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# THE LAWS OF LEROTHOLI: ROLE AND STATUS OF CODIFIED RULES OF CUSTOM IN THE KINGDOM OF LESOTHO

Laurence Juma\*

## I. INTRODUCTION

The status of customary law in African societies is diminished by factors, most of which are generated by the machinery of the modern state.<sup>1</sup> But its mantle, kept alive by neo-traditional scholarship and a commitment to multiculturalism in the post-independence era, has nevertheless sustained an active discussion on its relevance to the future of law and the general administration of justice in African states.<sup>2</sup> This notwithstanding, the reach of customary law in defining human relations and

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<sup>1</sup> Virtually all analyses have agreed that structures of modern government have put traditional customs under strain. See e.g., Josiah Cobbah, *African Values and Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309, 309 (1987) (noting that African traditional norms that always protected rights became moribund by the imposition of the state structures); Jackton Ojwang, *Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa*, in LEGAL PLURALISM: PROCEEDINGS OF THE CANBERRA LAW WORKSHOP VII 99, at 111 (Peter Sack & Elizabeth Minchin eds., 1986) (discussing how legal reform policies have sought to ameliorate the negative effect of statism on African traditional institutions in East Africa); Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L J.L. & FAM. 72, 76 (1989) (arguing that the colonial state was largely responsible for transforming customary rules into a dominant system of law that benefited the white administrators and male elders only).

<sup>2</sup> Laurence Juma, *From Repugnancy to Bill of Rights: African Customary Law and Human Rights in Lesotho and South Africa*, 21 SPECULUM JURIS 88 (2007) [hereinafter *From Repugnancy to Bill of Rights*]. See also Dan Nabudere, *Towards the Study of Post Traditional Systems of Justice in the Great Lakes Region of Africa*, 8 E. AFR. J. PEACE & HUM. RTS. 1 (2002); C.M.N. White, *African Customary Law: The Problem of Concept and Definition* 9 J. AFR. L. 86 (1965).

providing systems of justice that could overcome the tension between the traditional social structure and so-called 'modern' or 'western' legality, in which justice is equated to law, is far from settled. The reason could be that African customary law scholars have been preoccupied with finding points of convergence between two divergent paradigms instead of seeking to develop African customary law as a distinct legal tradition that espouses rules and supports institutions of its own kind.<sup>3</sup> Arising from the push by post-colonial governments towards unified legal systems, scholars have seen their role as that of sanitizing customary law and redefining its principles to fit modes of western legal tradition—an approach that has rendered African customary law even more precarious.<sup>4</sup> This anomaly is explicit in the struggle by the judicial systems of most African countries to find the relevance of customary law within structures of the modern state. And yet, throughout the continent, emerging jurisprudence has more than confirmed the dissonance of these two paradigms and has critically appraised the shortfall of customary law in meeting the positive legal aspirations of modern society.<sup>5</sup> In South Africa, for example, a series of startling, even mind boggling, decisions by the Constitutional court,<sup>6</sup> has set fermenting the debate on the future of African customary law in the face of the ever expanding regimes of in-

<sup>3</sup> Martin Chanock, *Neo-traditionalism and Customary Law in Malawi*, 16 AFR. L. STUD. 80, 81 (1978); see Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20, 21 (1984) (advancing the view that African custom loses substantive identity when subordinated to imported law).

<sup>4</sup> Inspired by the demands for equality for all peoples, African governments deemed the separation of courts and law based on race to be inimical to the values that had informed the liberation and independence movements. It was somewhat contradictory that, at the same time, the leaders sought to 'Africanize' the law and legal systems in general so as to diminish the influence of colonial, European law. Another problem was that elites in many of the newly independent African states had already become used to working with European law during the struggle for independence and were wary of traditional systems that would not further the interests of 'modern' development. See Sandra F. Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 J. MODERN AFR. STUD. 571, 577 (2001).

<sup>5</sup> Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 9 ST. THOMAS L. REV. 459, 461-62 (2002); Simon Coldham, *The Status of Women in Zimbabwe: Veneria Magaya v Nakayi Shonhiwa Magaya* (SG 210/98) 43 J. AFR. L. 248 (discussing the implications of the judgment on gender equality); Dikgang Moseneke, *Transformative Adjudication in Post-Apartheid South Africa—Taking Stock after a Decade*, 1 SPECULUM JURIS 2, 8 (2007) (discussing the role of the South African Constitutional Court in enforcing the Bill of rights).

<sup>6</sup> *Gumede v. President of S. Afr.* 2009 (3) SA 152 (CC). See also *Bhe v. Khayelitsha* 2005 (1) BCLR 1 (CC); *Mthembu v. Letsela* 2000 (3) SA 219 (A).

ternational human rights.<sup>7</sup>

This approach, where customary law is viewed through the lenses of imported law, began in the early days of colonialism.<sup>8</sup> Initially, it supported the 'codification' and 'restatement' projects that were meant to distil customary rules and make them applicable in mainstream judicial systems,<sup>9</sup> But neither codification nor restatement fared well.<sup>10</sup> Indeed,

<sup>7</sup> N. Ntlama, *Equality Misplaced in the Development of Customary Law of Succession: Lessons from Shilubana v. Nwamitwa* 2009 2 SA 66 (CC), 20 STELLENBOSCH L. REV. 333 (2009). See also D. Ndima, *The African Law of the 21<sup>st</sup> Century in South Africa*, 34 COMP. & INT'L L.J. S. AFR. 323 (2003); Elmarie Knoetze, *Westernization or Promotion of African Women's Rights?*, 20 SPECULUM JURIS 105 (2006); Weiland Lehnert, *The Role of the Courts in the Conflict Between African Customary Law and Human Rights*, 21 SOUTH AFRICAN J. ON HUM. RTS. 241 (2005); C.M.A. Nicholson, *The Realization of Human Rights within the Context of African Customary Marriages*, 66 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG (JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW) 373, 381 (2003); Van der Meide, *Gender Equality v. Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of Marital Property Regime of the Official Version of Customary Law*, S. AFR. L.J. 100 (1999).

<sup>8</sup> See *From Repugnancy to Bill of Rights*, *supra* note 2, at 95-96.

<sup>9</sup> See MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA 137-40 (1985) (noting that through codification, the white colonial administrators sought to create customary laws for use in the colonial courts. Their aim was to make the legal system established in the colony conform to the "idealised English rule of law"). One example of a codification project includes the South African Natal Code of Zulu Law. Proc R151/1987 (S. Afr.); see generally Thomas V. McClendon, *Tradition and Domestic Struggle in the Courtroom: Customary Law and Control of Women in Segregation-Era Natal*, 28 INT'L J. AFR. HIST. STUD. 527, 532-33 (1995) (describing the origins of the Code). The Laws of Lerotholi, compiled by the Basotho National Council in 1903, which are the subject of discussion in this article, are another example. See V. PALMER & S. POULTER, THE LEGAL SYSTEMS OF LESOTHO 101 (1972). So are the self-stated legal texts produced by traditional authorities in northern Namibia. See MANFRED HINZ & SANTOS JOAS, CUSTOMARY LAW IN NAMIBIA: DEVELOPMENT AND PERSPECTIVE 91 (1995). There are also several examples of restatement projects. See, e.g., 1 EUGENE COTRAN, RESTATEMENT OF AFRICAN LAW: KENYA I (1968); 2 EUGENE COTRAN, RESTATEMENT OF AFRICAN LAW: KENYA I (1968); 3 J.O. IBIK, RESTATEMENT OF AFRICAN LAW: MALAWI I (1970); 4 J.O. IBIK, RESTATEMENT OF AFRICAN LAW: MALAWI II (1971); K. P. KLUDZE, RESTATEMENT OF AFRICAN LAW: GHANA I (1973); INDIGENOUS CRIMINAL LAW IN BOPHUTHATSWANA (A.C. Myburgh, ed., 1980); M.W. PRINSLOO, INHEEMSE PUBLIEKREG IN LEBOWA (1983); A.C. MYBURGH AND M.W. PRINSLOO, INDIGENOUS PUBLIC LAW IN KWA NDEBELE (1985); N. N. Rubin *The Swazi Law of Succession: a Restatement*, 9 J. AFR. L. 90 (1965). Apart from codification and restatement projects, there were also commissions instituted to gather traditional rules and compile them for use by the colonial administrators. See, e.g., ISAAC SCHAPER, A HANDBOOK OF TSWANA LAW AND CUSTOM (1938); THE CAPE COMMISSION ON THE LAWS AND CUSTOMS OF THE BASOTHS (1873).

<sup>10</sup> PETER FITZPATRICK, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20, 21 (1984). See also T.W. Bennett & T. Vermeulen, *Codification of African Law*, 24 J. AFR. L. 206 (1980); William Twinning, *The Restatement of African Customary Law: A Com-*

in many African countries, the principles of customary law still remained largely unwritten, informal, and often difficult to ascertain.<sup>11</sup> In the few cases where codification was attempted, lasting legacies of strict traditional edicts were created, which have become permanent features of these legal systems.

While focusing on the experiences of the Kingdom of Lesotho, where a customary code known as the Laws of Lerotholi, which were promulgated in 1903, is still the main source of customary law,<sup>12</sup> this article will explore the import of such codified rules on legal transformation in a post-colonial African state. Unlike many African countries where most institutions of African customary law created in the colonial

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ment, J. MODERN AFR. STUD. 221, 228 (1963); Brett L. Shadle, *Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya 1930-60*, 40 J. AFR. HIST. 411, 412 (1999). It is noteworthy that recent studies on customary law, which have centred discussions on its viability in the face of emerging principles of human rights, have endeavoured to explain customary law as an evolving phenomenon that is incapable of being reduced into strict statement of rules and obligations. See, e.g., Wieland Lenhert, *The Role of Courts in the Conflict between African Customary Law and Human Rights*, SOUTH AFRICAN J. ON HUM. RTS. 241 (2005).

<sup>11</sup> See A.N. Allot, *The Judicial Ascertainment of Customary Law in British Africa*, 20 MOD. L. REV. 244 (1957). Because of this difficulty, some countries have enacted legislation to assist the court in ascertaining customary law. In Botswana, for example, section 7(2) of the Common Law and Customary Law Act provides: [i]f any court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made by or on behalf of the parties, it may consult reported cases, textbooks and other sources and may receive opinions either orally or in writing to enable it to arrive at a decision in the matter . . . . Common Law and Customary Act 51 of 1969 § 7(2). In Kenya, the courts follow similar procedures. In *Kimani v. Gikanga*, the court stated its position: “[a]s a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done, but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of present apparent lack in Kenya, of authoritative textbooks on the subject, or of any relevant case law, this would in practice usually mean that the party propounding customary law would have to prove that customary law, as he would prove the relevant facts of his case. *Kimani v. Gikanga*, (1965) 17 E.A.L.R. 753. Likewise, two South African cases, *Maqovuka v. Madidi* and *Nomantunga v. Ngangana*, established the principle that the burden of proving customary law is on the person who seeks to rely on it. *Maqovuka v. Madidi* 1911 NHC 132 (S. Afr.); *Nomantunga v. Ngangana* 1951 NAC 342 (S. Afr.). But the courts have always preferred expert opinion of traditional rulers, those upon whom the task of administering traditional rules is bestowed. PALMER & POULTER, *supra* note 9, at 102-03 (noting also that the chiefs are often used as assessors in courts).

<sup>12</sup> Q. Letsika, *The Place of Sesotho Customary Law Marriage within Modern Lesotho Legal System*, BOTSWANA L.J. 73,74 (2005).

era have been overthrown by the nascent epistemic and liberal constituencies, the Kingdom of Lesotho presents an interesting variation, where codified customary law rules endure forty years after independence.<sup>13</sup> Despite their province getting eroded by piecemeal legislative action, occasional transformative judicial pronouncement by activist judges, and the changing perception of role of African customary law in multicultural societies, these rules have persisted. What the Lesotho experience shows, however, is that there is a connection between the way codified law evolved and its effect on society. This is amply demonstrated by the discussion in this article of how the system of codified rules originated and the challenges that these rules have faced in the modern constitutional era.

Two main assumptions guide the discussions herein. The first is that codified rules in Lesotho arose out of contests within society in which all groups, the white colonialists, the local chiefs, and the general population, were involved. Therefore, it may not be entirely true to assert that the reinvention of tradition in the colonial times was a project of the British colonizers in which the Africans did not play a significant role. This assumption is crucial to the understanding of how the same rules have survived independence and continue to provide a source of law in the current era. Also, it supports the view that in the context of power relations, much of what the colonial systems had started was not dismantled by the arrival of independence and, whereas the players may have shifted, the power relations have remained the same. The second assumption is that codified rules of custom have stifled the development of African law alongside the ethos of democracy and human rights. For those keen to have African customary law elevated beyond the narrow confines of 'pluralism,' the existence of codified rules presents a dilemma of sorts. The existence of a body of rules, which enjoy quasi-legislative status and unqualified support by those steeped in tradition, is seen to militate against development of a more dynamic system of African law. I have argued elsewhere that codification has therefore created an imbalance between what is generally perceived of as 'modern' and progressive legal institutions and the extant domain of traditional rules and custom.<sup>14</sup>

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<sup>13</sup> See Sebastian Poulter, *Marriage Divorce and Legitimacy in Lesotho*, 21 J. AFR. L. 66, 67 (1977).

<sup>14</sup> Laurence Juma, Address at the African Customary Law Revisted: The Role of Customary Law in the 21<sup>st</sup> Century Conference in Gaborone, Botswana: Putting Old Wine in New Wines Skins: Customary Code of Lerotholi And Justice Administration in

In this regard, codified rules are like a double-edged sword.

This article is not a conclusive study of codified customary law in general. Moreover, the subject has a wide scope that cannot be covered in these few pages. However, my modest intentions herein are to instigate a debate on the relevance of codified law to the development of African law in modern African states and to provide a platform for critically examining the role of Africans themselves in rule creation and formation in the post-independence period.

## II. EMERGENCE OF 'AFRICAN CUSTOMARY LAW' IN LESOTHO

Lesotho is a small Kingdom in the southern part of the African continent that is uniquely situated within the belly of South Africa.<sup>15</sup> The country is inhabited by the Sotho speaking people, often referred to as the 'Basotho'.<sup>16</sup> Unlike other African countries with many ethnic groups of differing cultures and traditions, the Kingdom of Lesotho is solely inhabited by the Basotho, a homogenous lot with a single ancestry.<sup>17</sup> Before the 1800s, the Basotho were loose communities set within small chiefdoms with no overall ruler.<sup>18</sup> Although elements of patriarchy and communal ownership were widely practiced, most of the customs and traditions were generally in flux.<sup>19</sup> One author has described Basotho

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Lesotho (Oct. 23, 2008) (on file with author).

<sup>15</sup> PALMER & POULTER, *supra* note 9, at 3.

<sup>16</sup> D. FRED ELLENBERGER & J.C. MACGREGOR, HISTORY OF THE BASOTHO: ANCIENT AND MODERN 21 (Negro Univ. Press 1969) (1912) (noting that the Basotho are part of the larger Sotho-speaking group of peoples, including the Tswana, Pedi, and Southern Soto, who are believed to have settled in the area south of Limpopo in about 1600).

<sup>17</sup> See Richard Weisfelder, *The Basotho Nation-State: What Legacy for the Future?* 19 J. MODERN AFR. STUDIES 221, 223 (1981) [hereinafter *Basotho Nation-State*].

<sup>18</sup> See Tefetso Mothibe, *Early Communities in Southern Highveld, 1500-1800*, in ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO 1500-2000, 1, 8 (Neville Pule & Motlatsi Thabane eds., 2002) [hereinafter *Early Communities*]. The word "chiefdom" is used here to refer to a small tribal unit composed of a few clans living under the rule of a chief. Chiefdom is, in Mothibe's definition, a stage in human evolution that lies between "hunter-gatherer band and the more complex state." *Id.* at 8 n. 32. A chiefdom is also, in Carneiro's definition, an autonomous political unit comprising a number of villages or communities under permanent control of a paramount chief. See Robert Carneiro, *A Theory of the Origin of the State*, 169 SCI. 733, 735 (1970). In contrast to chiefdom, a state is "a society in which there is a centralised and specialised institution of government." J. HAAS, THE EVOLUTION OF PRE-HISTORIC STATE 3 (1983).

<sup>19</sup> STEPHEN GILL, A SHORT HISTORY OF LESOTHO: From the Late Stone Age Until the 1993 Elections 62 (1993) (noting that the Sotho tradition were neither timeless nor static).

traditions as “frequently innovative, localized and contested.”<sup>20</sup> However, like other Bantu speaking groups of Southern Africa, they reared cattle, and their women engaged in subsistence agriculture.<sup>21</sup> In areas with high levels of rainfall, staple foods such as *mabelle* (sorghum) and *poone* (maize) were cultivated.<sup>22</sup> Apart from agricultural activities, the women were involved in the making of grass mats and utensils such as *motlhotlo* (sieve), *liroto* (grass basins) and *lisiu* (grain basket).<sup>23</sup> Generally, the economy revolved around the chief and the homestead. The chief was to be supported by all, as his wealth fed the impoverished, supported military expeditions, and ran the administration.<sup>24</sup> Thus, paying of tribute in the form of communal labour (*Matsema*), supply of animal products and participation in the decision making process were all an essential part of community life.<sup>25</sup> Interestingly, the chiefdoms were held together by intricate political, social, and economic relationships, galvanised by consultations at multiple levels and consensual support.<sup>26</sup>

The origins of a unified Basotho nation is believed to have occurred in the wake of social upheavals among ethnic groups settled in the southern parts of Africa in the early 1800s.<sup>27</sup> Historically referred to as the *Lifaqane*, these upheavals were abetted by the rise of powerful kingdoms such as Amazulu, the infiltration of the European imperialists in the Cape region, and the fierce competition for resources rendered in the aftermath of extended droughts in the 1880s.<sup>28</sup> During this time, insecurity abounded and unleashed streams of refugees, who went scampering for safety towards the north.<sup>29</sup> It is these diverse sets of refugees who were

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<sup>20</sup> M. Epprecht, *Women Class and Politics in Colonial Lesotho 1930-1964*, 43 (1992) (unpublished Ph.D. dissertation, Dalhousie University)); accord GILL *supra* note 19, at 27; see also, ELIZABETH A. ELDREDGE, *A SOUTH AFRICAN KINGDOM: THE PURSUIT OF SECURITY IN THE NINETEENTH-CENTURY LESOTHO I* (J.M. Lonsdale ed. 1993).

