

# The Constitutional Rules of Succession to the Institution of Monarch in Lesotho

H 'Nyane\*



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## Author

Hoolo 'Nyane

## Affiliation

University of Limpopo  
South Africa

Email [hoolo.nyane@ul.ac.za](mailto:hoolo.nyane@ul.ac.za)

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## Abstract

The rules that govern succession to the office of King in Lesotho are largely customary. The *Constitution of Lesotho*, 1993 provides that succession to the office of King shall be regulated in terms of customary law; the *Constitution* itself does not provide for the substantive and procedural rules governing succession. The zenith of customary rules is that succession to kingship in Lesotho is based on the principle of primogeniture. The primogeniture rule has always presented problems of application in Lesotho; more so in the era of equality and democracy. This paper critiques the rules of succession to the office of King. It contends that by leaving the regulation of succession exclusively to customary law without clear articulation in the *Constitution*, the *Constitution* is unduly yielding to a system of law (customary law) which is not only subservient to the *Constitution* but also based on a different set of values. The paper recommends that the rules of succession must be codified in the *Constitution* and must be realigned with contemporary notions of constitutionalism and equality.

## Keywords

Lesotho; *Constitution of Lesotho*; succession; customary law; King.

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## 1 Introduction

The hybrid state that emerged as the outcome of the pre-independence political settlement in Lesotho was an attempt to balance the alien institutions of government with the grounded traditional institutions.<sup>1</sup> Key among the institutions that survived the merger was the institution of the monarch. Although it emerged as largely constitutional in the British style,<sup>2</sup> its processes of accession were left to custom and tradition. This was despite the introduction of the liberal notion of universal franchise and popular vote at independence. The customary mode of ascending to the throne, which is based mainly on primogeniture, is one area within the post-colonial scheme of constitutional monarchy which has pitted monarchism against contemporary forces of constitutional democracy.<sup>3</sup> Despite the *Constitution of Lesotho, 1993* (the *Constitution*) proclaiming this kingdom to be "democratic",<sup>4</sup> accession to the position of head of state is still by right of birth.<sup>5</sup> This state of affairs has led to perennial constitutional tensions in Lesotho. On the one hand, the monarchy took every effort to pin its legitimacy on the fact of traditionalism – that it is not only antique in the governance of Lesotho but that it is also accepted.<sup>6</sup> The main argument made in favour of the retention of monarchism is that democracy in the mould of the Western liberal democracy is alien to African systems of governance, and thus it will struggle to enjoy acceptability.<sup>7</sup> On the other

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\* Hoolo 'Nyane. LLB (Lesotho) LLM (North-West) LLD (UNISA). Associate Professor and Head of Public and Environmental Law Department, School of Law, University of Limpopo, South Africa. Email: hnyane@yahoo.co.uk.

<sup>1</sup> Proctor 1969 *Civilisations* 64.

<sup>2</sup> Macartney 1970 *Parliamentary Affairs* 121. The author metaphorically observes that "Certainly the physical pattern is that of Westminster, down to the dispatch boxes presented by the British House of Commons and the Gentleman Usher of the Black Rod, who looks just as much the part as does his British namesake. In its anxiety not to deviate from British parliamentary practice indeed the National Assembly is officially converted into an upper house for the Speech from the Throne by the simple expedient of a ritual draping of the Speaker's chair with royal purple."

<sup>3</sup> One of the most pressing forces of contemporary constitutional democracy is that people and institutions that wield power in a state must be subject to popular will. This is despite so much diversity of intellectual views on what should constitute public will. However, what has emerged as the common ground is that popular participation in governance processes is the bedrock of contemporary constitutional theory. See for example Patterson *American Democracy* 57-58.

<sup>4</sup> Section 1(1) of the *Constitution* provides that "Lesotho shall be a sovereign democratic kingdom".

<sup>5</sup> Section 45 of the *Constitution*.

<sup>6</sup> Hamnett *Chieftainship and Legitimacy* 9-10.

