue that was inquired into.

In the context of private actors, and commenting on the importance of section 2 of the Constitution (the supremacy clause),

116 See PW Hogg *Constitutional Law of Canada* (2007) 773-774; Roach (n 112) 491-492.

117 Linington (n 101) 73.

118 *Chief Justice & Others v Law Society* (C OF A (CIV) 59/2011 (constitutionality of rules authorising registrars to make judicial decisions in uncontested matters); *Law Society of Lesotho v Ramodibedi NO* Constitutional Case 1 of 2003 (constitutionality of Justice Ramodibedi performing judicial functions at the Court of Appeal, while he remained a judge of the High Court); *Law Society of Lesotho v Brendan Peter Cullinan* CIV/APN/438/2004 (constitutionality of the appointment of a retired judge as acting judge to hear a single matter).

119 *Koro-Koro Constituency Committee* (n 105) para 40.

120 See cases referred to in n 108.

the Court of Appeal in *Koro-Koro Constituency Committee* pointed out that section 2 was peremptory and the obligations imposed had to be fulfilled.¹²¹ The Court went on to state that because the courts in Lesotho are the foremost protectors of the Constitution, its values and mores, they have an obligation to respect, protect, promote and fulfil constitutional obligations.¹²² As a result the Court concluded that '[n]o court may countenance or enforce a contractual clause that is incongruent with the Constitution as it would be acting in violation of the Constitution – the supreme law'.¹²³

The importance of this declaration by the Court of Appeal lies in the fact that the court realised the far-reaching obligation of the judicial system to consider constitutional questions raised by litigants before the court, and the correlative right, the right to constitutional behaviour, that inheres on the part of private actors to raise the issues before the courts in Lesotho. It is a recognition of public interest standing based on the supremacy clause.

In *Mosito v Letsika* the respondents (first applicants in the High Court) challenged the constitutionality of the 'removal' of Justice Nugent and the 'appointment' of Dr Kananelo Mosito as the President of the Court of Appeal. The respondents were attorneys and senior advocates, and therefore members of the Law Society. The respondent in the High Court had objected to their standing to challenge the constitutionality of the removal of Justice Nugent and the appointment of Dr Mosito, but the High Court had dismissed the objection, holding that the applicants did have such standing.¹²⁴

It is important to point out that the respondents had not relied, for the constitutional challenge, on any Bill of Rights provisions in terms of section 22(1) of the Constitution. To establish their standing to litigate the respondents had in their founding affidavit alleged that the basis of their instituting the proceedings was that they were legal practitioners and that the administration of justice would be brought into disrepute should an unqualified person be appointed to head the apex court. Furthermore, as legal practitioners they had legal and ethical obligations and duties to uphold the rule of law.¹²⁵

121 *Koro-Koro Constituency Committee* (n 105) para 40.

122 As above.

123 As above.

124 See the High Court decision in *Letsika v Dr K Mosito* (CC 16/2017) [2018] LSHC 1 (9 February 2018), <https://lesotholii.org/node/11045> (accessed 12 April 2020) (*Letsika*).

125 *Mosito v Letsika* (n 8) para 23.

It therefore was clear that the respondents could not launch a constitutional challenge in terms of section 22(1) of the Constitution. They sought to establish non-Bill of Rights standing. During the hearing, however, the Court was persuaded, not by the respondents but by the appellants' counsel, to regard the respondents as having public interest standing based on the supremacy clause (section 2 of the Constitution). The Court reasoned:¹²⁶

[Counsel for the appellants], in an argument not contained in the written heads of argument, argued in the alternative that, perhaps the respondents could have sued in terms of S.2 of the Constitution – the Supremacy clause. He argued that the supremacy clause permits public interest litigation in certain circumscribed circumstances and referred this Court to the approach in Canada as evidenced by the decision in *Minister of Justice (Can) v Borowski*. While we agree that there maybe [sic] much force in this submission, it needs to be remembered that the respondents were not challenging 'any other law' for being inconsistent with the Constitution. This argument, in our considered view does not find application in *casu*.

The Court further rejected any suggestion that the respondents had 'sufficient interest'¹²⁷ and held that the respondents did not have standing in the matter which entitled them to sue as they could not establish the personal injury standing required by section 22(1) of the Constitution.¹²⁸ Clearly, the Court of Appeal overlooked the implication of the supremacy clause, the role of the court in democratic Lesotho in upholding the Constitution and the rule of law, and the corresponding right of the respondents to constitutional behaviour on the part of the Prime Minister. At the High Court level, the Court had correctly determined that the respondents had the necessary (public interest) standing to challenge the appointment. The High Court allowed the applicants standing on the basis that

[i]t is about the perceived violation of the supreme law, the perceived subversion of ... the rule of law and the perceived threat to the rule of law. Therefore, it appears that supreme interest may well be at stake in this matter. If that is correct, it cannot be contended, with conviction, that the [respondents] have no legal standing ... they, individually and collectively, have a direct interest in the legality of the appointment of judges in general.¹²⁹

¹²⁶ *Mosito v Letsika* para 24.

¹²⁷ Para 25.

¹²⁸ Paras 29-32.

¹²⁹ High Court decision in *Letsika* (n 124) paras 30-31.