<sup>21</sup> See GILL *supra* note 19, at 45.

<sup>22</sup> *Early Communities*, *supra* note 18, at 7-8.

<sup>23</sup> *Id.* at 8.

<sup>24</sup> Tefesto Mothibe, *State and Society, 1824-1833*, in *ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO 1500-2000*, 21, 15 (Neville Pule & Motlatsi Thabane eds., 2002) [hereinafter *State and Society*].

<sup>25</sup> See GILL, *supra* note 19, at 49 (stating that this redistribution ensured that the equilibrium between the commoners and the chiefs was maintained).

<sup>26</sup> *Id.* at 49.

<sup>27</sup> *State and Society*, *supra* note 23, at 15.

<sup>28</sup> See generally, ELDREDGE, *supra* note 20; CAROLYN HAMILTON, *THE MFECANE AFTERMATH: RECONSTRUCTIVE DEBATES IN SOUTHERN AFRICAN HISTORY* (1995).

<sup>29</sup> *State and Society*, *supra* note 23, at 15.



welded together into a nation by Moshoeshoe.<sup>30</sup> From his headquarters in Thaba Bosiu, Moshoeshoe instigated great political and military upheaval among the surrounding chiefdoms to acquire the status of protector and superior leader of the entire Sotho groups.<sup>31</sup> Through a shrewd system of placing (*Mafiasa* and *Bahlanka*), he was able to consolidate his class rule over the smaller Basotho chiefdoms and render them subject to an oligarchy controlled by his family.<sup>32</sup> By 1834, Moshoeshoe had established himself as the sovereign ruler of the Basotho nation.<sup>33</sup> The missionaries who arrived to the area in 1833 acknowledged his kingdom as a nation “at peace and on the threshold of prosperity.”<sup>34</sup>

The significance of Moshoeshoe goes beyond his achievements in crafting the Basotho nation. Many accounts idolize him as the most vivid symbol of national unity.<sup>35</sup> This symbolism has survived in institutions that owe their origin to the ingenuity of this great leader. Others have suggested that Moshoeshoe was a mere benefactor of existing traditional structures. Thompson, for example, has suggested that while Moshoeshoe did not invent distinctively new institutions, create a standing militia to enforce his will, or monopolize imported resources, he “built on the institutions, customs, [and] norms he had known as a young man, adapting and stretching them to the utmost to serve his purposes.”<sup>36</sup>

<sup>30</sup> *Id.* at 20.

<sup>31</sup> See *State and Society*, *supra* note 23, at 15-34; see also Sam Rugege, *Chieftainship and Society in Lesotho: A Study in the Political Economy of the Basotho Chieftainship from Pre-colonial Times to the Present* 76 (1993) (unpublished D. Phil. thesis, University of Oxford).

<sup>32</sup> GILL, *supra* note 19, at 85-86. See also IAN HAMNETT, *CHIEFTAINSHIP AND LEGITIMACY: AN ANTHROPOLOGICAL STUDY OF EXECUTIVE LAW IN LESOTHO* 25 (1975) (noting that ‘placing’, was the method of governance where Moshoeshoe appointed members of his agnatic kin to positions of chieftainship in territories that he controlled); L.B.B.J. MACHOBANE, *GOVERNMENT AND CHANGE IN LESOTHO 1800-1966: A STUDY OF POLITICAL INSTITUTIONS* 5 (1990) (suggesting that Moshoeshoe’s status as *morena e moho*, that evidenced the peak of his power, could have been confirmed in 1824, by which time his kingdom realized “a genuine state of nationhood”).

<sup>33</sup> HUGH ASHTON, *THE BASUTO* 3 (1952).

<sup>34</sup> ELDREDGE, *supra* note 20, at 3.

<sup>35</sup> See Thérèse Blanchet-Cohen, *Moshoeshoe, the Chieftainship and the Basotho: The Past Lingers on: A Review Article*, 3 J. SOUTH AFR. STUDIES 230, 232 (reviewing four books on Moshoeshoe: LEONARD THOMPSON, *SURVIVAL OF TWO WORLDS: MOSHOESHOE OF LESOTHO 1786-1870* (1975); PETER SANDERS, *MOSHOESHOE: CHIEF OF THE SOTHO* (1975); A CHIEF IS A CHIEF BY THE PEOPLE: THE AUTOBIOGRAPHY OF STIMELA JASON JINGOES (John Perry & Cassandra Perry eds., 1975) [hereinafter *A CHIEF IS A CHIEF*]; and IAN HAMNETT, *CHIEFTAINSHIP AND LEGITIMACY* (1975).

<sup>36</sup> THOMPSON, *supra* note 35, at 204.

Nonetheless, Moshoeshoe's ability to mould state institutions so as to subdue tensions evoked in the aftermath of unification was in itself remarkable. During his reign, traditional institutions of judicial and political governance were reinvented and elevated to acquire a national character.<sup>37</sup> He harnessed the Basotho chieftainship (*Borena*) and imbued it with political and legal characteristics that became definitive of its stature in Basotho society. Thus, the *Borena* was institutionalized into a state system and, from it, tangible forms of authority became explicit.<sup>38</sup> Other institutions, such as the traditional court system, (*Khotla*), and the chief's councils, (*Pitsos*), assumed greater political significance during this time.<sup>39</sup>

While it may not have been captured by many historical accounts, Basotho customary law, or the law of Moshoeshoe as it was called, evolved at the same time that the institutions of governance were being crafted. The law, administered through the *Khotla*, was intimate to the whole community and became an integral part of the society's political and social structure.<sup>40</sup> It was this law of custom that later assumed some uniformity in all the variegated Basotho communities spread across the Kingdom.<sup>41</sup> This law found legitimacy in the exercise of chieftain responsibility.<sup>42</sup> But as the nation's administration became more centralized, so did its judicial structure. Thus, a legal system predicated upon loose forms of social organisation and applied haphazardly throughout the nation, became more of an anathema to the sustained leadership of the *Borena*. Adding to the changing political and social conditions rendered by the arrival and accommodation of the missionaries, the colonial hegemony, and the contest within the traditional ruling elite, a systematic approach towards defining the limits of customary authority and law, became a project of immense interest to those in authority.

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<sup>37</sup> *State and Society*, *supra* note 23, at 20-23.

<sup>38</sup> *Id.* at 28-29.

<sup>39</sup> *Id.* at 30.

<sup>40</sup> GILL, *supra* note 19, at 49-50.

<sup>41</sup> See PATRICK DUNCAN, *SOTHO LAWS AND CUSTOMS* at vi-vii (1960). There is some controversy on whether the Basotho as a group, or a people, existed as such before Moshoeshoe. Ellenberger and MacGregor argue that the word "Basotho" comes from the Swazi nickname "Abashunto," which was given to the people of the Highveld who looked different from the lowlanders. ELLENBERGER & MCGREGOR, *supra* note 16, at 21. It was King Moshoeshoe who used word as a unifying term for his new kingdom. MOTHIBE, *State and Society*, *supra* note 23, at 20.

<sup>42</sup> See PALMER & POULTER, *supra* note 9, at 32 (this was because the chiefs, the *Morena*, had legislative responsibilities).

## III. ESTABLISHMENT OF COLONIAL AUTHORITY

African social history of the 19<sup>th</sup> and 20<sup>th</sup> century has unavoidably focused on slavery and liberation struggles, tracing a lineament of bitterness and human suffering emitted through the agency of colonialism.<sup>43</sup> No wonder most studies that have sought to discover and interpret African experiences during colonial period have been based on a “resistance paradigm,” magnifying the role of the European in shaping culture, politics, and law.<sup>44</sup> Whereas it could be true that colonialism with all its injustices, racism, oppression, and genocide lends itself to this paradigm, the discourse on African experience and institutional development is incomplete without bringing into the fold broader themes of societal change predicated on class struggles, the participation of the so called faceless masses, and competing economic forces.<sup>45</sup> Indigenous resistance to colonial rule would then be located within the broader understanding of societies embroiled in multi-layered contests of a socio-political and economic nature. Realizing, as we do, that Africans under the yoke of colonialism had nuanced experiences and that these shaped their attitudes and actions, internal African politics emerging at the time should be viewed not as a separate paradigm, but as an all inclusive paradigm that takes on broad, complex strategies of negotiations, resistance, and even collaboration. A full range of human action spanned the distance between resistance and domination, but, in between these poles, there was indeed “a very crowded spectrum of human interests, goals and needs.”<sup>46</sup> In the context of normative action, such interests, goals and needs, did occasionally overlap to support the production of rules that were of benefit to both spectrums. The codification agenda in Lesotho was brought forth by such combination of interests, manifest in the interaction of the

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<sup>43</sup> See, e.g., EUGENE GENOVESE & JORDAN ROLL: *THE WORLD THE SLAVES MADE* (1974); Klaas van Walraven & Jon Abbink, *Rethinking Resistance in African History: An Introduction*, in *RETHINKING RESISTANCE: REVOLT AND VIOLENCE IN AFRICAN HISTORY 1* (Jon Abbink et al. eds., 2003).

<sup>44</sup> See Martina Ghosh-Schellhom, *Spaced In-Between Transitional Identity*, in *BORDERLANDS: NEGOTIATING BOUNDARIES IN POST-COLONIAL WRITING* 29-30 (Monika Reif-Hüsler ed., 1999).

<sup>45</sup> See Allen Isaacman & Barbara Isaacman, *Resistance and Collaboration in Southern and Central Africa 1850-1920*, 10 *INT'L J. AFR. HIST. STUD.* 31, 31-35 (1977); see also Jack Lewis, *The Rise and Fall of the South African Peasantry: A Critique and Reassessment*, 11 *J. S. AFR. STUD.* 1, 3-4 (1984); see also Frederick Cooper, *Peasants Capitalists and Historians: A Review Article*, 7 *J. S. AFR. STUD.* 284, 284-85 (1981).

<sup>46</sup> Eric Allina-Pisano, *Resistance and the Social History of Africa*, 37 *J. SOC. HIST.* 187, 193 (2003).

various forces competing for hegemony within the narrow political space. Mapping out these interactions and the forces that spawned them is attempted herein through the analysis of the colonial enterprise in Lesotho and the response it received from African traditional polities.

#### A. *The Boer Threat and Annexation of Territory*

Like most African countries that suffered colonial rule, the establishment of the British colonial rule over Basutoland (Lesotho) was heralded by the arrival of missionaries.<sup>47</sup> The first missionaries to set foot in Thaba Bosiu, Moshoeshoe's headquarters, were the three Frenchmen: Thomas Arbousset, Eugene Casalis, and Constant Gossellin, all from the Paris Evangelical Missionary society (PEMS).<sup>48</sup> They arrived in June 1833, a year before Moshoeshoe was officially recognized by the British rulers at the Cape, as the leader of the Basotho nation.<sup>49</sup>

The missionaries did not constitute as much of a threat to Moshoeshoe as the Boer encroachment in the Mohakare Valley which occurred soon thereafter.<sup>50</sup> The major source of conflict between Moshoeshoe and the Boers was land.<sup>51</sup> One reason why the Boers were a problem to Moshoeshoe was because they introduced the new concept of individual ownership of land.<sup>52</sup> In traditional Basotho society, land was not the property of an individual; it belonged to the community held in trust by the chiefs.<sup>53</sup> Casalis described land ownership among the Basotho as fol-

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<sup>47</sup> Tefetso Mothibe and Maria Ntabeni, *The Role of the Missionaries, Boers and British in Social and Territorial Changes, 1883-1868*, in *ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO 1500-2000*, 35 (Neville Pule & Motlatsi Thabane eds., 2002).

<sup>48</sup> *Id.* at 35-36.

<sup>49</sup> See GILL, *supra* note 19, at 88.

<sup>50</sup> Mothibe & Ntabeni, *supra* note 47, at 42. But, still, the significance of missionaries to the colonial enterprise is well documented. Nader and Grande have shown how the 'civilizing mission' of Christianity embodying its teachings of humility, compromise, and consensus pacified African resistance. Laura Nader & Elisabetta Grande, *From the Trenches and Towers: Current Illusions and Delusions about Conflict Management—in African and Elsewhere*, 27 L. & SOC. INQUIRY 573, 578 (2002) (arguing that this mission was carried out in two ways: "[b]y teaching the 'savages' about peaceful resolution of conflict through law courts, and by teaching them the rules of a good Christian life (which among other things . . . included turning the other cheek, acquiescence, or the opposite of militancy—something that probably suited the colonial powers since it supported the political agendas of colonialism.)").

<sup>51</sup> SANDERS, *supra* note 35, at 60.

<sup>52</sup> T.H.R. DAVENPORT, *SOUTH AFRICA: A MODERN HISTORY* 123-56 (3d ed. 1987).

<sup>53</sup> ASHTON, *supra* note 33, at 144.

lows:

The sale and transfer of land is unknown to these people. The country is understood to belong to the whole community, and no one else has the right to dispose of the soil from which he derives support. The sovereign chiefs assign to their vassals the parts they are to occupy; and these latter grant to every father of a family a portion of arable land proportionate to his wants. The land thus granted is insured to the cultivator as long as he does not change his locality. If he goes to settle elsewhere, he must restore the fields to the chief under whom he holds them, in order that the latter may dispose of them to some other person.<sup>54</sup>

The chief's traditional hold on land, the single most important means of production, also invested them with political authority. Thus, the idea that one could acquire a freehold title with uncontested rights of ownership had the potential of completely altering the economic structure of the Basotho community by diminishing the chief's control over vital economic resources. It could also promote individual competition for land, thus promoting factional fighting and further political fragmentation.

For these reasons, Moshoeshoe sought a British alliance to eliminate the Boer threat. The basis of the cooperation between the chief and the British was first outlined in the Napier Treaty of 1843.<sup>55</sup> Under this treaty, Moshoeshoe undertook to be a faithful friend and ally of the Cape Colony and, to maintain peace by arresting, and returning to the Cape, any fugitives.<sup>56</sup> This was to be the beginning of the end of the traditional chieftainship and the beginning of a new form of chieftainship that operated as a civil service of the colonial administration. In return, the British issued a strong proclamation warning the Boers against encroaching into Basotho territory.<sup>57</sup> From then on, a series of treaties were signed that had the effect of shrinking the Basotho territory and ceding more authority to the British.<sup>58</sup> The process of colonisation of Lesotho, which was to last over 40 years began in earnest.<sup>59</sup>

<sup>54</sup> EUGENE CASALIS, *THE BASUTOS* 159 (1992).

<sup>55</sup> Mothibe & Ntabeni, *Role of Missionaries*, *supra* note 24, at 46.

<sup>56</sup> *Id.* at 46-47.

<sup>57</sup> *Id.* at 46.

<sup>58</sup> *Id.* at 47.

<sup>59</sup> See Motlatsi Thabane, *Reconsidering the Motives for Colonisation, 1868-1871*, in *ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO 1500-2000*, at 79, 79-80 (Neville Pule & Motlatsi Thabane eds., 2002) (identifying five phases of the colonisation process: 1840s to mid-1850s; 1868 to 1871; 1871 to 1881; and 1881 to 1884, when Leso-

As tension escalated between the Boers and the Basotho, Moshoeshoe leaned more towards the British. Already, between 1865 and 1866, the two communities engaged in an intermittent war, which had culminated in the Basotho ceding much of their territory in present day Free State to the Boers.<sup>60</sup> Another looming military invasion by the Boer commandos in 1867 must have convinced Moshoeshoe to put his people under the British protection. By the Annexation Proclamation 14 of 1868, the Basutos became British subjects and their land became British territory administered from the Cape.<sup>61</sup> Three years later, Basutoland was placed under the administration of the Cape Colony.<sup>62</sup> For the British, the control of Lesotho had the promise of both strategic and economic benefits. Sir Philip Edmond Woodhouse, who had been the Governor of Cape Colony and British High Commissioner to South Africa since 1862, convinced the colonial office in London that a prolonged war between the Boers and the Basotho was not good for the stability in the region.<sup>63</sup> His views, expressed in a letter to the colonial office in May 1868, were that British commerce would be ruined if the conflict was not brought to an end.<sup>64</sup>

Upon annexation of Lesotho, the British soon realized the high cost of its administration.<sup>65</sup> In 1871, Lesotho was placed under the administration of the Cape Colony and therefore subject to the laws passed by the Cape parliament.<sup>66</sup> Colonel Charles Griffith, who became governor's

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tho was finally handed over to the British) [hereinafter Thabane, *Motives for Colonisation*].

<sup>60</sup> Mothibe and Ntabeni, *Role of Missionaries*, *supra* note 24, at 47.