<sup>7</sup> In Swaziland, for instance, in 1973, when Sobhuza II abrogated the *Swazi Constitution*, he alleged that: "The Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction ... and an impediment to free and progressive development in all spheres of life; that the Constitution has permitted the introduction into Swaziland of highly undesirable political practices alien to, and incompatible

hand, the whirlwinds of liberal constitutionalism, whose features are electoral democracy, popular will, limited government and equality,<sup>8</sup> have come to claim significant space in the constitutional discourse. Sometimes it is alleged that this is the era of constitutional democracy and anything antithetical to its precepts is irrelevant and must be pushed to extinction. Rugege captures this view rather accurately when he says:

It is often argued, correctly in my view, that hereditary rule is fundamentally undemocratic. The right of hereditary rulers to exercise power over their fellow citizens is not derived from a democratic mandate ...but from the accident of birth in a ruling family normally according to the rules of primogeniture ...<sup>9</sup>

Thus, this article seeks to critique the model of succession to the institution of monarch in Lesotho. Section 45 of the *Constitution* provides that when a vacancy occurs in the office of king, the College of Chiefs shall designate the successor in accordance with the customary law of Lesotho, "in order of prior right".<sup>10</sup> The section does not embody the substantive and procedural rules for succession save for the vague reference to succession "in order of prior right". The substantive and procedural rules of succession are not necessarily settled. The only aspect of them on which there is some semblance of consensus is the principle of primogeniture. However, as it is demonstrated in this study, the development of primogeniture in Lesotho has not been smooth. Furthermore, primogeniture as a principle is generally under pressure for its tension with contemporary notions of equality. The contention of this paper is twofold. Firstly, the paper contends that the substantive and procedural rules of succession must be expressly articulated in the *Constitution*. They should not be left to custom. Secondly, primogeniture should be reviewed as the basis for succession to kingship.

## **2 The application of the primogeniture rule under Lesotho customary law of succession**

In Lesotho, customary law rules governing succession to the office of *Morena e Moholo* are fairly similar to the rules governing succession to any other junior chieftaincy. In fact, according to one articulate oral Mosotho historian, Tumisang Letsie, "chieftaincy in Lesotho was originally one thing

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with, the Swazi way of life." See s 2(c) of the *King's Proclamation* 578 of 1973; also see Maroleng 2003 *Afr Secur Rev* 46 for commentary.

<sup>8</sup> According to De Smith *New Commonwealth* 108: "A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held ... where political groups are free to organize in opposition to government ...".

<sup>9</sup> Rugege "Future of Traditional Hereditary Chieftaincy" 148.

<sup>10</sup> Section 45(1) of the *Constitution*.

which was hierarchical in nature, at whose apex was *Morena e Moholo*".<sup>11</sup> Indeed, this statement is important to demonstrate a pre-colonial scenario, which is different from the colonial incarnation of "Paramount Chief" and later Motlotlehi (King) in the post-colonial dispensation. These latter colonial incarnations, according to Letsie, have hugely disaggregated *Morena e moholo* from the general chieftaincy.

The current King can hardly claim the status of *Morena e moholo* because he is no longer directly related to the appointment of chiefs, their discipline and to be the final arbiter on their disputes – whether they be boundary disputes or succession disputes.<sup>12</sup>

That notwithstanding, today the rules that govern succession to the office of king and that of the chief are largely the same, as they are both based on customary law.<sup>13</sup> Thus, for the purposes of customary succession, the two will hereinafter generally be treated interchangeably.

As Duncan observes, it would seem that the origins of the customary law of succession are traceable to the 19<sup>th</sup> century, when Moshoeshoe organised the various Sotho-speaking communities that were scatted by devastating *lifaqane* wars<sup>14</sup> that swept almost the entire Southern Africa. The same applies to the case with the institution of *Morena e moholo*. Duncan says:

The position of paramount chief is a modern creation based on the personality of Moshoeshoe ... The term 'paramount chief' is even newer than the office, and in 1871 it was applied to three of Moshoeshoe's sons; Letsie, Masupha and Molapo.<sup>15</sup>

Thus, the rules of custom regulating succession can safely be traceable to Moshoeshoe himself. There is sufficient evidence to the effect that accession to highness by Moshoeshoe was not necessarily regulated by the currently established rules of succession. According to Machobane:

... exactly when and how Moshoeshoe assumed the office initially of *Morena* (as distinct from *Morena e Moholo*) over his little chiefdom of Bakwena of

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<sup>11</sup> Interviewed on the 20<sup>th</sup> October 2012 in Maseru, Lesotho. The translation is mine.