5 Conclusions and recommendations

The foregoing discussion demonstrates that the current position of public law in Lesotho favours a restrictive approach to standing. This trajectory is inspired by the Constitution itself and the judicial approach. As has been demonstrated, section 22(1) of the Constitution, which is based on private interest standing, has been a convenient justification for a general approach by the judiciary in Lesotho to exclude even meritorious cases on the basis of a lack of standing. Signs of a liberal approach only emerge in the High Court, and are then reversed by the Court of Appeal. The article argues that section 22(1) of the Constitution, which seems to inspire the restrictive approach to standing in Lesotho, is antiquated; it belongs to old conceptions of the enforcement of human rights and therefore must be amended. However, the reticence and conservatism of the Court of Appeal are also to blame for this judicial approach. Other common law judiciaries a long time ago moved away from an insistence on the 'privatisation of public law'.¹³⁰ The bellwether of this new approach was the *dictum* of Lord Diplock in *R v Inland Revenue Commissioners*,¹³¹ that

[i]t would be ... a grave *lacuna* in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped. The contemporary situation is that in the United Kingdom standing no longer presents an insurmountable challenge to public interest litigation.¹³²

The two main theories used in this article squarely apply to the Constitution of Lesotho. The Court of Appeal can readily invoke these theories to liberalise standing in Lesotho. The supremacy clause in the Constitution gives the courts a mechanism to relax the rules of standing. The Canadian Supreme Court has already blazed the trail on how a supremacy clause in the constitution can be utilised to liberalise standing. In *Canadian Council of Churches* the Court took the view that the main purpose of the supremacy clause is to ensure that the Constitution and other applicable laws are adhered to and to prevent the immunisation of law and conduct from any constitutional challenge, thereby enforcing the rule of law and constitutionalism.¹³³

¹³⁰ Sunstein (n 63) 1432-1481.

¹³¹ *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses* (1982) AC 617.

¹³² *Inland Revenue Commissioners* (n 131).

¹³³ *Canadian Council of Churches* (n 35) 252-253; *Downtown* (n 33) paras 31-34. Also see Hogg (n 116) 781. The same rationale underpinned the liberalisation of rules of standing in the UK. See *Re ex parte National Federation of Self Employed*

Similarly, the Indian Supreme Court stated that public interest standing ensures the 'effective policing of the corridors of power' by courts.¹³⁴ Public interest standing 'serve[s] to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalised members of society'.¹³⁵ It therefore facilitates access to justice for the marginalised and disadvantaged who cannot afford to approach the courts.¹³⁶

However, while there is a general move towards the liberalisation of standing, the concern about busybodies who may flood the court system remains. For this reason, modern constitutions and judicial precedent have established requirements for standing, however liberal their approach may be. The Constitution of South Africa lists the people who may have standing to litigate.¹³⁷ Similarly, the Canadian Supreme Court has developed a body of principles to guide the courts in determining whether a litigant may be granted standing. In the main, public interest standing under the supremacy clause is granted to a party who establishes the following requirements. First, the matter must raise a serious legal question. Second, the applicant must establish that he or she has a genuine interest in the resolution of the question. Third, the applicant must establish that there is no other reasonable and effective manner in which that question may be brought to court.¹³⁸ The third requirement or factor in the public interest standing analysis has recently been recast to be more flexible as follows: 'whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court'.¹³⁹

The granting of public interest standing to a public-spirited applicant is at the discretion of the courts, taking into account the exigencies of each particular case. In exercising their discretion with respect to public interest standing, the courts weigh the three factors in light of the underlying purposes and the particular circumstances of the case.¹⁴⁰ Important factors that the courts may consider include, but are not limited to, whether the particular case raises a serious justiciable issue; whether the party bringing the action has a

and Small Businesses Ltd [1982] AC 630 644; *Re ex parte The World Development Movement Ltd* [1995] 1 All ER 611.

134 *Fertilizer Corporation Kamgar Union v Union of India* (1981) 2 SCR 52 70.

135 *Downtown* (n 33) para 76.

136 *Downtown* para 22.

137 Sec 38 of the South African Constitution.

138 Roach (n 112) 491; Hogg (n 116 above) 779. For a similar position under the South African interim Constitution, see *Port Elizabeth Municipality v Prut* 1996 (4) SA 318 (ECD) 324-325.

139 *Downtown* (n 33) para 20.

140 *Downtown* para 2.

real stake or a genuine interest in its outcome; and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means of bringing the case to court.¹⁴¹ The courts should exercise this discretion to grant or refuse public interest standing in a 'liberal and generous manner'.¹⁴²

It should always be remembered that in determining whether or not to grant or refuse public interest standing, the court's paramount consideration is the need to uphold the Constitution and the rule of law and to prevent the immunisation of the law and public conduct from constitutional scrutiny.¹⁴³ This approach was adopted correctly by the High Court in *Letsika*¹⁴⁴ but, regrettably, was reversed on appeal. On the other hand, the use of the discretion should be informed by the need to avoid the proliferation of public interest litigants, particularly where unmeritorious cases are brought before the courts by meddlesome interlopers.¹⁴⁵ Superior courts must encourage public-spirited persons to champion the public interest cause, rather than characterising them as meddlesome interlopers and busybodies. The judicial liberalisation of the rules of *locus standi* to recognise public interest litigants in Lesotho is imperative, taking into account the fact that the office of Attorney-General, the first defender of the public interest in Lesotho,¹⁴⁶ has not since the dawn of democracy 27 years ago initiated a single case before the courts in defence of the public interest.

141 *Downtown* paras 2 & 37.

142 *As above*. See also *Canadian Council of Churches* (n 35) 253.

143 *Downtown* paras 33-36.

144 High Court decision in *Letsika* (n 124) paras 30 & 31.

145 *Ressler* (n 68) 103.

146 See sec 98(2)(c) of the Constitution.