<sup>61</sup> Proc R14/1986 (S. Afr.) ("With a view to the restoration of peace and the future maintenance of tranquility and good government on the north eastern border of the colony of the Cape of Good hope, her Majesty, the Queen having been graciously pleased to comply with the request made by Moshesh, the Paramount chief, and other headmen of the tribes of the Basutos, that the said tribe maybe admitted to the allegiance of Her Majesty.").

<sup>62</sup> Basutoland Annexation Act 12 of 1871 (S. Afr.); *see also* Proc R74/1871 (S. Afr.); *see also* Proc R44/1877 (S. Afr.).

<sup>63</sup> L.B.B.J. MACHOBANE, *GOVERNMENT AND CHANGE IN LESOTHO 1800-1966: A STUDY OF POLITICAL INSTITUTIONS* 37 (1990).

<sup>64</sup> Letter from Sir Philip Edmond Woodhouse to the Secretary of State Colonies (May 25, 1868), in 3 GEORGE M. THEAL, *BASUTOLAND RECORDS 3000 (1898-1902)* cited in L.B.B.J. MACHOBANE, *GOVERNMENT AND CHANGE IN LESOTHO 1800-1966: A STUDY OF POLITICAL INSTITUTIONS* 37 (1990).

<sup>65</sup> *Motives for Colonisation*, *supra* note 59, at 80.

<sup>66</sup> L.B.B.J. MACHOBANE, *GOVERNMENT AND CHANGE IN LESOTHO 1800-1966: A STUDY OF POLITICAL INSTITUTIONS* 48-49 (1990).

agent in Maseru, introduced legal changes that were meant to promote “Christianity and civilisation,” but these changes mainly targeted family and the chieftainship.<sup>67</sup> New rules were introduced that were meant to generally improve the status of women and diminish the significance of *Bohali*: it was no longer possible to force women into marriage and there were rules that sought to ensure the equality of men and women.<sup>68</sup> These new laws were indeed present on paper but did not transcend into everyday life. The judicial power was placed under the magistracy, thus undermining the authority of the chiefs as a person dissatisfied with the ruling of the chief could now appeal directly to the magistrates.<sup>69</sup> Magistrates were also given powers to allocate land, a prerogative that the chief for centuries had hitherto enjoyed.<sup>70</sup> As far as the administration of justice was concerned, the introduction of the magistracy technically diminished the importance of the chief’s court, (*Lekhotla*).<sup>71</sup> While the colonial administration had to later struggle with the problem of administering customary law within an essentially western judicial institution, their legitimacy remained very contentious amongst the Africans. Moreover, the new rules contradicted most of the Basotho customs, and were therefore, not very popular: even the colonial magistrates found it hard to enforce them. The attempt to ‘civilise’ and ‘Christianise’ the African through legislation brought about adverse consequences to British rule.

#### *B. The Gun War 1880-81 and its aftermath*

The rapidly changing social and political environment evoked tensions among traditional institutions, the colonial administration, and tra-

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<sup>67</sup> GILL, *supra* note 19, at 117.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 118 (*Khotla* proceedings were conducted in the chief’s court.). CASALIS, *supra* note 54, at 160. (Crimes were tried in a traditional setting characterised by popular participation. Although it was the chief’s prerogative to impose sentence, the process allowed parties to call witnesses, lead evidence, and cross-examine witnesses. Writers of the Basotho judicial process have acknowledged with consensus the extent to which freedom of speech could be exercised.). See L.B.B.J. MACHOBANE, GOVERNMENT AND CHANGE IN LESOTHO 1800-1966: A STUDY OF POLITICAL INSTITUTIONS 23-24 (1990). (“Any man could cross-examine witnesses or the accused. The decisions were generally based on legal customs but with greater propensity towards reconciliation, restitution and maintenance of social cohesion. The Basotho rarely imposed death sentences. Serious cases such as those of witchcraft could attract banishment and/or ‘eating up’ of the property of the guilty party.”).

ditional leaders themselves. The colonial administration exploited these changes to undermine traditional institutions.<sup>72</sup> Also, with the adoption of the market economy and with more Basotho assimilating to the British way of life, an emerging class of poor became evident.<sup>73</sup> Perhaps, this was the reason why this period saw an unprecedented rise in the number of traditional diviners and prophets, who called for a return to 'tradition of the forefathers.'<sup>74</sup> Although traditional appeal had little effect on the colonial policies that were becoming entrenched economically and socially, it provided inspiration to the smaller chiefs who were dissatisfied with their own circumstances. For example, in 1879, Chief Moorosi refused to recognize the authority of the newly appointed magistrate of the Quthing district.<sup>75</sup> His rebellion was quickly stopped by the British with the assistance of Letsie, the successor to the Moshoeshoe throne, and other loyal chiefs.<sup>76</sup> Obviously, their motive was to please the British and also to punish Moorosi because they distrusted him. A year later, the Gun War, lasting from 1880 to 1881, erupted as the Basotho leaders resisted the British attempt to disarm them.<sup>77</sup> The war ended in a Basuto victory, thus temporarily blocking the expansion of British power and restoring much of the chiefly prerogatives, power and influence.<sup>78</sup>

The ascendancy of chiefs was short lived. In 1884, Basutoland was placed under British control again, but, this time, the system of indirect rule was adopted to mitigate the unpopular policies of the Cape colonial authority.<sup>79</sup> According to Weisfelder, the British approach afforded more protection to the Chiefs as agents of the colonial administration, but had the adverse effect of making the senior chiefs unresponsive to the demands of their people.<sup>80</sup> For example, the skirmishes between Molapo's

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<sup>72</sup> Motlatsi Thabane, *Aspects of Colonial Economy and Society, 1868-1966*, in *ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO 1500-2000*, at 103, 110 (Neville Pule & Motlatsi Thabane eds., 2002). [hereinafter Thabane, *Economy and Society*]

<sup>73</sup> *Id.* at 106.

<sup>74</sup> GILL *supra* note 19, at 125.

<sup>75</sup> *Id.* at 127.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 128-30; Richard Welsfelder, *Defining National Purpose: The Roots of Factionalism in Lesotho* (1974) (unpublished Ph.D. dissertation, Harvard University).

<sup>78</sup> Roger Southall, *Between Competing Paradigms: Post-Colonial Legitimacy in Lesotho*, 21 J. CONTEMP. AFR. STUD. 251, 253 (2003).

<sup>79</sup> GILL, *supra* note 19, at 130.

<sup>80</sup> Richard Weisfelder, *The Basuto Monarchy*, in *AFRICAN KINGSHIPS IN PERSPECTIVE: POLITICAL CHANGE AND MODERNIZATION IN MONARCHICAL SETTINGS* 160



two sons, Jonathan and Joel, revealed the rivalry that now existed among chiefs, much of which was predicated on the inchoate traditional succession rules and the British attitude towards African traditional leadership.<sup>81</sup> The contests and rivalry that ensued as a result are revealed in the high incidence of what came to be called the ‘medicine murders,’ where the chiefs used human body parts to protect their throne.<sup>82</sup>

The turbulence disorganized traditional institutions of governance as well.<sup>83</sup> For example, the national council, (*Pitso*), a body that for many years had acted as the chief’s judicial and legislative organ, came under threat.<sup>84</sup> Its functions were later taken over by the Basuto National Council, a body responsible for enacting the Laws of Lerotholi.<sup>85</sup> Al-

(René Lemarchand ed., 1977, *cited in* David Coplan & Tim Quinland, *A Chief by the People: Nation Versus State in Lesotho*, 67 AFR. 27, 33 (1997).

<sup>81</sup> GILL, *supra* note 19, at 129.

<sup>82</sup> See generally, Colin Murray & Peter Sanders, *Medicine Murders in Basutoland: Colonial Rule and Moral Crisis*, 70 AFR. 49-78 (2000) (analysis of the case of two chiefs, Bereng and Gabashane, who were hanged after being found guilty of committing murder (medicine murder) by the colonial courts).

<sup>83</sup> LORD HAILEY, AN AFRICAN SURVEY: STUDY OF PROBLEMS ARISING IN AFRICAN SOUTH OF SAHARA 506-07 (1957) (detailing earlier accounts of the nature of the Basotho traditional polity and how they were affected by the imposition of colonial rule); see also, M.C. Leggasick, *The Grigua, the Sotho-Tswana and the Missionaries* (1969) (unpublished Ph.D. dissertation, University of California at Los Angeles); ASHTON, *supra* note 33, at 7.

<sup>84</sup> Nqosa Leuta Mahao, *Colonial Rule and the Transformation of Chieftaincy in Southern Africa: A Case Study of Lesotho* 21 (2) SPECULUM JURIS 206, 212 (2007). See Sandra Wallman, *Pitso: Traditional Meetings in a Modern Setting* 2 CAN. J. AFR. STUDIES 167, 169 (1968) (noting that the noun *Pitso* is taken from the verb *ho bitsa* which means ‘to call’); Nqosa Leuta Mahao, *Chieftaincy and the Search for Relevant Constitutional and Institutional Models in Lesotho* 9 (1) LESOTHO L.J. 149, 164-65 (1993) (discussing how the *Pitsos* conducted their affairs. Notes that usually, the agenda at *Pitso* would be presented by one of the counselors and all other members would be invited to voice their opinion, and that the discussions were carried in the “spirit of freedom of speech and openness.” After the deliberations, the chief would offer his deciding opinion, which would then be adopted as the position of the *Pitso* on the matter. Voting was not permitted and no system of checks and balances existed to contest the chief’s views or moderate his opinion. The *Pitso* was by and large the rubberstamp of the chief’s decision and that of his henchmen. According to Mahau, the *Pitsos* were “no more than an institutional conveyor belt which availed a myriad of opinions and helped the chief to make informed choices when they exercised their decision making powers” and thus “fell short of the much vaunted perception that cast it as a vivid example of direct democracy.”).

<sup>85</sup> See JAMES E. BARDILL & JAMES COBBE, LESOTHO: DILEMMAS OF DEPENDENCE IN SOUTHERN AFRICA 22 (1985) (noting that the differences that existed between the council and *pitsos* were the restricted membership and the more pronounced role of the colonial administrator in the former).

though regional *Pitsos* were still being held, they were not so much for the carrying out important functions associated with controlling the exercise of political authority, but rather, they became forums for conveying the decisions already made by the British Resident Commissioner or the paramount chief.<sup>86</sup>

### C. *The Colonial Judicial System*

When Basutoland was declared a crown colony in 1884, the colonial administration took steps to create what may be regarded as the first legal system.<sup>87</sup> This was effectuated through the General Law Proclamation of May 29, 1884 ("Proclamation").<sup>88</sup> The Proclamation provided for the retention of the general common law of the Cape colony that had been applicable in Basutoland since 1871 and customary law as administered by the chiefs.<sup>89</sup> Minor amendments were made to section 2 of the Proclamation, and the existing law is as follows:

In all suits, actions, or proceedings, civil or criminal the law to be administered shall as nearly as the circumstances of the country will permit be the same as the law for the time being in force in the Colony of the cape of Good Hope: Provided however, that in all suits, actions or proceedings in any court to which all of the parties are Africans, and in all suits, actions or proceedings whatsoever before any Basuto court, African Law may be administered.<sup>90</sup>

It also provided that no Acts passed by the Cape parliament after its date were to become part of the law of Basutoland.<sup>91</sup> The idea was that, henceforth, Basutoland was to be administered as a separate entity, its historical connection to the Cape notwithstanding. Moreover, it seemed from the wording of the Proclamation that the British were not quite comfortable with administering the Roman Dutch Law that had become the common law in the Cape.<sup>92</sup> Thus, the Proclamation also created by

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<sup>86</sup> ASHTON, *supra* note 33, at 217; Sandra Wallman, *Pitso: Traditional Meetings in a Modern Setting* 2 CAN. J. AFR. STUDIES 167, 170 (1968).

<sup>87</sup> SEBASTIAN POULTER, *LEGAL DUALISM IN LESOTHO* 2 (1999).

<sup>88</sup> Proc R2B of 29 May 1884 (S. Afr.). *See also*, *LEGAL DUALISM IN LESOTHO*, 3 (1999).

<sup>89</sup> Proc R2 of 29 May 1884 (S.Afr.).

<sup>90</sup> Proc R2 of 29 May 1884 (S.Afr.).

<sup>91</sup> *Id.*; *see also*, Sebastian Poulter, *The Common Law in Lesotho*, 13 J. AFR L. 127, 128 (1969).

<sup>92</sup> *Compare* Poulter, *The Common Law in Lesotho*, (1969) (noting, in the usual British colonial tradition, the Proclamation could have had a reception clause allowing for

law a dual court structure and did away with the magistracy established under the 1871 Annexation Proclamation. By virtue of regulations 1, 2, 4, and 12, of the Proclamation, a parallel court structure was established in which the imported law was to be administered by the courts of the Resident Commissioner, while customary law was left in the domain of traditional chiefs courts. Section 4, which established the Chiefs Courts stated as follows:

It shall be lawful for any native chief...appointed by the Resident Commissioner to adjudicate upon and try such cases, criminal or civil and to exercise jurisdiction in such manner and within such limits as may be defined by any rules established by the authority of the Resident Commissioner.<sup>93</sup>

Appeals from the Chiefs Court lay to the combined court of the Chief and the Assistant Commissioner and then to the Resident Commissioner.<sup>94</sup> The recognition of customary law and the chiefs' authority to administer it was a marked departure from the earlier colonial policy of complete disregard to traditional authority manifest in the period prior to 1881. Indeed, the Proclamation indicated a new path in the British approach towards dealing with Basuto chiefs. According to Hailey, the colonial authority "showed maximum regard for customary authority of chiefs, and restricted intervention to such measures as were necessary to satisfy the more simple requirements of local rule, such as collection of tax or preservation of order."<sup>95</sup> Apparently, the British realized that to achieve total subjugation of the Basuto people, the chiefs needed to be fully incorporated into colonial service.<sup>96</sup>

In the same vein, the new colonial legal order sought to utilize cus-

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application of the common law and doctrines of equity by a certain date), with James Beardsley, *The Common Law in Lesotho*, 14 J. AFR. L. 199, 199 (1969) (arguing in favor of a more flexible interpretation to the reception law and suggesting that by not so doing the benefit of according enormous latitude to judicial discretion that is desirable in such matters may not be attained. Also, that external events have nonetheless imposed a cut-off in 1909).

<sup>93</sup> Proc R4 of 29 May 1884 (S. Afr.).

<sup>94</sup> Proc R8 of 29 May 1884 (S. Afr.) ("It shall be lawful for any person, a party to any suit or proceeding before any Native Chief . . . to appeal from the decision of such Chief, in the first instance to a court composed of an Assistant Commissioner and of such chief and in the event of their disagreeing the Resident Commissioner shall decide the matter in dispute . . .").

<sup>95</sup> WILLIAM MALCOLM HAILEY, *AN AFRICAN SURVEY REVISED 1956: A STUDY OF PROBLEMS ARISING IN AFRICA SOUTH OF THE SAHARA* 272 (1957).

<sup>96</sup> See W.C.M. MAQUTU, *CONTEMPORARY CONSTITUTIONAL HISTORY OF LESOTHO* 23 (1990) (noting that the chiefs also provided cheap labor in the field of administration).

tomary law as a tool for social and political control - an "instrument of the power of an alien state and part of the process of coercion."<sup>97</sup> To be successful in this endeavour, the colonial government needed to do two things. The first was to create a system of administration that would be capable of adopting the traditional institutions of governance into its ranks. Secondly, they had to reinvent African custom and tradition, drain it of all the regenerative and adaptive qualities, and reduce its rigid concepts and rules so that it could be administered by the colonial judicial system. Thus, the colonial administration became privy to a process that has been referred to as the "invention of tradition."<sup>98</sup> In this scheme, refining the rules of custom and streamlining the chieftainship were seen as mutually reinforcing strategies for entrenching colonial authority. Thus, as far as administration goes, the colonial government divided the country into seven administrative districts, namely, Berea, Maseru, Leribe, Quthing, Mafeteng, Mochale's Hoek and Quthing Nek.<sup>99</sup> The British then placed chiefs in charge of these districts.<sup>100</sup> This strategy heralded what Makoa has recently called, the 'corporatist and exclusivist' administrative strategy—a strategy that elevates the elite to positions of prominence but denies them actual political power.<sup>101</sup>

#### IV. THE CODE OF LEROTHOLI

It is useful to situate the discourse on codification of Basotho customary law within the historical development of traditional institutions that were the kingpin of political governance and justice dispensation. Normative activity, even within the context of a traditional society, is a product of intense competition among institutions of power. In Lesotho, traditional institutions never enjoyed unqualified support amongst the Basotho because of the expansion of the power of the Chieftainship (*Bo-rena*) and other institutions associated with it such as the Chiefs Court

<sup>97</sup> Martin Chanock, *Neo-traditionalism and Customary Law in Malawi*, 16 AFR. L. STUD. 74 (1978).

<sup>98</sup> Terence Ranger, *The Invention of Tradition in Colonial Africa*, in THE INVENTION OF TRADITION 211, 251 (Eric Hobsbawm & Terence Ranger eds., 1983).

<sup>99</sup> JAMES FERGUSON, THE ANTI-POLITICS MACHINE: DEVELOPMENT, DEPOLITICIZATION, AND BUREAUCRATIC STATE POWER IN LESOTHO 76-78 (1990) (noting that Butha Buthe and Mokhotlong were added in 1978, while Thaba Seka was carved out in 1978).

<sup>100</sup> *Id.* at 78.

<sup>101</sup> See generally Francis Makoa, *Electoral Reform and Political Stability in Lesotho*, 4 AFR. J. CONFLICT RESOL. 79-94, (2004).