<sup>12</sup> Dr Letsie was originally a professional medical doctor who, because of his royal lineage and age, has accumulated tremendous knowledge on the content and history of chieftaincy in Lesotho. He was interviewed on 22 October 2011 in Maseru. The interview was mainly in Sotho and the translation is largely mine.

<sup>13</sup> Just as the *Constitution* provides that succession to Office of King will be governed by custom, s 2 of the *Chieftainship Act* 22 of 1968 provides that the hereditary right to the office of chief is recognised under customary law, and his succession is approved by the King, acting in accordance with the advice of the Minister.

<sup>14</sup> For the elaborate account of state formation and the role of Moshoeshoe in Lesotho in general, see Thompson *Survival in Two Worlds*.

<sup>15</sup> Duncan *Sotho Laws and Customs* 43; also see Select Committee *Report on Basutoland Annexation Bill*.

Mokoteli (a fragment of Monaheng's dynasty) before lifaqane, is something we can no longer establish with certainty.<sup>16</sup>

However, there is evidence to the effect that Letsie, the first son of Moshoeshoe, was, after the demise of the father, recognised as the *Morena e Moholo* and heir to Moshoeshoe's chieftainship.<sup>17</sup> As Moshoeshoe himself did not accede to power through primogeniture, the rule probably started gathering momentum with his first son Letsie. It is imperative to note, though, that the fact that Moshoeshoe did not accede to supremacy through primogeniture has led other commentators, particularly chief Nkai Nkuebe,<sup>18</sup> to argue that succession to office of *Morena e Moholo* is not necessarily by right of birth. He argues that the Sesotho adage that *Morena ke Morena ka Batho* (the chief is chief because of the people) is a broader principle that undergirds governance in the Sesotho way. It is a maxim to demonstrate not only the democratic nature of the *Sesotho* mode of government but it is also a procedural principle which anchors the role of the people in the process of chiefly succession. Nkuebe's oral evidence dovetails with the findings of Ashton, who ultimately argues for the notion of expedience in the processes of chiefly succession. He argues:

This bare statement of the law, though it accurately reflects the basic principles of succession, does not cover the many exceptions and variations which may occur. Formerly, although succession remained within the chief's family, the law was *sometimes modified by extraneous considerations, such as the popularity or the ability of the claimants*.<sup>19</sup>

Authorities consulted during the present study demonstrated that ordinarily succession to the office of chief generally, and the office of king in particular, would be hereditary; based on the primogeniture rule. But there are certain exceptions that are necessitated by peculiar circumstances. Duncan describes this scenario as "hereditary modified by expediency".<sup>20</sup> There is therefore an institution called a "family council" at which all matters of succession and inheritance are considered at least in the first instance. The family council, or college of chiefs<sup>21</sup> in the case of succession to the office of king, is ultimately the final arbiter on matters of succession.<sup>22</sup> What is

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<sup>16</sup> See Machobane *Government and Change in Lesotho* 5-6.

<sup>17</sup> Select Committee *Report on Basutoland Annexation Bill* 49.

<sup>18</sup> Chief Nkai Nkuebe is one of the renowned monarchists in Lesotho. He was extensively interviewed on 2 October 2010.

<sup>19</sup> Ashton *The Basuto*. Emphasis added.

<sup>20</sup> Duncan *Sotho Laws and Customs* 48.

<sup>21</sup> For the discussion on the College of Chiefs, see the succeeding section on the constitutional law of succession.