(*Lekhotla*) and the Chief's Council (*Pitso*).<sup>102</sup> So, whereas these institutions could have been regarded as the pillars of the nation, they also constituted a field of contestation that later yielded to reorganization and reform. Thus, the need to codify and streamline Basuto customary law must be seen to arise amid the scramble by these institutions for power. Initially, the strength of these institutions lay in their ability to mollify dissent and effectively resolve the whole range of disputes that could destabilize political leadership. But as the nation grew, these institutions became hostage to challenges by the citizenry and the demands for economic survival. Apart from vertical contests precipitated by discontent among smaller chiefs, whose authority was slowly usurped by the *Morena e moholo* (the paramount chief),<sup>103</sup> and later the British, tensions within the political body politic itself, arising from corruption, and uneven application of the law, arbitrary rule by some of the chiefs, and a myriad of other complaints, necessitated a revision of customary law and the streamlining of the customary judicial process.<sup>104</sup>

Two rather complementary developments paved way for the concerted efforts towards reducing the whole morass of customary law into a single code. The first related to the overall weakness of the colonial administrative structure evident in its inability to completely harness the authority of the chiefs.<sup>105</sup> In this regard, the British system of indirect rule that had been so successful in parts of East and West Africa was faulted for limiting intrusion by the British administrator into the native affairs while giving the Chiefs almost unfettered control over people and territory.<sup>106</sup> A report by Sir Alan Pim characterized the colonial administration in Lesotho as falling short of indirect rule standards and constitut-

<sup>102</sup> Nqosa Leuta Mahao, *Colonial Rule and the Transformation of Chieftaincy in Southern Africa: A Case Study of Lesotho* 21 (2) SPECULUM JURIS 163-69.

<sup>103</sup> See generally EUGENE CASALIS, THE BASOTHOS: OR TWENTY THREE YEARS IN SOUTH AFRICA 214 (1861) (noting that *Morena* comes from the Sotho word *rena*, which means tranquility or prosperity. Thus, *Morena* signifies the responsibility of ensuring peace and public safety.).

<sup>104</sup> Sam Rugege, *The Struggle over the Restructuring of the Basotho or Chiefs' Courts in Lesotho: 1903-1950*, 3 LESOTHO L.J. 159, 162-63 (1987).

<sup>105</sup> David Coplan & Tim Quinland, *A Chief by the People: Nation Versus State in Lesotho*, 67 AFR. 27, 38 (1997) (One will remember that the collapse of the first British administration in Lesotho after the Gun Wars of 1880-1881 were precisely because of the same reason.); GILL, *supra* note 19, at 128-30; Richard Weisfelder, *The Basuto Monarchy*, in AFRICAN KINGSHIPS IN PERSPECTIVE: POLITICAL CHANGE AND MODERNIZATION IN MONARCHICAL SETTINGS 88-92 (René Lemarchand ed., 1977).

<sup>106</sup> See Roger Gocking, *Colonial Rule and the legal Factor in Ghana and Lesotho*, 67 AFR. 61, 70 (1997).

ing instead “a policy of non-interference, of proffering alliance, of leaving two parallel Governments to work in a state of detachment unknown in tropical Africa.”<sup>107</sup> Whether diminished control by the British colonial officers was due to apathy or sheer incompetence, it allowed for a greater influence of traditional legal institutions such as the *Pitsos* (general Council of the people) and *Khotla* (traditional or chiefs court) on the management of native affairs and thus greater authority of the chiefs.

The second factor is connected to the first. As Basutoland entered a phase in its legal and judicial history where the chiefs became the cornerstone of justice administration and the bulk of disputes among natives were dealt with by the chiefs courts established under section 4 of the Proclamation, cracks began to emerge on the role of customary law in the overall maintenance of public order.<sup>108</sup> The colonial administration appointed the chiefs as civil servants so that there was no clear cut difference between the exercise of judicial and political functions.<sup>109</sup> Naturally, these appointments allowed the chiefs to grossly mismanage their judicial prerogatives and evoke much criticism and dissent from the commoners.<sup>110</sup> There was also the worrisome trend of smaller chiefs supporting the commoners against the principal chiefs.<sup>111</sup> Combined with the ambiguity of customary succession procedures, the whole institution of chieftainship became chaotic, incapable of furthering the colonial interests in the country. On the other hand, the British who themselves came from a judicial tradition in which veritable distinctions existed between judicial and political organs, found the chiefs' powers to be unwieldy and in need of streamlining.<sup>112</sup> Apart from political tensions, there were religious rivalries as well.<sup>113</sup> With an arbitrary traditional go-

<sup>107</sup> Alan Pim, Report on Financial and Economic Position of Basutoland, 1935, Cmnd 4907 (London HMSO, 1935), at 14, *quoted in* L.B.B.J. MACHOBANE, GOVERNMENT AND CHANGE IN LESOTHO 1800-1966: A STUDY OF POLITICAL INSTITUTIONS 147 (1990).

<sup>108</sup> Gocking, *supra* note 106, at 70.

<sup>109</sup> See PALMER & POULTER, *supra* note 9, at 34.

<sup>110</sup> See Rugege, *supra* note 104, at 160-68.

<sup>111</sup> Richard F. Weisfelder, *Early Voices of Protest in Basutoland: The Progressive Association and Lekhotla La Bafo*, 17 AFR. STUD. REV. 397, 400-01 (1974) [hereinafter Weisfelder, *Early Voices of Protest*].

<sup>112</sup> See PALMER & POULTER, *supra* note 9, at 34 (noting that statutory restrictions were placed on chiefs); see Thabane, *Economy and Society*, *supra* note 72, at 105-06 (discussing the rift that was emerging between citizens and chiefs as a result of the chieftaincy being part of the colonial civil service).

<sup>113</sup> See Weisfelder, *Basotho Nation-State*, *supra* note 17, at 242; see also D. Khama, *Reinterpretation of the Historical Development of the Church and State in Lesotho's*

verning class a growing political awareness among commoners, and a very uneasy colonial administration, the future of the Basuto nation seemed threatened.

To restore faith in the colonial administration and ensure its continuity, the traditional justice system had to be reformed. Reformation could only be feasible in the context in which the social and political institutions of a traditional character had hitherto exercised their authority. No wonder, seeking a concurrence in the establishment of a traditional council authority with a national character akin to the *Pitsos* became a major preoccupation of British in the period after 1884. The need arose from the combined interest of the British and the Chiefs to maintain their positions amid the rising tensions and contests emanating from below. From the paramount chiefs' perspective, such a body was seen to carry the promise of evolving norms and structures of justice administration that would reflect their true way of life and set them apart from the western influence as well as a claim to some autonomy in the exercise of judicial and legislative functions.<sup>114</sup> The British, on the other hand, supported the formation of the Council because they thought it would perform advisory functions only.<sup>115</sup> This divergence of opinion was to be the Council's greatest challenge.

A. *The Basutoland National Council (Lekhotla La Lesotho La Sechaba)*

The initial overtures to establish a council came from the British, but received immediate support from the paramount chief. It was Sir Marshal Clarke, the newly appointed Resident Commissioner of Basutoland, who, in 1884, asked the High Commissioner for authority to establish a Council of Advice comprised of chiefs and headmen.<sup>116</sup> His initial recommendation was that the chiefs be nominated by the Paramount

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*Education Partnership*, 16 LESOTHO L.J. 151, 154-55 (2006). This rivalry existed quite apart from the tensions between religion and tradition that occurred at almost every level of society. See BARDILL & COBBE, *supra* note 85, at 30 (arguing that the expansion of the Catholic church in the 1940s and its accommodation of most customary practices such as polygomy and bride-wealth, brought it into direct conflict with radical protestant churches such as PEMS).

<sup>114</sup> See MOCHABANE, *supra* note 32, at 80-81.

<sup>115</sup> Sebastian Poulter, *The Place of the Laws of Lerotholi in the Legal System of Lesotho*, 71 AFR. AFF. 144, 150 (1972) [hereinafter Poulter, *The Place of the Laws of Lerotholi*].

<sup>116</sup> MOCHABANE, *supra* note 32, at 77.

Chief, who was Letsie at the time, upon recommendation by the Resident Commissioner.<sup>117</sup> Letsie accepted the idea in March 1886, but the Council was not established immediately due to disagreements within the monarchy and the chieftainship, as some chiefs feared that it may erode their powers.<sup>118</sup>

The idea, however, generated awareness of the need for constitutional moderation of the powers of the chiefs and found support amongst smaller chiefs and headmen.<sup>119</sup> One chief, Tsolo Mopeli, at a *Pitso* in April 1887 explained:

I say it will be a good thing to have council to help and the eyes of the Resident Commissioner and the chiefs and people . . . We want council in the same way as these laws come to us finished. We have to obey them but they are already written. What can we do if we find any of the laws heavy as regards Sesuto customs . . . Why we wanted the Council is because old men can come in their karosses and help make laws . . . . At the Council we could all speak and follow enlightened people. Sometimes a man is oppressed by chiefs and he could appeal to the Council.<sup>120</sup>

The prevalent view was that the council would replace the *Pitso* and thus become a parliament of sorts, capable of formulating laws for the good governance of the territory. It would, according to Letsie, be the Council of Laws where the Basotho, like the British, would enact their laws and lay down systems of governance based on their traditional legal system.<sup>121</sup>

In 1889, the Resident Commissioner revived the discussion by suggesting a different composition of the council.<sup>122</sup> He suggested a membership of between sixty and seventy men.<sup>123</sup> The council would meet once every year to “consider any fresh laws submitted to it, in so far as” they would affect the Basotho; address questions connected with local affairs; receive reports on hut tax expenditures; and deliberate on serious

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<sup>117</sup> *Id.* at 80.

<sup>118</sup> *Id.* at 80-81.

<sup>119</sup> *Id.* at 78.

<sup>120</sup> *Id.* at 78-79 (referencing: Basotholand National Pitso 6 Apr. 1887 CO 417/14). Mopeli's view was representative only of those chiefs who saw the Council as a “progressive step from indigenous institutions” and not necessarily a majority opinion. *Id.* at 78.

<sup>121</sup> See MOCHABANE, *supra* note 32, at 80.

<sup>122</sup> *Id.* at 79.

<sup>123</sup> *Id.*



national cases.<sup>124</sup> While Letsie again accepted the proposal, several contentious issues arose to delay its official inauguration. The first related to the issue of appellate jurisdiction. The Resident Commissioner had suggested that the *Morena e Moholo* and he should retain powers to appoint from the members of the council members of a court of appeal instituted to “take cognisance of the native disputes.”<sup>125</sup> Letsie was not happy with this arrangement because he was disinclined to share his powers with the Resident Commissioner.<sup>126</sup> The second issue was the fact that his demand to be allowed unfettered discretion in nominating members of the council had been ignored.<sup>127</sup> Letsie died in 1891 and, his son, Lerotholi ascended to the throne.<sup>128</sup> The intervening saw great unrest in the territory, with attempts being made by Jonathan (an uncle) as well as Masopha and Maema (half-brothers) to overthrow Lerotholi;<sup>129</sup> an outbreak of rinderpest disease that devastated the cattle economy<sup>130</sup> and the Anglo-Boer war in Orange Free State diverting the attention of the British.<sup>131</sup> For this reason, attempts to establish the Council were delayed for eight years.<sup>132</sup> Only after having consolidated his position and having been convinced by the missionaries that a Council would strengthen his leadership, did Lerotholi again revive the debate.<sup>133</sup> His request was acceded to by the Colonial administration in 1903, and a Council was duly established under the name Basutoland National Council (*Lekhotla La Lesotho La Sechaba*).<sup>134</sup>

The Basutoland National Council operated without any legislative force until 1910, when requisite regulations were made by the Resident Commissioner and later approved by the High Commissioner.<sup>135</sup> According to these regulations, the Council was composed of one hundred

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 80.

<sup>126</sup> *Id.*

<sup>127</sup> MOCHABANE, *supra* note 32, at 80.

<sup>128</sup> *Id.* at 81.

<sup>129</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 150.

<sup>130</sup> See generally Pule Phoofolo, *Face to Face with Famine: The Basotho and the Rinderpest 1897-1899*, 29 J. S. AFR. STUD. 503, 503 (2003) (discussing the rinderpest outbreak).

<sup>131</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 150.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF BRITISH EMPIRE* 1057 (2001).

<sup>135</sup> MACHOBANE, *supra* note 32, at 82.

members, five to be appointed by the Resident Commissioner, twenty Principal Chiefs, and the rest to be appointed by the *Morena e Moholo*, taking into account the fair share of representation of all sections of the Basotho society.<sup>136</sup> In its first session in July 1903, a proposal was made to compile the Basotho traditional laws and reconcile them with the 'laws of Moshoeshoe.'<sup>137</sup> A committee of twenty-four members formed to undertake this task came up with twenty-one rules, which were later reduced to eighteen by the general Council.<sup>138</sup>

### B. *Structure of the Code*

The rules in the Code covered the following areas: succession to chieftainship; the supremacy of the *Morena e Moholo*; rights of appeal from the decisions of the chiefs; chiefs' access to free labour;<sup>139</sup> appeals from the decision of *Morena e Moholo* to the Resident Commissioner; application of due process to the custom of 'eating up'; debtors' rights; allocation of land; forfeiture of land use; procedure and summons to chiefs courts; disposal of immovable property upon removal from a chief's jurisdiction; law on theft; seduction and abduction of unmarried women; limits, duties and responsibilities of heirs; rights of widows and male children; compensation for physical injury; jurisdiction of Assistant Commissioners and Resident Commissioners Courts; and use of fire-arms.<sup>140</sup> These laws, henceforth known as the Laws of Lerotholi, were printed and issued the following year.<sup>141</sup> The laws have since been amended and some portions of them have become obsolete with enactment of legislation,<sup>142</sup> but the current version of them is substantially a

<sup>136</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 151.

<sup>137</sup> *Id.*; MOCHABANE, *supra* note 32, at 84.

<sup>138</sup> MOCHABANE, *supra* note 32, at 89.

<sup>139</sup> In the 1903 version of the Laws of Lerotholi, failure to perform tribute labor (*let-sema*) was made an offense. Section 4 provided as follows: "[b]e it enacted that the paramount chief or any chief may call the chiefs and sub-chiefs under them and their people, to take messages for them and to cultivate their lands. Any chief or man refusing such lawful summons shall be liable to a fine not exceeding ten shillings or in default two days work." Laws of Lerotholi 65 of 1903 § 4. But the laws also conferred to the citizens the right to be allocated land for cultivation and "safeguarded them from against unreasonable dispossession."

<sup>140</sup> Laws of Lerotholi 65 of 1960.

<sup>141</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 152.

<sup>142</sup> *Id.* (noting, for example, that revisions in 1922 on: the right of appeal from the chief's court, right of a maternal uncle to a portion of the *bohali* paid on marriage of his niece, elaboration on wills, and declaration of a public holiday on Moshoeshoe day, were

merger of the original version from 1903 with the subsequent amendments, rules, and orders made by the Paramount Chief in pursuance to Native Administration Proclamation No. 61 of 1938,<sup>143</sup> which includes the newly promulgated laws and revisions since 1922 on land tenure systems, chieftainship, administration of justice, family law, customary edicts, and what was referred to as the 'Native Court Rules' included in the English version by the colonial administration in 1946.<sup>144</sup>

The Laws are laid out in three parts. Part I, which is entitled: Declaration of Basuto Law and Custom, is comprised of rules contained in the 1903 version together with the subsequent revisions.<sup>145</sup> It contains provisions that relate to the authority of the Paramount chief, matters of successions to the chieftainship, land allocation, and inheritance.<sup>146</sup> Succession is decreed by birth in accordance with age-old customary practice.<sup>147</sup> Chieftainship devolves through the male lineage.<sup>148</sup> As for land ownership and tenure, the Chiefs have the power to allocate land in their area of jurisdiction to all their subjects "fairly and impartially."<sup>149</sup> The provision also places, at the discretion of the chiefs, the power to take away from such subjects a land or lands that are not properly used.<sup>150</sup> Part II is basically comprised of the rules made subsequent to the 1938 Proclamation by the paramount chief but with a few additions plucked from the 1903 version dealing with seduction and abduction.<sup>151</sup> It deals with a number of unrelated issues that were thought to fall within

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all made); *see also* Rugege, *supra* note 104, at 167. Other significant revisions were made in 1938, 1946, and 1955. Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 154.

<sup>143</sup> Local and Central Courts Proclamation 62 of 1938 § 8, 15 (stating that the Paramount Chief has authority to make rules necessary for the "peace, good order and welfare" of his people subject to the approval of the High Commissioner). *See also* Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 154; MAQUTU, *supra* note 96, at 2; PALMER & POULTER, *supra* note 9, at 490-92 (discussing the history of the law and suggesting that the legislation elevated the role of the Resident Commissioner in policing the native courts, thereby trimming the power of the chiefs).

<sup>144</sup> High Commissioners Notice 32 of 1946, *cited in* Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 154 n. 44.

<sup>145</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 154.

<sup>146</sup> *Id.*

<sup>147</sup> Laws of Lerotholi 65 of 1960 § 2.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* § 7. The current modification to this rule occurred in response to the High Court's decision in: *Nkhasi v. Nkhasi* 1955 HCTLR 39 (LSHC).

<sup>150</sup> Laws of Lerotholi 65 § 7(3).

<sup>151</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 154.

the jurisdiction of the Chiefs Courts under the Proclamation. These include issues of abduction, special grazing areas set aside by the Chiefs (*Leboella*), payments of local rates, regulations relating to animals, sale of beer, use and cultivation of Dagga (marijuana), circumcision, initiation schools, marriage, and defamation of character.<sup>152</sup> The marriage rules are contained in section 34 and affirm the requirement of a bride price (*Bohali*) to be paid before a marriage can be completed.<sup>153</sup> Part III contains the orders by the Paramount chief that relate to the maintenance of good order and welfare of subjects.<sup>154</sup> The orders cover a wide range of activities that, in the past, had created some friction and suspicion among the people, such as the keeping of livestock and proper use of agricultural land. Thus, these sections were appended to earlier sections, especially section 8 of Part I, which addressed similar concerns.

### C. *The Status of the Laws of Lerotholi*

The General Law Proclamation of 1884 allowed for the application of customary law in Basutoland set the stage for the reinvention of custom by the colonial administration and their handmaidens, the Christian missionaries.<sup>155</sup> Using the chieftainship institution, official customary law was nurtured and later codified. With codified law, the role of chiefs as judicial functionaries became moribund. The 1938 Native Courts Proclamation abolished the traditional chief's courts and placed the jurisdiction of administering customary law with statutory courts.<sup>156</sup> In 1965, the Native Courts Proclamation was renamed the Central and Local Courts Proclamation and, under it, the native courts became known as the Basotho Courts.<sup>157</sup> Under section 9, these courts were given jurisdiction to preside over all customary law matters.<sup>158</sup> However, the exercise of this jurisdiction was restricted by the repugnancy clause, a familiar pattern in most British colonies.<sup>159</sup> The law, apart from excluding cases

<sup>152</sup> DUNCAN, *supra* note 41, at 121-61.

<sup>153</sup> *See id.* at 28.

<sup>154</sup> *See* Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 154.

<sup>155</sup> *See* Weisfelder, *Early Voices of Protest*, *supra* note 111, at 403. The word "reinvention" here is used to signify the evolution of 'official' customary law as opposed to 'living' customary law. Juma, *From Repugnancy to Bill of Rights*, *supra* note 2, at 109-11 (discussing the distinction).

<sup>156</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 152-54.

<sup>157</sup> POULTER, *supra* note 87, at 18.

<sup>158</sup> PALMER & POULTER, *supra* note 9, at 129.

<sup>159</sup> *See* POULTER, *supra* note 87, at 19.

of civil marriages unless they involved the return of *bohali*, also prohibited legal practitioners from representing litigants in customary law courts.<sup>160</sup> The general import of this law was to provide a transitional mechanism to natives as they assimilated to the 'modern' legal system and deliberately kept customary law occupying an inferior position to all other written law. This arrangement survived independence and, today, the bulk of customary law disputes are still being handled by the Local Basuto Courts, with the Subordinate Courts and the High Courts acting in a supervisory role.<sup>161</sup>

### 1. Historical Context

Invariably, the courts have resorted to the Laws of Lerotholi to determine the content of custom in a myriad of cases where customary law has been found to be the applicable law.<sup>162</sup> Disputes over inheritance, chiefly succession, seduction and marriage, as well as burial are all matters that seem to fall within the regime of customary law and, by extension, the Laws of Lerotholi. But even in these cases, legislation and judicial pronouncements are slowly encroaching into the areas hitherto reserved for customary law. Nonetheless, it is appropriate to observe that the status of customary law in Lesotho has not been enhanced by codified law. From the days of colonialism to the present, customary law has remained subordinate to 'western law.' While it could be agreed that the codification process was never really complete in Lesotho, had it been, the Laws of Lerotholi could have been re-enacted as part of the Native Proclamation and affirmed by the colonial legislative authority. This affirmation could have raised the laws' status in the hierarchy of norms and establish them to par with other colonial ordinances. Because this was not done, colonial courts treated these rules as nothing but a collection of customary rules that could only be applied if they met the usual repug-

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<sup>160</sup> Local and Central Courts Proclamation 62 of 1938 § 20. The law was first deemed void in the case: *Attorney General of Lesotho v. Mopa* 2002 1 (LSCA), available at <http://www.saflii.org/ls/cases/LSHC/2002/3.pdf>. Justification for the exclusion of legal practitioners from the courts was decided in the case: *Mahloane v. Letele* 1974 (1974-1975) LLR 255 (LSCA) at 256.

<sup>161</sup> PALMER & POULTER, *supra* note 9, at 510; see M. MAMASHELA, FAMILY LAW THROUGH CASES IN LESOTHO, at *Introduction* (1991) (arguing that jurisdiction is important because customary law still governs the life of ninety per cent of the population).

<sup>162</sup> See POULTER, *supra* note 87, at 17-19; see *Masupha v. Masupha* 1977 LLR 54 (applying customary law rules to forbid polyandry).

nancy tests.<sup>163</sup>

One example that illustrates this point is the famous case of *Griffith v. Griffith (The Regency Case)*<sup>164</sup> decided in 1943, where Lansdown J. described the Laws of Lerotholi as lacking “official recognition,” but nevertheless helpful “on any question as to the existence or extent of any customary practice amongst the Basuto people.”<sup>165</sup> In this decision, the court maintained that the Laws of Lerotholi were never equal to any other written law and that their status remained similar to that of any other unwritten customary law. The matter involved a contest between a widow of the late Chief Seeiso and his brother over the position of regency.<sup>166</sup> If the court had applied the customary rules set out in Part I of the Laws of Lerotholi, it would have denied the widow the right to succeed. But the Court, using standards set out in the South African case of *Van Breda v Jacob*, refused to accept customary rules on the grounds that they were not well established and had no force of law.<sup>167</sup> In a landmark decision, described by some as *cause célèbre*, the court affirmed the possibility that a woman could become a paramount chief notwithstanding the qualifying provisions of section 2 of the Laws of Lerotholi.<sup>168</sup>

The effort to raise the status of Laws of Lerotholi became a matter of protracted debate, especially after the Regency Case.<sup>169</sup> Even as late as 1950s, this debate was still raging. In 1951, the Council resolved that they should re-codify the whole of customary law and have it re-enacted as part of the colonial Proclamations.<sup>170</sup> This move was quickly stifled by the Resident Commissioner.<sup>171</sup> It was certainly not in the interest of the British that rules of custom should assume a status that was equal to other legislation passed by the colonial legislative machinery. Obviously, the colonial project could have been threatened if a set of rules that con-

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<sup>163</sup> See, e.g., *Ramalapi v. Letsie* 1972 (1978) LLR 404 (LSHC) at 404 (holding a customary rule, which provides a home for a child in the mother’s family unit, not to be repugnant to justice and morality); see also Ian Hamnett, *Some Notes on the Concept of Custom in Lesotho*, 15 J. AFR. L. 266, 270 (1971).

<sup>164</sup> *Griffith v. Griffith*, 1926-53 HCTLR 50 (Lesotho).

<sup>165</sup> *Id.* at 58.

<sup>166</sup> Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 155.

<sup>167</sup> In *Van Breda v Jacobs* 1921 AD 330 (S. Afr.) set out conditions that a customary rule must meet before it can be enforced: It must be reasonable; must have existed for a long time; must be generally accepted; and its contents must be clear and certain.

<sup>168</sup> MOCHABANE, *supra* note 32, at 199

<sup>169</sup> *Id.* at 201.

<sup>170</sup> *Id.* at 202.

<sup>171</sup> See Poulter, *The Place of the Laws of Lerotholi*, *supra* note 115, at 158.

tradicted its values were to become binding on all its courts. These actions by the colonial government show why not a single colonial statute mentioned the Laws of Lerotholi, or even acknowledged their existence.

## 2. The Post-Colonial Experience

Ironically, independence did not change matters very much. The debate on the relevance and status of the Laws of Lerotholi is still vivid. Today, the debate canvasses a wide range of issues, from the mundane concerns of what constitutes custom in any particular circumstances, to more problematic choice of law issues.<sup>172</sup> Nevertheless, the position of Code in the hierarchy of norms has remained the same. The Laws of Lerotholi are still regarded only as one of the sources of customary rules. The 1993 Constitution refers to customary law in sections 18, 45, and 154 but does not mention the Laws of Lerotholi.<sup>173</sup> Invariably therefore, the courts have resorted to the Laws of Lerotholi to determine disputes over inheritance, chiefly succession, seduction and marriage, as well as burial, which traditionally fall within the ambit of customary adjudication.<sup>174</sup> But even so, the gap between the applicable law and the prevailing customary practices seems to be widening. It seems that the Laws of Lerotholi have been outpaced by the changes in the Basuto social life. Rules regarding marriage have been threatened. Inheritance under male primogeniture, which is sanctioned by the Laws of Lerotholi, is equally under threat. In addition, claims based on human rights and gender equity have multiplied such that the Lesothos legal system will be forced to respond. In all likelihood, it will follow the jurisprudence emerging from

<sup>172</sup> See e.g. Hamnett, *Some Notes on the Concept of Custom*, *supra* note 163 at 270 (arguing that the problem is compounded by judges taking some fragment of foreign law and using it to determine what customs means. In this instance, the judges would then treat the Laws of Lerotholi as “preferred declaration of custom”). See also, GEORGE W.K.L. KASOZI, IMPLEMENTATION OF HUMAN RIGHTS STANDARDS: A STUDY ON THE COMPATIBILITY OF LESOTHO’S LAWS WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966) WITH PARTICULAR REFERENCE TO GENDER DISCRIMINATION, 105 (Danish Human Rights Centre, 2001) [http://www.humanrights.dk/files/importerede-%20filer/hr/pdf/kasozi\\_-\\_implementation.pdf](http://www.humanrights.dk/files/importerede-%20filer/hr/pdf/kasozi_-_implementation.pdf) (noting that the Laws of Lerotholi is also a hindrance to the implementation of human rights).

<sup>173</sup> LESOTHO CONSTITUTION (Government Printer, Maseru, 1993).

<sup>174</sup> See e.g. *Sehloho v. Mafisa* JC 69/49 (unreported, but discussed in DUNCAN, *supra* note 41 at 107) (pregnancy by a man other than the eloping partner did not amount to actionable wrong under Laws of Lerotholi); *Moletsane v Moletsane* LAC (2000-2004) 962 (holding that a subsequent civil marriage (customary) is invalid if the first marriage With another woman was still subsisting at the time of the husband’s death).

South Africa and other jurisdictions.<sup>175</sup>

Practice has also shown that the courts will only apply or refer to the Laws of Lerotholi when there is no legislation dealing with the issue before it. In the recent case of *Semahla v. Lephole*, for example, the appellant, in a dispute regarding customary succession to land, alleged that since the nomination of heir to the deceased's property had not been done in accordance with a 1992 statute, any rights to such property purportedly acquired under customary law as provided for in the Laws of Lerotholi, or any other rules, were invalid.<sup>176</sup> On this claim, the court avoided dealing with the more problematic question of which law to apply, probably because it found an easier way of disposing of the matter. Apparently, the property, which was the subject of dispute was in an urban area and thus fell outside the ambit of the statute, which only covered properties in rural areas.<sup>177</sup> Although the court upheld the rule of customary law in this instance, it was clear from the judgement of that had the land been in rural area, the statute would have overridden the Laws of Lerotholi.<sup>178</sup> This obviously confirms our earlier view that the Code has added no value to customary law rules in Lesotho.

### 3. Legality of Its Rules – Customary Marriage and Succession

The application of the rules contained in the Laws of Lerotholi by the mainstream courts has not been entirely smooth. Time and again, the questions of the legality of such rules has been raised. Two examples that demonstrate the tension in the application of codified law briefly examined here are marriage and succession. Undoubtedly, section 34 of the Laws of Lerotholi, which provide an entry point for any enquiry into the essentials and procedures for contracting customary marriage, has elicited unfavourable treatment from the courts.<sup>179</sup> For a customary marriage to be completed, the section requires three things: an agreement between the parties, an agreement between the parents, and payment of the

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<sup>175</sup> See *Gumede v. President of S. Afr.* 2009 (3) SA 152 (CC). See also *Bhe v. Khayelitsha* 2005 (1) BCLR 1 (CC); *Mthembu v. Letsela* 2000 (3) SA 219 (A).

<sup>176</sup> *Semahla v. Lephole* 2000 1 (LSCA) at 9-10, available at <http://www.saflii.org/ls/cases/LSHC/2000/129.pdf>.

<sup>177</sup> *Id.* at 10. The respective limitation is contained in section 7 of The Land Act 1979. Land Act 17 of 1979 § 7 (Lesotho).

<sup>178</sup> See *Semahla v. Lephole* 2000 1 (LSCA) at 10, available at <http://www.saflii.org/ls/cases/LSHC/2000/129.pdf>.

<sup>179</sup> See Letsika, *supra* note 12, at 77.



*bohali* in part or in full.<sup>180</sup> However, in Basoto society, men and women rarely feel constrained by such conditions to their relationships. Indeed, with the introduction of civil marriages under the Marriage Act 1974, the respect for tradition among younger educated couples began to wane.<sup>181</sup> The courts, in turn, have persistently shown reluctance to deny the existence of marriage simply because one of the essentials has not been fulfilled. In *Makaka v Makaka* for example, the *bohali* was discussed and never paid, yet the court still found that there was a valid marriage.<sup>182</sup> In the court's view, a person could acquire status of a wife under Basuto custom even without the fulfilling the requirements of the Laws of Lerotholi.<sup>183</sup> What this means is that the tenets of a customary marriage today cannot be defined through regimes of a codified law. Times have changed, and the limitations of the law have become more than apparent. In an earlier decision of *Ramaisa v. Mpholenyane*, Cotran J. made this observation:

I think a large part of the difficulties encountered in these cases has arisen because attempts have been made to reduce customs, but not all others, and in haphazard fashion, by a body lacking experience in the art of legislative drafting, into ink and paper with the result that the written words have assumed a quality of rigidity out of all proportion to their true meaning or significance.<sup>184</sup>

There are two key principles in the Basotho law of succession. The first is that of male primogeniture. It is embodied in section 11 (1) of the Laws of Lerotholi, which provides that "the heir will be first male child of first married wife, and if there is no male child in the first house, then the first born male child of the next wife married in succession."<sup>185</sup> Male primogeniture is a common practice in most traditional communities in

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<sup>180</sup> Laws of Lerotholi 141 § 34 (1) (a) – (c). Understandably, once a customary marriage has come into being, the parties lose capacity to contract a civil marriage with other partners. See, e.g., *Makata v. Makata* LAC (1980-1984) 198 (holding that a customary marriage is a valid marriage within the meaning of s 42 of the Marriage Act, 1974).

<sup>181</sup> See, e.g., W.C.M. MAQUTU, CONTEMPORARY FAMILY LAW: LESOTHO POSITION 6, 7 (2005) (blaming the youth's indifference to customary law on education and technological advancement).

<sup>182</sup> *Makaka v. Makaka* 2007 1 (LSHC) at 20-21 (Lesotho), available at <http://www.saflii.org/ls/cases/LSHC/2007/113.pdf>.

<sup>183</sup> *Id.*

<sup>184</sup> *Ramaisa v. Mpholenyane* 1977 LR 149; see also *Moeti v. Lefalatsa* 1999-2001 LLR 511 at 513-14 (D).

<sup>185</sup> Laws of Lerotholi § 11(1).

many parts of Africa.<sup>186</sup> In recent times, the principle has come into sharp criticism by gender and human rights advocates. In South Africa, for example, the principle has been found by the courts to be in conflict with the constitutional doctrines of equality and non-discrimination.<sup>187</sup> Thus, new forms of legislation have been enacted to ameliorate its consequences and to ensure that customary practices do not result in the marginalisation of persons on these bases.<sup>188</sup> It is arguable whether Lesotho might go the same way as South Africa. At the present, the courts have not been called upon to adjudicate the constitutionality of section 11(1) of the Laws of Lerotholi. But even if this were to happen, the courts would still have to negotiate the meaning of section 18(4)(c) of the Constitution which places customary practices above the right not to be discriminated against.<sup>189</sup> It is more than likely that Constitutional litigation could be skewed in favor of affirming the customary practice. Also, Lesotho, as compared to its neighbours, does not have a very vocal civil society. Human rights and gender groups have diminished voices in a state where tradition is intertwined with politics.<sup>190</sup>

The second principle in Basotho law of succession is that of sharing, such that no single dependent takes sole ownership of property to the exclusion of others. It is contained in section 14 (3) of the same law and provides:

If there is any male issue in any house other than the house from which the principle heir comes, the widow shall have the use of all property allocated to her house and at her death any remaining property shall devolve upon the eldest son of her house who must share such property with his junior

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<sup>186</sup> See, e.g., Elijah Taiwo, *The Customary Law Rule of primogeniture and Its Discriminatory Effects on Women's Inheritance rights in Nigeria: A Call for Reform*, 22 SPECULUM JURIS 104 (2008); Jelili Omotola, *Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture*, 15 IND. INT'L. & COMP. L. REV. 115 (2004-2005).

<sup>187</sup> See e.g., *Gumede v. President of the Republic of S. Afr.*, 2009 (3) BCLR 243 (CC) (S. Afr.).

<sup>188</sup> See, e.g., Reform of Customary Law of Succession and Regulation of Related Matters Act § 2 (completely removes from the jurisdiction of customary law all matters related to intestate succession).

<sup>189</sup> LESOTHO CONSTITUTION § 18(4) (c) (provides that the prohibition on discrimination shall not apply to any law that makes provision "for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law").