<sup>22</sup> The jurisprudence emerging from the courts in Lesotho, though, is that the family council still remains very cardinal in resolving succession disputes. See for instance *Maseela v Maseela* 1971-1973 LLR 132 (HC) 132, where the court held that, following the death of the head of the family, where there is dispute amongst his dependants, the matter must be referred to family arbitration. In the case of *Moteane*

known for certain is that in certain circumstances, like the imbecility of the first son, the council can decide against the rule.<sup>23</sup> Imbecility (mental retardation) justified the family council's choosing the younger brother in the case of *Chere v Sekara*.<sup>24</sup> The list of grounds for deviation from primogeniture is not exhaustive. What becomes evident is that, although the rule of primogeniture is so deeply ingrained within the customary law of succession, it is not absolute. Secondly, it is of paramount importance to realise that, although not so well developed, there is some democratic content in the manner in which the monarch accedes to power. The participation of the people in the process of succession lends some democratic credence to the process.

### 3 Exceptions and deviations from primogeniture

Both oral and written evidence shows that succession took dramatic turns after the demise of Letsie I, the son of Moshoeshoe I. This is the period when the rule of primogeniture saw a stream of deviations and exceptions. While Letsie I himself succeeded Moshoeshoe through this rule, his successor deviated. Perhaps this was due partly to circumstances where the chief did not have a son. Letsie I was one such case. He did not have a male issue on the first House of Ntoetsi, alias 'Masenate. His first child was Senate, who was a female. Lerotholi was his first-born male child from the second great wife, Mantai. What is strange is that Moshoeshoe, instead of proposing Lerotholi as a successor to Letsie I, wanted Senate, who was female, to succeed her father Letsie I. He performed a rather strange ritual of converting Senate to make her a male. The ritual was performed by mounting Senate on a horse, giving her a rhinoceros' horn – which was a sign of power – and declaring her the successor. According to oral historian Tumisang Letsie, this was obviously a "strange custom". Another historian, Machobane, agrees that what Moshoeshoe did – what in his own parlance is called "female husbandship" – was an "extremely rare legal fiction in the history of Lesotho". In fact, in those rare instances in the Mokoteli clan where it was contrived, its inspiration would always be "political and

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*v Moteane* 1995-1999 LAC 307 310-133 Browde JA, in embracing the concept, said: " ... this concept of sharing appears to permeate the laws of inheritance in Lesotho and to accentuate the need for family debate in order to arrive at a mode of succession which will avoid friction within the family itself ... I need hardly point out that the court is here regarded as a last resort and that the family 'arbitration' and efforts at reaching an amicable agreement are necessary steps before the court is approached."

<sup>23</sup> For a discussion of the uncertainty and indeterminacy of the form and decisions of the family council, see Hamnett *Chieftaincy and Legitimacy* 10.

<sup>24</sup> *Chere v Sekara* JC 137/47.

motivated by considerations of succession".<sup>25</sup> Machobane even dared to say:

The case of Princess Senate ... a royal female and the grand-daughter of Moshoeshoe I, represented the first recorded instance in the history of the Basotho nation. All subsequent claims to that gender contrivance are those that traced their ancestry back to and derived their *raison d'être* from her on her account.<sup>26</sup>

However, this narrative by Machobane could hardly be taken to suggest that the notion is completely alien to Sesotho customary succession rules.<sup>27</sup> What could be conceded, though, is the fact that Senate's drama was probably the first – largely because it occurred when most of the rules of succession were in their formative stages.

Moshoeshoese's urge to see Senate succeed Letsie I came in two parts. The first plan was that he "accordingly ... paid *lobola* to his nephew Ramaneella to secure his daughter Maneella's hand in marriage and turned her over as her wife".<sup>28</sup> Lerotholi was therefore roped in to sire children for Senate with Maneella (alias Malet'sabisa). The grand plan was that Senate herself was going to be the heir to Letsie I. This plan appears to have been thwarted when Senate, despite being imaginatively converted into a "male", fell pregnant by her own half-brother, Lefojane, from the second house of Maneko.<sup>29</sup> Out of that contrivance was born a daughter called Deborah. Clearly, favouritism had at this stage plunged the royalty into a succession predicament. Fortunately enough, the Debora plan could not be sustainable because she was a girl.