<sup>190</sup> See Juma, *supra* note 2 at 104.

brothers (emphasis is mine).<sup>191</sup>

This principle is canvassed in the Court of Appeal decision of *Moteane v. Moteane*.<sup>192</sup> The appellant, the eldest son of the deceased, sought an order to restrain the respondents, his siblings, from interfering in any way with estate of the deceased, who had died intestate.<sup>193</sup> He also sought a declaration that he is the “sole heir” to the deceased’s estate, a prayer that the court found to be ambiguous.<sup>194</sup> The appellant’s claim was based on section 11(1) of the Laws of Lerotholi.<sup>195</sup> In dismissing his claim, the Court of Appeal observed that under Basotho customary law, the determination of rights in such claims must take into account “the ethos of negotiation and the obligations of the family to honour the principle of mutual corporation and sharing which Basotho family law requires of them”.<sup>196</sup> The issue of being a sole heir was therefore dismissed as being contrary to the intendment of the customary law rule.<sup>197</sup> The requirement of family arbitration, which is the cornerstone of traditional African customary dispute resolution process, was held to be of utmost importance, the opinion explaining that it should have been attempted first before the matter came to court.<sup>198</sup>

In view of the foregoing, a few observations could be made in regard to the status of the Laws of Lerotholi. First, that they do not enjoy any preference above the informal rules of custom. Second, that the court will only revert to them when there is no legislation or common law that is applicable. Third, that nothing in the current legal system or practice seems to suggest that there might be any change towards enhancing their position. The laws’ current status and hallmarks of informality and fluidity, seem to suit traditionalists as well as constitutionalists alike. Even outside the courts, the debate on the status of the Laws of Lerotholi is muted; not too many voices are heard in support of the codified law.

<sup>191</sup> See DUNCAN, *supra* note 41 at 41-42.

<sup>192</sup> *Moteane v. Moteane*, 1997 (1995-1999) LAC 307 (LSCA) (Lesotho) available at <http://www.saflii.org/ls/cases/LSCA/1997/14.pdf>.

<sup>193</sup> *Id.* at 309.

<sup>194</sup> *Id.* at 312.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 312 (the Court relied on the precedent case *Maseela v. Maseela*, (1971-1973) LLR 132 (LSHC) where the court had ruled that in a dispute of this nature all the dependants of the deceased, including all those who have interest in the matter under customary law, need to be consulted and a family arbitration undertaken before the matter can be taken to court).

Moreover, those who live in urban areas and engage in modern commerce have no recourse in customary law and are not unduly concerned about its future.<sup>199</sup>

One might argue, then, that the codified law provides easy access to customary rules for judges and magistrates, most of whom may not be aware of Basotho customs. But, as Shellef has observed, many common law societies have evolved a flexible legal culture where “judges help make the law, and do so in terms of their understanding of an evolving society.”<sup>200</sup> In Lesotho, judges have a general predisposition towards liberal understandings of concepts such as equality, justice, and human rights that deter any meaningful engagement with custom.<sup>201</sup> Also, lack of proper reporting of cases in Lesotho and over-reliance on South African textbooks, case law, and judges, make Basotho courts less attuned to developing their own jurisprudence, let alone that of customary law.<sup>202</sup> One leading scholar has lamented thus: In Lesotho the problem is that the Court of Appeal is seldom in a position to discuss legal principles in a wholesome manner because previous decisions are not timeously reported or reported at all.<sup>203</sup> The result of this is that South African text books written by people who did not have Lesotho in mind and were not aware of difference between the law of Lesotho and that of the Republic of South Africa are commonly used.<sup>204</sup> The Court of Appeal becomes a victim of the unfavourable conditions under which it operates.<sup>205</sup>

#### V. LAWS OF LEROTHOLI AND LEGAL TRANSFORMATION IN MODERN LESOTHO

Despite all detractions, the Laws of Lerotholi, and indeed the customary law rules, are unlikely to vanish anytime soon. For about the one hundred years that the Laws of Lerotholi have existed, their contents have been contested, especially with regard to the powers that they con-

<sup>199</sup> MAQUTU, *supra* note 181, at 6.

<sup>200</sup> LEON SHELEEF, *THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM* 82 (2000).

<sup>201</sup> This is evident in cases that affirm constitutional rights such as *Lesotho Nat'l Gen. Ins. v. Nkuebe* (2002-2004) LAC 877 (where provisions of an act of parliament was found to be inconsistent with the constitution in so far as it limited the applicants rights to claim compensation).

<sup>202</sup> See MAMASHELA, *supra* note 161, at v.

<sup>203</sup> See MAQUTU, *supra* note 18, at 83.

<sup>204</sup> *Id.*

<sup>205</sup> See *id.*

fer to some traditional institutions, and their status in the hierarchy of legal norms.<sup>206</sup> Ironically, it is these same contests that have ensured the laws' survival. As litigants fought against the excesses of the chiefs and their appropriation of powers derived from the Laws of Lerotholi, the same were amended or revised to further entrench their application.<sup>207</sup> For this reason, the text of the Laws have invariably changed to accommodate the configuration of power and evolving administrative patterns. For example, section 7, which deals with allocation of land and recognizes the power of the High Commissioner to ratify the appointment of chiefs and headmen, was adopted in 1938 to conform to the Native Administration Proclamation of the same year.<sup>208</sup> In the post-independence era, this power is now vested in the Minister in charge of chiefs via the Home Affairs and Local Government by the Chieftainship Act.<sup>209</sup> Though rarely acknowledged, these revisions and amendments have incrementally transfused custom into 'modern' institutions of governance, making tradition an integral part of Basoto society. Thus, even without finding a direct reference to the Laws of Lerotholi in the new constitutional dispensation, their influence is felt through the application of a wider spectrum of customary jurisprudence. An examination of three aspects, namely the institution of chieftainship, the structure of the legal system, and the practice of democracy, may serve to illustrate the extent to which these laws influence society.

#### A. *The Institution of Chieftainship - Borena*

Chieftainship in post-colonial Africa faces considerable challenges. Some scholars predicted the extinction of chieftainship institution by the

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<sup>206</sup> See POULTER, *supra* note 87, at 17-19.

<sup>207</sup> See Rugege, *supra* note 104, at 47-49 (arguing that despite open disapproval of the tribute labour "letsema," the same was retained in the 1922 and 1946 amendments of the Laws of Lerotholi).

<sup>208</sup> Proc 61/1938 (Lesotho) (this proclamation required that the Chiefs and headmen be confirmed by the High Commissioner through notice in the Gazette). The colonial courts considered the matter of assigning chiefs to be purely administrative; the consequence was that any chiefs not recognized by the High Commissioner could not exercise chiefly authority. See DUNCAN, *supra* note 41 at 50-51.

<sup>209</sup> Chieftainship Act of 1968 § 14. Under section 14 the Minister has the power to publish the Chief names but the fact that a person has not been gazetted does not mean that he or she is in fact not a chief as the question of whether a person is in fact a chief is one of fact, to be determined by the available evidence. *Ministry of Home Affairs & Local Gov't v. Sakoene*, 2001 (2000-2004) LAC 332, available at <http://www.saflii.org/ls/cases/LSHC/-2001/159.pdf>.

turn of the last century.<sup>210</sup> But the institution reinvented itself, adapted to the new realities and renegotiated its role in a constantly changing cultural and political landscape. Today, chieftainship in many parts of Africa could be considered as both traditional and modern, its power and relevance drawing from a cultural etiquette that has been hard to shake off. Its resilience, attributed by some to the retraditionalisation of society and political manipulation, may have a deeper correlation with how nationalism and statehood have been constructed in the African community.<sup>211</sup> In the case of Lesotho, such resilience stems from the construction of national identity by the “conceptual unity of the chieftainship in Sotho consciousness.”<sup>212</sup> Such a construction is seen in the practice of placing, which ensures the continuance of chiefs via lineage and maintenance of a leadership hierarchy in the colonial administration.<sup>213</sup> From the chieftainship, a political structure emerged that determined a national identity alongside the territorial boundaries of Basutoland. This engineering of national identity could not have been possible without drawing from a repertoire of acceptable traditional practices and custom consolidated in the Laws of Lerotholi.<sup>214</sup>

As already stated, chieftainship among the Basotho has been significant as the symbol of a nation's cohesion and identity from the days of Moshoeshoe. Yet the institution has attracted controversy of varying forms and shapes in the trajectory of Lesotho's political history. In the formative days of the Basotho nationhood, chieftainship was important as a unifying symbol of society.<sup>215</sup> Although the chieftainship was based on kinship model, the maintenance of authority and sustenance of allegiance was highly dependent on the chiefs' ability to provide goodies,

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<sup>210</sup> See Francis Nyamjoh, *Chieftainship and Negotiation of Might and Right in Botswana Democracy*, 21 J. CONTEMP. AFR. STUD. 233 (2003); John Comaroff, *Rules and Rulers: Political Processes in Tswana Chieftainship*, 13 MAN 1 (1978); Jean-Pierre Warnier, *The King as a Container in Cameroon Grasslands*, 39 PAIDEUMA 303-19 (1993); A. Harriet-Sievers, *Igbo Traditional Rulers: Chieftainship and the State in South Eastern Nigeria*, 33 AFRIKA SPECTRUM 57-79 (1998). See generally DANIEL LERNER, *THE PASSING OF TRADITIONAL SOCIETY: MODERNISING THE MIDDLE EAST* (1958) (for information regarding contemporary theories of African chieftaincies).

<sup>211</sup> K. Linchwe II, *The Role of Chief can Play in Botswana's Democracy in DEMOCRACY IN BOTSWANA* 99-102 (John Holm & Patrick Molutsi eds., 1989).

<sup>212</sup> HAMNETT, *supra* note 32, at 43.

<sup>213</sup> *Id.* at 26-30; *State and Society*, *supra* note 23, at 20.

<sup>214</sup> Coplan & Quinlan, *supra* note 80, at 38.

<sup>215</sup> *Basotho Nation-State*, *supra* note 17, at 224; Blanchet-Cohen, *supra* note 35, at 230.

such as land, to their subjects.<sup>216</sup> While Moshoeshoe may have introduced innovative ways of consolidating power, his assertion of the chieftainship institution were based on the “old conceptions of leadership.”<sup>217</sup> Such conceptions went in tandem with his national consolidation project and, thus, emphasized the vesting of all authority in the chief (*Morena*), who then became the ultimate “ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and [ ] magician of the people.”<sup>218</sup> As already discussed, Moshoeshoe’s chieftainship was a loose combination of individual leaders left alone to manage their affairs. But in subsequent years, the Basuto chieftainship, like many others within the African continent, succumbed to the demands of colonialism and European capitalism to become part of the colonial civil service.<sup>219</sup> Despite its demonstrated propensity to embrace forces that protect its interests and to vigorously fight those who threaten it, the chieftainship was unable to withstand the colonial manoeuvres and arm twisting. It thus lost the ability to assert its traditional authority over resources and subjects. In the 1960s, the momentum created by the independence movements swept aside the hallowed perception of chiefs and encouraged debates advocating for the restraint on their powers.<sup>220</sup> The political party activity that subsumed the first decade of Lesotho’s independence eroded much of the image of permanency that the chieftainship had hitherto enjoyed and shook the belief that the institution was “essential to the very existence of the Basotho as a people.”<sup>221</sup>

Unlike in other regions, where the chieftainship was relegated from the mainstream of political governance, the Borena in Lesotho survived the threats and still plays some very crucial role in governance as well as resource use and supervision.<sup>222</sup> According to Hamnett, the chieftainship in Lesotho may be still be powerful because of its hold in land matters, but because of the rise in political consciousness, it is currently “no more than one limited group competing with other groups that are structurally

<sup>216</sup> Rugege, *supra* note 104, at 38.

<sup>217</sup> GEOFFREY TYLDEN, *THE RISE OF THE BASOTHO* 3 (1950).

<sup>218</sup> SCHAPER, *supra* note 9, at 62.

<sup>219</sup> Coplan & Quinlan, *supra* note 80, at 36.

<sup>220</sup> Blanchet-Cohen, *supra* note 35, at 231.

<sup>221</sup> *Id.*

<sup>222</sup> See Resetselemang Leduka, *Chiefs, Civil Servants and the City Council: State-Society Relations in Evolving Land Delivery Processes in Maseru, Lesotho*, 28 IDPR 181, 204 (2006).

equal to and co-ordinate with it".<sup>223</sup> This, therefore, compromises its claim that it represents 'national' rather partisan interests.<sup>224</sup> Nonetheless, recent studies amplify the traditional character of chieftainship and thus devote considerable space to analysing the legitimacy of the chiefs' authority in rural and community settings.<sup>225</sup> Quinlan and Wallis, for example, observe that since the locus of chieftainship authority is in the rural areas where the majority lives, it has been relatively difficult for government to exercise full authority in these areas.<sup>226</sup> They also dismiss the view that chieftainship in Lesotho is likely to disappear.<sup>227</sup> Instead, they foresee a continued relationship that forestalls any effort to supplant traditional forms of governance with modern forms of governance.<sup>228</sup> Crucial to this discussion, however, is the idea that so long as the Chieftainship maintains its prominence, the Laws of Lerotholi with all their rigidity and contradictions, will continue to provide reference to the applicable custom and traditional rules.

### 1. Structure and Authority

Chieftainship in Lesotho is hierarchical. At the top is the *Morena e Moholo*, or the Paramount Chief, whose claim to authority is both territorial and dynastic.<sup>229</sup> Then, there are the District chiefs (*Morena oa se-tereke*), Ward chiefs (*Morena oa sehloho*), Sub-Ward chiefs (*Morena*), village headmen (*Ramotse*) and lastly, the Counsellors (*Letona*).<sup>230</sup> Apart from the *Morena e Moholo*, who controls the whole country, the other chiefs control administrative areas that were created by the colonial ad-

<sup>223</sup> HAMNETT, *supra* note 32, at 88.

<sup>224</sup> *Id.*

<sup>225</sup> See, e.g., Tim Quinlan & Malcolm Wallis, *Local Governance in Lesotho: The Central Role of Chiefs*, in GRASSROOTS GOVERNANCE? CHIEFS IN AFRICA AND THE AFRO-CARIBBEAN 145 (Donald Ray & P.S. Reddy eds., 2003).

<sup>226</sup> *Id.* at 148.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> ASHTON, *supra* note 33, at 186. The term Paramount Chief first appeared in the Report of the Select Committee, Basutoland Annexation Bill of 1871, in reference to Moshoeshoe's sons Letsie, Masupha, and Molapo. The term then found its way into colonial legislation—section 2 of the Native Administration Law (Cap 54). A Paramount Chief is defined in this section as "any person recognized as such by the High Commissioner, and includes any person recognized as regent or as acting paramount chief." See DUNCAN, *supra* note 41, at 43.

<sup>230</sup> Quinlan & Wallis, *supra* note 225, at 147.



ministration.<sup>231</sup> Today, there are about ten districts each under the district chief.<sup>232</sup> Thus, the chiefs' authority has always been demarcated in terms of location and population. According to Quinlan and Wallis, this hierarchical structure is maintained by the relationship between the chiefs and their subjects. They observe that the chieftainship remains the focal point of society, "around which, Basotho define their nation, country and their place in it."<sup>233</sup> They make the point that even Moshoeshoe could not have created such a hierarchy without the participation of the subjects.<sup>234</sup> Currently, both the *Chieftainship Act 1968* and the Constitution recognize the hierarchical chieftainship order and its participation in executive and legislative organs of government.<sup>235</sup>

The structure of chieftainship elucidated above, shows the spread of chiefs' authority throughout the nation. It also indicates why it was easy for the colonialists to maintain a hold of Lesotho through the chieftaincy once it became part of the civil service. However, hidden within the structure are the numerous challenges that the institution has had to endure as it struggled to secure its relevance and authority. Galvanised around tradition and yet hamstrung by a plethora of administrative changes wrought by successive political governments, the chieftainship is an institution under siege. That is why its hold on codified customary law, its last bastion of authority, will not dissipate soon. But this aside, the institution has served other purposes that may be worthy of mention. Key among these is its support for decentralised governance.<sup>236</sup> The decentralisation policy adopted by the current government recognises that chiefs must be involved in local councils if government objectives for development and service delivery are to be realised.<sup>237</sup> Apart from the foregoing, the spread of chiefs all over the country has made it easier for them to render useful services such as helping people identify lost animals, preventing crime and generally assisting in the maintenance of law and order, protection of community development projects, working towards the peace and tranquillity of society and being custodians of Basu-

<sup>231</sup> *Id.*; ASHTON, *supra* note 33, at 186.

<sup>232</sup> Quinlan & Wallis, *supra* note 225, at 147.

<sup>233</sup> *Id.* at 148.

<sup>234</sup> *Id.*

<sup>235</sup> LESOTHO CONSTITUTION §§ 10, 104; Chieftainship Act 1968.

<sup>236</sup> See generally Government of Lesotho, Decentralisation Action Plan for Lesotho, 2009/10-2010/11, available at <http://www.gtz.de/de/dokumente/en-lesotho-decentralisation-action-plan-2009-2010.pdf>.