After the first effort of making Senate herself an heir had been thwarted, *Morena e Moholo* Moshoeshoe could neither be discouraged nor did he relent in his quest to see Senate or her descendants hold the sceptre. He then continued with the plan – in what has been styled the second stage of the grand plan<sup>30</sup> – using Senate again to try tactfully to unite the Houses of Letsie and Molapo by arranging for Joseph, the son of Molapo to sire an heir with Senate. Senate and Joseph bore the boy – Mots'oene. Clearly, Moshoeshoe did not want Lerotholi as the successor to Letsie despite the

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<sup>25</sup> Machobane 2000 *Review of Southern African Studies* 20.

<sup>26</sup> Machobane 2000 *Review of Southern African Studies* 20.

<sup>27</sup> The succession of a female to chieftainship is not alien in Lesotho both for the purposes of regency and for the purposes of the substantive holding of the office. In terms of s 10(5) of the *Chieftainship Act* 22 of 1968, a widow who does not have a male issue can be a substantive holder of the office of Chief. This provision is based on customary practice.

<sup>28</sup> Machobane 2000 *Review of Southern African Studies* 20.

<sup>29</sup> Machobane 2000 *Review of Southern African Studies* 28.

<sup>30</sup> Machobane 2000 *Review of Southern African Studies* 28.

fact that Lerotholi was the first-born male child of Letsie I, albeit not from the senior wife. According to Machobane:

Lerotholi was in his early twenties when Moshoeshoe commanded his educated son Nehemia Sekhonyana to present Mots'oene to the nation as his successor after Letsie's death. Nehemia Sekhonyana raised the young lad to the full view of the Pitso and declared him heir to Letsie.<sup>31</sup>

Upon Letsie's death, the council of "Sons of Moshoeshoe" aborted the plan and appointed Lerotholi as *Morena e moholo*. What is clear about this drama is that during those formative years of customary law of succession, there was much uncertainty and imprecision regarding the rules of custom that govern succession.<sup>32</sup> Obviously, by planning to make Senate the successor irrespective of her gender, Moshoeshoe was "sufficiently encouraged by the British example in his much admired Queen Victoria of the United Kingdom".<sup>33</sup> These were clear indications of the British influence on customary practices.

Another controversy came about with the succession of Lerotholi. It would be recalled that "Malet'sabisa (alias Maneella) was originally roped in as the wife of Senate who had been converted into a male for purposes of succession to the throne. When it became apparent that the plan had failed, 'Lerotholi was simply ordered to take her as his own first Great Wife'.<sup>34</sup> For some reason Lerotholi himself agreed, and it went down to popular history as such – Melet'sabisa is generally regarded as the first wife of Lerotholi. It should be noted, however, that Malet'sabisa was originally designated as the wife of Senate. Malet'sabisa and Lerotholi had two sons, Letsie II and Griffiths.

The controversy that this arrangement brings to the discourse is whether, despite the "Sons of Moshoeshoe" having agreed that Lerotholi should succeed his father Letsie I as *Morena e moholo*, the descendants of Lerotholi could be taken as his or of Senate, strictly speaking. According to one highly knowledgeable oral historian, Tumisang Letsie:

I regard Morena Lerotholi as the regent because Maneella was not his wife originally. The original idea has always been that Lerotholi will sire children for Senate through Maneella. So, strictly speaking, Letsie II and Griffiths are the sons of Senate.<sup>35</sup> (author's own translation)

There is some probative weight in this narrative, because some descendants of Lerotholi, like one Chief Goliatha Senate Moshoeshoe, who

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<sup>31</sup> Machobane 2000 *Review of Southern African Studies* 29.

<sup>32</sup> Poulter 1975 *JSAS* 181.

<sup>33</sup> Machobane 2000 *Review of Southern African Studies* 29.

<sup>34</sup> Machobane 2000 *Review of Southern African Studies* 31.

<sup>35</sup> Interviewed on the 20<sup>th</sup> October 2012 in Maseru, Lesotho.

was the son to Let'sabisa (the daughter of Maneella and Lerotholi), have always regarded themselves as the descendants of Senate, not of Lerotholi; hence the surname Senate. It could therefore be observed that the development of the rule of primogeniture has come a long way, and it should always be understood against its background. While the rule has remained so resilient over time, it is always proper to interpret it against its political and historical undercurrents to understand it fully.

#### **4 The advent of the *Laws of Lerotholi* as an attempt to record the law of succession**

The legal effect of the Lerotholi Code has been sufficiently discussed above, but it may be wise to discuss the background of its succession rules, particularly in the context of the preceding discussion of the Senate saga. The earliest version of the Code was drawn up in 1903 during the reign of the controversial Paramount Chief Lerotholi. At that time there was no blueprint of any written customary laws. The only available document was the Cape Colony Report of the Commission on Laws and Customs of the Basotho of 1872. Lerotholi obviously used this opportunity to regularise the rules of succession, which were hugely shaken by the Senate saga, thereby legitimising himself as having properly succeeded his father Letsie I. No wonder the first law of the 1903 version of the *Laws of Lesotho* is on succession. The law provided that:

... 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 the chief; provided that if a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses.<sup>36</sup>

Perhaps Duncan is right to observe that "it may be assumed that Lerotholi's desire was that his new council ought to record the custom of descent through the male line".<sup>37</sup> The law depicted exactly what happened with his succession. It was emphasised in the Code as a matter of principle that where the first wife had no male issue, "the first born male child of the next wife in succession shall be the chief". Indeed, his senior son Letsie II succeeded him (Lerotholi) under the father-son rule. The deviation came with Paramount Chief Griffith, who was the junior brother to Letsie II. Expediency obviously necessitated the ouster of his nephew Makhaola, who was born posthumously from "Letsie's wife (his first wife having had no male

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<sup>36</sup> Lerotholi *Laws of Lerotholi* pt I, s 2. This section is the mirror-image of the s 1 of the 1903 version.

<sup>37</sup> Duncan *Sotho Laws and Customs* 14.

issue) and was therefore the true heir according to this law".<sup>38</sup> This was made even easier by the "coincidence of the sudden death of Letsie II's infant son Tau in 1913",<sup>39</sup> who was the heir apparent to Letsie II.

It would appear that ever since then the rule of primogeniture – succession by the male line – has been the nerve centre of Sesotho customary law of succession. Even the courts of law came to recognise the principle. In the case of *Joel Mots'oene v Sir Edward Harding*<sup>40</sup> the court held that:

It is admitted that the question of succession to all chieftainships in Basotholand is governed by Basuto law and custom, and the law on the subject has been codified in a pamphlet entitled *Basutoland Laws of Lerotholi* which has been handed in and *which is accepted by all parties as correctly representing the law.*

So, the *Laws of Lerotholi*, despite their being largely discredited as having no legislative force, still remain the anchor of immemorial rules of custom on aspects such as succession, marriage, chieftaincy powers and many more.<sup>41</sup>

## 5 The regency dispute of 1940 and the development of primogeniture

The regency dispute between chieftainess Mant'sebo and Prince Bereng in 1940 after the demise of Paramount Chief Seeiso is an important epoch in the history of the evolution of the customary law of succession in Lesotho. In order to properly grasp the nature of this dispute, one had best go back to the reign of Paramount Chief Griffith. Upon his death in 1939, Griffith left two potential claimants to the throne – Seeiso, who was his son by his second wife, as there was no male issue from the first House, and Bereng, the son by the third House. Bereng was older than Seeiso.

In terms of the succession rules that evolved during the reign of Great King Moshoeshoe and were solidified by the Lerotholi Code, there was no doubt that Seeiso was the rightful heir, as he was born from the senior House,

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<sup>38</sup> Hamnett *Chieftaincy and Legitimacy* 193; also see Ellenberger and MacGregor *History of the Basuto*.