<sup>237</sup> *Id.* at 6.

to culture and tradition.<sup>238</sup>

Since the days of Moshoeshoe, agnatic relationships have always been the basis of transfer of wealth and political power.<sup>239</sup> All the Paramount Chiefs trace their agnatic link to Moshoeshoe and, throughout history, they have used this legendary connection to their advantage. The Laws of Lerotholi provided the rules of succession that ensured that the chiefly office was occupied by male descendants.<sup>240</sup> It provided,

The succession to the chieftainship shall be by right of birth: that is the first born male child of the first wife married: if the first wife has no male issue then the first born male child of the next wife married in succession shall be heir to the chieftainship.<sup>241</sup>

The Paramount chiefs had immense powers under colonial and customary laws. For instance, Paramount Chief had powers to make laws, provided that they related to a matter permissible under custom and were not "repugnant to morality or justice."<sup>242</sup> Such powers were contained in sections 8 and 15 of the Native Administration Law.<sup>243</sup> Indeed, there were streams of orders that were made in pursuance to these sections that were meant for the good order of society. Some of the areas in which such orders were issued included witchcraft prohibition, livestock and even imposition of criminal sanctions.<sup>244</sup> Most importantly, however, some of the orders made under these sections now comprise the rules in Part II and III of the current version of the Laws of Lerotholi.<sup>245</sup>

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<sup>238</sup> See J. DZIMBA & MATSOLO MATOONE, INST. OF SEC. STUDIES, STOCK THEFT AND HUMAN SECURITY: A CASE STUDY OF LESOTHO 9-10 (I2005).

<sup>239</sup> See Ian Hamnett, *Koena Chieftainship Seniority in Basutoland*, 35 AFR. 241, 242 (tracing the lineage of Moshoeshoe and indicating how power was transferred through the *Koena* dynasty).

<sup>240</sup> Laws of Lerotholi 65 of 1922 § 1; see Chieftainship Act 22 of 1968 § 10 (re-enacting this rule); see also *Molapo v. Molapo* 1973 (1926-53) HCTLR 50 (LSCA), discussed in Sebastian Poulter, *Marriage, Divorce and Legitimacy in Lesotho*, 21 J. AFR. L. 66 (1977).

<sup>241</sup> Laws of Lerotholi § 1.

<sup>242</sup> Proc 61 of 1938, §8 (1) (granting powers to the Paramount Chief to issue orders to be obeyed by natives within his area of jurisdiction). The application of this law is discussed in *Mohale v. Mahao* 2005 LSCA 10, available at <http://www.saflii.org/ls/cases/LSCA/2005/10.html> (holding that the authority of the chief to demarcate boundary could not be challenged). See also ASHTON, *supra* note 33, at 209 (discussing how Moshoeshoe issued decrees abolishing death penalty and prohibiting sale of European liquor to the Basotho).

<sup>243</sup> DUNCAN, *supra* note 41 at 45.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

It should be noted that the relationship between the chieftainship and tradition has been a lopsided one, where the former only reverts to the latter when its position is threatened.<sup>246</sup> In the post-Moshoeshoe era, the chieftainship position has manifested an enduring sense of disregard for fairness even within the confines of traditional law.<sup>247</sup> The individual chiefs have constantly manipulated the rules to guarantee control self preservation. The Laws of Lerotholi for example, may have been seen as a triumph of those who sought, so vigorously, limitation and streamlining of the chiefs' powers as well as succession procedures, but they remained a self-preservation measure that ensured that the commoners' grievances were moderated through a procedure in which the chiefs had enormous influence. They also guaranteed free labor for the chiefs and complete control over resources. The chiefs continued to exercise judicial functions until 1938, when the chief's courts were abolished, and local courts were established in their place.<sup>248</sup> But, even then, the chiefs continued to have tremendous influence over these courts, as they were considered to be the custodian of customary rules.<sup>249</sup> The subsequent amendments to the Laws of Lerotholi and the coming of the independence may have curtailed some of these prerogatives, but they left intact the position of power and influence that the chiefs have continued to enjoy to the present day.<sup>250</sup> The Chieftainship structure established by the colonial administration was adopted by the post-independence government to a large measure.<sup>251</sup>

Perplexing though it may seem, some analysts have suggested that the traditional Basotho chieftainship had an equivalent in constitutionalism in post-modern statism, and even gone a step further, to assert its

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<sup>246</sup> See Hamnett, *supra* note 163, at 272 (illustrating how, in some instances, the chiefs even thought that they were above customary law, and giving the example of the bizarre *Nkuebe* case (JC 591/52), where Chief Sempe claimed that he was not subject to the customary rule that requires the return of cattle upon divorce). His claim was rejected upon the observation that "'custom' means that which applies to the nation generally; it can not affect only a certain sector of it . . . . Law and custom should be the same throughout the nation." *Id.*

<sup>247</sup> ASHTON, *supra* note 33, at 220.

<sup>248</sup> Native Courts Proc 62 of 1938.

<sup>249</sup> GILL, *supra* note 19, at 186, 187; THE LEGAL SYSTEMS OF LESOTHO, *supra* note 9, at 103 (noting that chiefs continue to serve as assessors).

<sup>250</sup> MAQUTU, *supra* note 96, at 23.

<sup>251</sup> *Id.* at 44 (noting that chiefs have remained a fixture of the legislative organs since 1959).

preference to the dysfunctional post-colonial African governments.<sup>252</sup> Mahao refers to the widely documented view that the Basotho Chieftainship had an inherent appeal to citizens' consent, and argues that if this were indeed the case, then the institution had little difference with liberal democratic systems.<sup>253</sup> Taken at face value, this would give the impression that the chiefs ruled by approval of their subjects, or that their appointment sought participation of the majority. According to Sheddick, the appointments of chiefs depended on "approval of the people over whom [they were] to rule," even though such succession was governed by the primogeniture principles provided by custom.<sup>254</sup> These principles included the claim to the office by right of birth by male successors to the throne.<sup>255</sup> And although the final selection process involved the participation of members of a family council, those outside the lineage of the chief still had little to say even if they disagreed with the choice. Mahao argues that the idea of consent in Basotho chieftainship is a far cry if weighed against the ethos of modern constitutionalism.<sup>256</sup> Indeed, the assurance that the performance of a leader will be subject to continuous review, which may determine the tenure of his office, define the limits of power placed upon political leaders by modern constitutional regimes. That such limitations could not be said to have existed in the Basotho chieftainship, especially with regard to the ascension to office, is not in doubt.

## 2. Role of Chiefs in Land Matters

In Lesotho, land belongs to the Basotho nation and the king holds it in trust for the nation.<sup>257</sup> Under the Laws of Lerotholi, a communal system of tenure was established in respect of land under the supervision of the chiefs.<sup>258</sup> Thus, the chiefs and their headmen were responsible for allocating residential and agricultural land to households.<sup>259</sup> To be allo-

<sup>252</sup> See, e.g., Mahao, *supra* note 84, at 157.

<sup>253</sup> *Id.* at 157-58; *accord.* VERNON SHEDDICK, LAND TENURE IN BASUTOLAND 30 (1954); *accord.* JINGOES, *supra* note 35, at 183.

<sup>254</sup> SHEDDICK, *supra* note 253, at 30.

<sup>255</sup> ASHTON, *supra* note 33, at 193.

<sup>256</sup> Mahao, *supra* note 84, at 159.

<sup>257</sup> LESOTHO CONSTITUTION § 107; ASHTON, *supra* note 33, at 144.

<sup>258</sup> See, e.g., Laws of Lerotholi 65 § 11 (dealing with *leboella* – land set aside for communal use but supervised by the chiefs).

<sup>259</sup> Laws of Lerotholi 65 § 8 (providing, in part, that chiefs and headmen were responsible for allocating land to their subjects); *see id.* § 9 (providing that any chiefly dep-

cated land, one had to show good behavior and owe allegiance to the chief.<sup>260</sup> Ordinarily, an adult Basotho male who is married would be entitled to three pieces of land: a piece each for wheat, maize and corn.<sup>261</sup> The chiefs would take into account such factors as “length of residence, in the village, birth within ward and the existence of kinship or affinal links with those already established.”<sup>262</sup> Upon allocation, one was expected to cultivate the land and put it to proper use. The law allowed the chiefs to revoke allotment if the allottee had not cultivated the land for two successive years or had acquired more than was required for his family’s subsistence.<sup>263</sup> As noted by Hemnett, the rules that allow for deprivation of land have many gaps that the chiefs have exploited.<sup>264</sup> The overall effect is that injustices do occur, especially when land is taken from one person and given to another and the looser has to pursue his claim through the courts.<sup>265</sup>

Under the customary system, the chief had immense powers, which were often liable to abuse. Indeed, given the undemocratic nature of the chieftainship institution, sustained efforts to limit its influence and participation in resource allocation has been part of the land reform agenda in Lesotho since 1959.<sup>266</sup> Legislative intervention, which began with the Advisory Board’s 1965 Lands Regulations, went through a number of changes and finally culminated in the Land Act of 1979.<sup>267</sup> The Act had the effect of limiting the chiefs’ role in determining access to and use of land. The Act, in section 12, vests the power to allocate land on Land Committees established by the Minister under section 18.<sup>268</sup> The effect of this Act was to limit the chiefs’ powers over land conferred by the Laws of Lerotholi. Arable lands as well as sites for building homes are now allocated by Land Committees.<sup>269</sup> The committees are based on

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rivations of land were to be made for “good reason”).

<sup>260</sup> SHEDDICK, *supra* note 253, at 156.

<sup>261</sup> ASHTON, *supra* note 33, at 146 (but this was not absolute).

<sup>262</sup> HEMNETT, *supra* note 32, at 72.

<sup>263</sup> Rugege, *supra* note 104, at 40.

<sup>264</sup> HEMNETT, *supra* note 32, at 76.

<sup>265</sup> *Id.* at 76.

<sup>266</sup> Rugege, *supra* note 104, at 61.

<sup>267</sup> See generally NONE MOKITIMI, ANALYSIS OF SECURITY OF TENURE UNDER THE CUSTOMARY LAND TENURE SYSTEMS IN LESOTHO (2006).

<sup>268</sup> Lands Act 17 of 1979 § 12, available at <http://www.unep.org/padeli/publications/comp2Lesotho.pdf>.

<sup>269</sup> *Id.* § 12.

areas of jurisdiction of chiefs and headmen.<sup>270</sup> The people elect those who serve in the committees.<sup>271</sup> It is in the sphere of resource allocation, especially land in the rural areas, that a contest between the chiefs and government is most evident. In rural settings, communities place reliance on chiefs to “uphold collective access to, and need for, natural resources, particularly those that sustain livestock.”<sup>272</sup> In mountain areas, chiefs still control access to grazing areas, numbers of livestock a person can have, and even trade in livestock. Other positive effects of the Act include the ability of individuals to apply for titles, as land in rural areas can now be commercially leased and inherited.<sup>273</sup>

From the point of view of maximization of resource use, the Act had shortcomings that necessitated further review. For example, the Act denied no-Basotho the right to own arable land, a fact that drew open criticism from human rights quarters and external economic partners.<sup>274</sup> In 1999, a commission headed by Justice Ramobedi, was established to investigate, among other things, the land tenure systems, efficient administration, matters of inheritance, dispute resolution, and recommend appropriate review of legislation.<sup>275</sup> Clearly, the intention of the government was to bring under scrutiny the role of chiefs in the management, use, and ownership of land. The commission released its report in

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<sup>270</sup> Lands Act 17 of 1979 § 12 (1), available at <http://www.unep.org/pad-elia/publications/comp2Lesotho.pdf>.

<sup>271</sup> See A. Mosaase, *Lesotho's Land Policy Under the Land Act 1979 and its Implications for the Agricultural Sector in LAND POLICY AND AGRICULTURE IN EAST AFRICA AND SOUTHERN AFRICA* (J. W. Arntzen et al. eds., 1986), available at <http://www.greenstone.org/greenstone3/nzdl;jsessionid=CCF2FC147-086CD48877CFEA6D1192CF1?a=d&d=HASH01ebd5fc6a25573976c01b4b.5.np&c=ccgi&sib=1&dt=&ec=&et=&p.a=b&p.s=ClassifierBrowse&p.sa=>.

<sup>272</sup> Quinlan & Wallis, *supra* note 225, at 166.

<sup>273</sup> Lands Act 17 of 1979 § 20, available at <http://www.unep.org/pad-elia/publications/comp2Lesotho.pdf>.

<sup>274</sup> See *Moteane v. Moteane*, 1997 (1995-1999) LAC 307 (LSCA) (Lesotho) at 9, available at <http://www.saflii.org/ls/cases/LSCA/1997/14.pdf> (holding that applicant was excluded from inheriting property on the basis that he was not a citizen).

<sup>275</sup> See Neville W. Pule & Motlatsi Thabane, *Lesotho's Land Tenure Regimes: Experiences of Rural Communities and the Calls for Reform*, 42 J. MODERN AFR. STUDIES 283, 289 (2004); see also, PONTŠO SEKATLE SECURING LAND RIGHTS FOR THE POOR AND MARGINALIZED IN LESOTHO (2010), available at [http://siteresources.worldbank.org/EXTARD/Resources/336681-123643687-9081/5893311-1271205116054/sekatle\\_matumelopaper.pdf](http://siteresources.worldbank.org/EXTARD/Resources/336681-123643687-9081/5893311-1271205116054/sekatle_matumelopaper.pdf) (presented by Pontšo Sekatle, Minister for Local Government and Chieftainship, to the World Bank Annual Conference on Land Policy and Administration in Washington D.C., April 26-27, 2010).

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2000.<sup>276</sup> Among its recommendations were the establishment of a freehold system for industrial land, power for married women to register titles deeds to land, and rights for foreign companies to acquire land for investment purposes.<sup>277</sup> Amid some opposition, a new Bill prepared along these recommendations was placed before parliament in October 2009.<sup>278</sup>

### 3. Chiefs in the Post-Colonial Era

Although the chiefs played such a prominent role in governance immediately after independence, their significance has slowly dwindled in subsequent years due to the rapid political and social change that the country has been through. While chiefs are firmly entrenched in the civil service of the state and rely on “their position [s] as [its] salaried functionaries,”<sup>279</sup> limitations on their powers are now explicit in many legislative regimes brought into force in the last three decades. Two of the regimes that have had profound effect on the general exercise of chieftainship authority are the Chieftainship Act of 1968<sup>280</sup> and the Local Government Act of 1997.<sup>281</sup> The Chieftainship Act establishes modalities of appointment and acquisition of official status.<sup>282</sup> In a way, “it continued a trend of bureaucratising the chieftainship, without taking away its hereditary base, and without contradicting the Laws of Lerotholi, which hitherto provided legal basis for chieftainship.”<sup>283</sup> The Act requires that all chiefs, including headmen, should be gazetted.<sup>284</sup> Interestingly, the courts have interpreted this requirement liberally to allow customary chiefs who are not gazetted to be recognized.<sup>285</sup> Their reasoning

<sup>276</sup> KINGDOM OF LESOTHO, REPORT ON LAND POLICY REVIEW COMMISSION (2000).

<sup>277</sup> *Id.*; see also Pule and Thabane, *Land Tenure Regimes*, *supra* note 275, at 289-90.

<sup>278</sup> See Caswell Tlali, *US Agency Accused of Imposing Land Bill*, LESOTHO TIMES, Nov. 18, 2009, available at <http://www.lesotimes.com/?p=2688>.

<sup>279</sup> BARDIL & COBBE, *supra* note 85, at 117.

<sup>280</sup> Chieftainship Act 22 of 1968.

<sup>281</sup> Local Government Act 7 of 1997.

<sup>282</sup> See Chieftainship Act 22 of 1968 § 10.

<sup>283</sup> Quinlan & Wallis, *supra* note 225, at 156.

<sup>284</sup> Chieftainship Act 22 of 1968 § 14; see also *Ramatekoa v. Jonathan* 1995-1999 LAC 427.

<sup>285</sup> *Ministry of Home Affairs & Local Gov't v. Sakoene*, 2001 (2000-2004) LAC 332 (holding that section 14 is not a hindrance to an ungazetted headman to be recognized if all other requirements were met); cf. *Mofoka v. Lihanela* 1987 1 (LSCA) at 2, available at <http://www.saflii.org/ls/cases/LSCA/-1987/183.pdf> (holding that an appeal based on un-gazetted headman was improperly considerable by the court; but cf. *Maq-*

is that the Act does not create the office of a chief, but merely recognizes it. The Act could therefore be characterized as permissive rather than exclusive.<sup>286</sup> Importantly, however, the Act makes provision for discipline of errant chiefs.<sup>287</sup> Under the Act, a disciplinary committee can be established to investigate allegations of impropriety.<sup>288</sup> The procedures for conduct of proceedings are set out in section 16.<sup>289</sup> The committee may relieve a chief of his or her powers if he or she is found to have acted contrary to section 17.<sup>290</sup> The process is, however, subject to judicial review.<sup>291</sup>

The Local Government Act, on the other hand, was an attempt by government to reorganize community roles and local government structures and align them with national economic development goals. While the Act was sensitive to the fact that the Chiefs are very influential at the local level, and, thus, should be incorporated into all local development programs,<sup>292</sup> it has nonetheless limited the role of chiefs in local councils considerably. For example, the Act gives the Minister the powers to create four councils: community councils, urban councils, municipal councils, and rural councils.<sup>293</sup> Although in all these Councils, there are positions reserved for the chiefs, their positions are elective, which means that they have to compete for them.<sup>294</sup> Secondly, the number of chiefs in each council has been limited to two.<sup>295</sup> What this means is that the chiefs can no longer unilaterally make decisions on important council matters.<sup>296</sup> The overall effect of the Act is to limit the authority of the

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*toane v. Minister of Interior* 1984 1 (LSCA) at 2, available at <http://www.saflii.org/ls/cases/LSCA/-1984/8.pdf> (holding that the court could not create an official declaration of a headman who was not gazetted).

<sup>286</sup> See *Maqetoane v. Minister of Interior*.

<sup>287</sup> Chieftainship Act of 22 of 1968 §§ 15-17.

<sup>288</sup> *Id.* § 16.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* § 17.

<sup>291</sup> See, e.g., *Nkuebe v. Attorney Gen.* 2000 1 (LSHC) at 2, 10, available at <http://www.saflii.org/ls/cases/LSHC/2000/83.pdf>.

<sup>292</sup> Motlamelle Anthony Kapa, *Chieftainship and Decentralisation in Lesotho: Problems of Reconciliation*, 15 LESOTHO L.J. 193, 198 (2005).

<sup>293</sup> Local Government Act 7 of 1997 § 4.

<sup>294</sup> See Khali Mofuoa, Electoral Inst. For the Sustainability of Democracy in Africa, *Local Governance in Lesotho: In Search of an Appropriate Format*, OCCASIONAL PAPER 33 (June 2005), at 9, available at <http://www.eisa.org.za/-PDF/OP33.pdf>

<sup>295</sup> *Id.*

<sup>296</sup> It should be noted, as well, that the Act precludes Principal Chiefs from participating in the councils. Local Government Act 7 of 1997 § 4(a)-(c).



chiefs by deferring all actions relevant to the local community to the various councils. This has created tension between the chiefs and local councils and could be the reason why these councils are not functioning.<sup>297</sup>

Liberal elements within the Basuto body politic have always viewed chieftainship with scepticism. This is because they see in it the forces that undermine the efforts to democratize the Basuto society. In the period leading to independence, there was a demand to marginalize the monarchy and seek a complete break from the past.<sup>298</sup> The Constitutional Reform Commission appointed in 1958 moderated this demand by relegating the position of the King, the former Paramount Chief under the British colonial rule, to that of a constitutional rather than an executive monarch.<sup>299</sup> This was deeply opposed by those who saw in this arrangement a deliberate attempt to reduce the monarchy to a position of impotence.<sup>300</sup> These fears and contests bubbled to the surface in the period immediately after the first post-independence elections in 1965,<sup>301</sup> leading to open political rivalry between the King, joined by the Marematlou Freedom Party (MFP), the ruling Basutoland National Party (BNP) and other opposition parties.<sup>302</sup>

A settlement of sorts, agreed upon by both parties in January 1967, confirmed the acceptance of this constitutional arrangement by the King and set the country towards the path of democratic consolidation.<sup>303</sup> A modicum of peace achieved under the government of Leabua Jonathan, however, was to be short lived; in 1970, Leabua and his Basutoland National Party (BNP) refused to accept the outcome of elections, suspended the Constitution and detained opposition members in a bid to retain pow-

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<sup>297</sup> See Pius Tanga, *The Women are Coming: Women's Participation in Lesotho's Local Governance*, ADVANCING WOMEN IN LEADERSHIP J., [http://www.advancingwomen.com/awl/awl\\_wordpress/?page\\_id=119&preview=true](http://www.advancingwomen.com/awl/awl_wordpress/?page_id=119&preview=true) (last visited Jan. 21, 2011).

<sup>298</sup> See Balam Nyeko, *The Independence Movement, 1952-1966*, in *ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO: 1500-2000* 153, 154 (Neville Pule & Motlatsi Thabane eds., 2002).

<sup>299</sup> MAQUTU, *CONSTITUTIONAL HISTORY*, *supra* note 96, at 43.

<sup>300</sup> GILL, *supra* note 19, at 210; MOCHABANE, *supra* note 32, at 289.

<sup>301</sup> See MAQUTU, *CONSTITUTIONAL HISTORY* *supra* note 96, at 36-37.

<sup>302</sup> Nyeko, *supra* note 298, at 168.

<sup>303</sup> Neville W. Pule, *Politics Since Independence*, in *ESSAYS ON ASPECTS OF THE POLITICAL ECONOMY OF LESOTHO: 1500-2000*, 173 (Neville Pule & Motlatsi Thabane eds., 2002).

er.<sup>304</sup> The Constitution, with all its trappings of individual rights and freedoms, was then portrayed as alien. Leabua was himself removed from power in January 1986, but the new regime only lasted for four years when it was toppled by another army faction.<sup>305</sup>

Since return to democracy in 1993 under the Basutoland Congress Party (BCP), while Lesotho has been spared the despotism of a military rule, political stability remains elusive. For example, the 1998 elections were catastrophic, with major riots occurring in Maseru and widespread violence.<sup>306</sup> It took Botswana and South Africa's military intervention to restore order.<sup>307</sup>

Throughout Lesotho's history of political turmoil, the King always provided legitimacy to the successive governments because of the contradictions inherent in the configuration of political power.<sup>308</sup> This notwithstanding, the monarchy was never able to subdue the forces of liberal democracy.<sup>309</sup> Therefore, the role of chieftainship in the post-colonial era was always steeped in controversy.<sup>310</sup> Competition for authority in the immediate post-independence period, which even saw the monarchy align itself with one political party against the others, and the pronouncements by the court that the King had no powers to interfere with senatorial affairs,<sup>311</sup> were all incidences that demonstrate the uneasy relationship that has existed between the two. In 1990, the King was even

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<sup>304</sup> *Id.* at 175.

<sup>305</sup> See *id.* at 193;; see generally Roger Southall, *Lesotho's Transition and the 1993 Election*, in DEMOCRATISATION AND DEMILITARISATION IN LESOTHO: THE GENERAL ELECTION OF 1993 AND ITS AFTERMATH 25 (Roger Southall & Tsoeu Petlane eds., 1995) (discussing the political developments during this period).

<sup>306</sup> See Pontšo Sekatle, *The 1998 Election*, 5 LESOTHO SOC. SCI. REV. 31 (1999).

<sup>307</sup> See Mpho G. Molomo, *External Military Intervention*, in *Lesotho's Recent Political Crisis*, 5 LESOTHO SOC. SCI. REV. 131, 133-34 (1999); see J. Kikoti, *The Failure of the SADC Organ on Politics Defence and Security (OPDS)* 16 LESOTHO L.J. 179, 190-92 (2006).

<sup>308</sup> See, e.g., Southall, *supra* note 78, at 253 (suggesting that the monarch has never been in any danger of being overthrown and thus remains "an undisputed symbol of Basotho nationalism").

<sup>309</sup> See generally Nqosa Leuta Mahao, *The Constitution, Elite and the Monarchy Crisis in Lesotho* 10 LESOTHO L.J. 165, 189 (1997), available at <http://uir.unisa.ac.za/handle/10500/446> [hereinafter Mahao, *Crisis in Lesotho*].

<sup>310</sup> *Id.*

<sup>311</sup> *Molapo v. Seeiso*, (1963-66) HCTLR 150 (holding that the King had no powers in terms of the Constitution to dismiss Senators who had supported the Basotho National Party against the Marematlou Freedom Party), noted in Mahao, *Crisis in Lesotho*, *supra* note 309, at 173.

sent into exile and later dethroned.<sup>312</sup> The 1993 Constitution should thus be seen in light of the effort to limit the participation of the monarchy in state affairs. Although it retained the King as the head of state, as in the Westminster model, the functions of running the government were exclusively vested in the Prime Minister.<sup>313</sup>

It has been argued that the survival of the Basuto monarchy is largely due to the fracture of the Basotho political heritage.<sup>314</sup> This may be so, but in my view, the position of the monarchy in social and political realms is galvanised by Lesotho's attachment to tradition. The 1993 Constitution, enacted after the fall of the military rule, recognized the position of chiefs and also retained the general principles of the Laws of Lerotholi as regards succession.<sup>315</sup> In the first instance, the role of the king as head of state, the manner of discharge of his functions and methods of succession are outlined in Chapter 5.<sup>316</sup> In section 45, the constitution provides that the King will be succeeded by a person "capable of succeeding under the customary law of Lesotho."<sup>317</sup> The source of the applicable customary law is the Laws of Lerotholi.<sup>318</sup> Thus, even though such appointment is to be done by the College of Chiefs, who are themselves subject to the rules of customary succession, the whole project is governed by customary law and not common law, save for the fact that the disputes arising from the appointments made under section 45 are to be heard by the High Court and not the Local Courts.<sup>319</sup> The influence of the Laws of Lerotholi can also be seen in the composition of parliament, which comprises the King, the Senate, and the National Assembly ac-

<sup>312</sup> Mahao, *Crisis in Lesotho*, *supra* note 309, at 178 (Lesotho's Office of the King Order 14 of 1990 § 12 provides: "[t]he person holding the office of King immediately before the coming into operation of this Order shall cease to be King and Head of State on the coming into operation of this Order."). The government, immediately thereafter, foisted the heir apparent to the throne. *Id.* Apparently, it feared any backlash that might result from the removal of the King.

<sup>313</sup> *Id.* at 180.

<sup>314</sup> Southall, *supra* note 78, at 253.

<sup>315</sup> LESOTHO CONSTITUTION 1993 § 45.

<sup>316</sup> *Id.* § 44 (establishes the office of the King as a constitutional monarch and head of state).

<sup>317</sup> *Id.* § 45(1).

<sup>318</sup> Laws of Lerotholi 65 § 1 ("The succession to chieftainship shall be by right of birth; that is, the first born male of the first wife married; if the first wife has no male issue then the first born male child of the next wife in succession shall be chief . . . . Provided that if a chief dies leaving no male issue, the chieftainship shall devolve upon the male following according to the succession houses.").

<sup>319</sup> LESOTHO CONSTITUTION, 1993 § 45(5).

according to section 54.<sup>320</sup> The Senate is basically a traditional institution because it is composed of the twenty-two principal chiefs and eleven other persons nominated by the King.<sup>321</sup> It has limited powers, as its decisions can be overruled by the National Assembly.<sup>322</sup> It should be mentioned, however, that the constitution does not make any provisions with regard to chiefs in general, other than to say that their position will remain as in the pre-1993 period.<sup>323</sup> It also gives a blanket authority to parliament to make regulations that govern its functions.<sup>324</sup>

## VI. THE POLITICAL QUESTION

While the contemporary debate on the relevance of customary law to modernity, however defined, may seem predicated on gender imbalance and the patriarchal character of African traditional societies, its scope touches upon other fundamental issues that are germane to the maintenance of political stability of African nations. It may be worthwhile to remember that the evolution of customary law in Lesotho is inevitably connected to the rise of Basotho nationalism that began in the early 1800s and culminated in the creation of the nation state. Indeed the promulgation of the Code through the Laws of Lerotholi could never have occurred in a vacuum. Right from the days of the great King Moshoeoe, the perpetuation of rules of custom had an ineluctable connection to the political demands of the day. For the most part, the relationship between politics and tradition was fostered by the application of customary rules as an ordering mechanism, but also as source of legitimacy for the traditional rulership. In the post-independence era, this relationship has survived, albeit to some significant degree, its influence felt through the constitutional monarchical system and the limitation of the exercise of liberal rights by the rules of custom. The Laws of Lerotholi still stand as a monolith of traditional symbolism that speak not only to the legality of certain traditional aspects of people's lives, but provide legitimacy to custom as an integral part of the country's legal system. The homogeneity of the Basotho community, the stagnation rendered in the wake of apartheid influence in the region, the consolidation of the monarchical powers, and low levels of economic development especially

<sup>320</sup> *Id.* § 54.

<sup>321</sup> *Id.* § 55

<sup>322</sup> *Id.* § 55(b).

<sup>323</sup> *Id.* § 103(1).

<sup>324</sup> *Id.* § 103(2).

in the rural areas have fostered their persistence. Thus, despite their flagrant discordance with most neo-liberal policies that the country had embraced after independence, the Laws of Lerotholi have abetted the survival of traditional institutions of governance.

Be that as it may, Lesotho has witnessed some of the worst political upheavals since independence. Virtually all elections have been marred by instances of political violence, some of which have threatened the very existence of the nation. The root causes of most of the problems have been poor management of elections, corruption in government, and the incongruent relationship between government and the monarchy. Although the effect of 'tradition' may be less succinct in the tumultuous political scene, it is, nonetheless, a factor that has been crucial to the practice of democracy in Lesotho. As already mentioned, 'tradition' features in the institution of chieftainship, the monarchy, and galvanises the claim to power rooted on beliefs that stretch back to the days of Moshoeshoe. In the post-colonial era, the struggle towards democratic governance has been forced to recognize 'tradition' and thus involve the monarchy in the crafting of the organs of government. But the relationship between monarchy and liberal constituencies inside and outside government have not been entirely smooth. Even within the new Constitutional dispensation, such relationship has hit a rocky path whenever the monarchy or other institutions of tradition felt threatened. For example, section 92 of the Constitution requires that the Prime Minister consults the King on matters of government.<sup>325</sup> The same provision was relied upon by King Letsie III in 1994 to suspend the tenure of Prime Minister Mokhehle when the latter established a commission of enquiry to investigate the King's father.<sup>326</sup> For the reasons aforementioned, it may be difficult, at least for now, to divorce tradition from the overall political life of the Basotho. In this regard, any attempts to modify, reconstruct, or simply banish codified customary edicts, are likely to be seen as an affront to institutions of traditional governance.

It seems inevitable that even as modern constitutionalism flounders in the post-colonial African state and the constriction of individual freedoms and rights become evident, the amplification of tradition never ceases. After democracy is subdued and the whole structure of government threatens to collapse or collapses all the same, leaders will still

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<sup>325</sup> *Id.* § 92.

<sup>326</sup> See Pule, *supra* note 303, at 202.

evoke their people's consciousness by drawing in the glory of extant customs or practices. Nowhere have these conditions been so prevalent than in the southern African kingdoms of Lesotho, Swaziland, and Zimbabwe. In these states, the institutions of African customary law have become so enmeshed with the dysfunctional governments, that notwithstanding the argument or even acknowledgement that customs evolve and will continue to do so, there may be some hope for charting an independent path of development. In the case of Lesotho, the same holds true. It seems, therefore, the Laws of Lerotholi even though outpaced by changes in Basuto social and political life will continue to survive.

## VII. CONCLUSION

The discussions in this article have been aimed at showing that in a situation where the political organization of the state is deeply tied to traditional institutions, codified systems of customary rules are less likely to be amended or repealed to meet the demands of modern day living. Lesotho's Laws of Lerotholi are a perfect example of codified rules that have lost their practicability in many respects, even as their authority is perpetuated in a momentum of skewed political and social transformation. While demands for the widening of democratic space and the expansion of regimes of rights have created serious contests against rigid and extant traditional rules in other African states, Lesotho has remained insular to such changes. For this reason, the Laws of Lerotholi occupy such an important position in the legal system that they dictate more than just the economic and social activities of rural communities, but the nature and style of political governance as well. In this respect, the criticism of customary law that it lends itself to easy manipulation by political systems, becomes even more explicit in the case of Lesotho. As it has been shown, the Laws of Lerotholi have provided easy exploitation by un-progressive leadership institutions, such as the Borena, which use these rules as a shield against the emerging liberal principles and to maintain absolute authority over their subjects. In this respect, therefore, codification has led to what can be termed as 'adverse traditionalism,' where rules of customary law are seen as a buffer to democratization and social transformation as well as an official limitation to individual rights and freedoms. Undoubtedly, this bears consonance to the role that 'official' customary law had played in legitimising political authority and governance. The introduction of customary law as a component of the colonial judicial enterprise and the sustenance of it, to a lesser degree, arguably constitutes evidence of its utility as a structure of further eco-

monic and political coercion.<sup>327</sup> But, whether Lesotho and civil society movements aspire to seek greater participation in the affairs of government though liberal political structures poised to deliver peace, democracy, and economic growth, only time will tell. For now, Lesotho seems to be steeped in tradition, its political arrangements wary of an imposing monarchy and a volatile citizenry.

Be that as it may, the position of the Laws of Lerotholi as a veritable component of the legal system and as a basis of democratic practice will continue to be a contested one. In as much as the relevancy of customary law is maintained by forces keen to perpetuate its hold on traditional privilege and larger segments of rural populations remain outside the domain of state-engineered economic development programs, the force of change necessary to remodel rules of custom embodied in the Code will remain an illusion. As it is now, the government has far greater challenges in alleviating poverty, harmonizing its electoral procedures, and stamping out corruption, and could be less disposed to appropriate its few available resources to changing or modifying the law of custom. Moreover, there are politics that detest any effort to link nationalism with tradition because of the obvious effect this effort would have of elevating the constitutional position of the chieftainship.

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<sup>327</sup> The thesis connecting the emergence of customary law with the establishment of colonial rule has been explored by many scholars. Takyiwaah Manuh, *The Women, Law and Development Movements in Africa and the Struggles for Customary Law Reform*, 8 THIRD WORLD LEGAL STUD. 207, 211 (1994-95); MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 119, 122 (1996) (arguing that the colonial rule transformed traditional socio-legal structures and thereby tipped the balance in favour state authority. The colonial administrators elevated the status of chiefs to be single institution having authority to exercise the power of custom). Some associate the development of customary law with the introduction of colonial capitalism. See Francis Synder, *Colonialism and Legal Form: The Creation of Customary Law in Senegal*, 19 J. LEGAL PLURALISM 49, 74 (1981) (while tracing the creation of customary law among the Banjal Jola community of Senegal, Synder writes: "[c]ustomary" law was an ideology with real practical effects; it marked a specific phase in the development of capitalism. At the same time it embodied the partial dissolution and transformation of Banjal conceptions and their subordination to legal ideologues and social relations through the state."); see also Martin Chanock, *Making Customary Law: Men Women and Courts in Colonial Northern Rhodesia*, in AFRICAN WOMEN AND THE LAW: HISTORICAL PERSPECTIVES 53 (Margaret Jean Hay & Marcia Wright eds., 1982). Still others advance the view that African traditions were exploited by the colonial authorities to stifle local development and perpetuate white domination. T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 1-2 (1995).