<sup>39</sup> Machobane *Government and Change in Lesotho* 196. There is apparently inconsistent evidence as to the cause of the death of the minor, Tau. As he was heir apparent to Letsie II, and he died during the deliberation about Griffiths' Regency, there is some evidence to the effect that his death was related to the succession deliberations that were underway at the time. On the one hand, there is the version that suggests that the death of the minor heir was natural and cannot be linked to the succession dispute that was roiling at the time.

<sup>40</sup> *Joel Mots'oene v Sir Edward Harding* 1954 HCTLR 1. Emphasis added.

<sup>41</sup> In fact, one scholar argues that "the Laws of Lerotholi restored the original custom, that the first wife was the first in order of marriage regardless of her rank". Jones "Chiefly Succession in Basutoland" 69.

rather than Bereng, although the latter was older. But a simple matter like this was complicated by the Paramount Chief's personal preferences. According to Heily, "there was no doubt that Griffith had intended that Bereng should succeed him".<sup>42</sup> Like his grandfather Moshoeshoe, who once had the grand plan to elbow Lerotholi from paramountcy, Griffiths had a grand plan that was executed in stages. The first and most crucial stage was to "place"<sup>43</sup> him as Ward Chief of Phamong in Mohale's Hoek. This is the ward which was held by Griffith himself before ascending to paramountcy. The second stage in 1926 was for him (Griffith) to officially "declare that Bereng was his senior son and heir to the throne".<sup>44</sup> He then pressured the "Sons of Moshoeshoe" to vote in support of Bereng as the heir to the throne.

This meticulously executed plan gave Bereng an overwhelming impression that he was destined for the throne. In his determination to see Bereng through to the throne, Griffiths announced in 1926 to the British authorities, who had the powers of "recognition", that his elder son was the heir. Seeiso protested and the family council was held in Matsieng over the apparent dispute of succession. Since the family council met only to legitimise what the *Morena e Moholo* had already overtly expressed, the council returned Bereng as the heir. However, there is evidence that most of the chiefs present had really supported Seeiso, but abstained from voting "for fear of offending Griffith".<sup>45</sup> Moreover, Seeiso's claim was also supported by the allegation that those who had voted for Bereng were not really the "sons of Moshoeshoe".<sup>46</sup>

In a shocking roundabout when Griffiths died, the expanded council of the "Sons of Moshoeshoe" (as opposed to the limited late paramount chief's own family) aborted the plan by choosing Seeiso. Seeiso died in 1940, leaving his first wife Mant'sebo, who was without a male issue, and the heir apparent, Bereng Seeiso, who was a minor son from the second House. Obviously, Bereng Griffiths still harboured very strong ambitions for the

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<sup>42</sup> Hailey *Native Administration* 90.

<sup>43</sup> For the elaborate discussion of the system of "placing", see Jones "Chiefly Succession in Basutoland" 72, who argues that "Bereng's position had been greatly strengthened by his father, Griffith, who had placed him as ward chief of the paramount's own personal ward of Phamong. However, the succession council preferred Seeiso and when Seeiso died a year later, it rejected Bereng's claim to act as regent for Seeiso's heir, preferring Seeiso's first wife Mant'sebo."

<sup>44</sup> Hailey *Native Administration* 90. According to Rosenberg *et al*, "[a]s early as 1917, Griffith expressed the fact that Bereng, not Seeiso Griffith would be his heir and successor". See Rosenberg *et al Historical Dictionary of Lesotho* 42.

<sup>45</sup> Haliburton *Historical Dictionary of Lesotho* 56.

<sup>46</sup> Jones "Chiefly Succession in Basutoland" 69.

throne. The death of his brother, Seeiso, presented him with another opportunity to bid for paramountcy.<sup>47</sup>

According to Hailey, "the natural course would have been to recognize Bereng as Regent or select him as Paramount Chief, as has been done in the case of succession to Letsie II when his brother Griffiths was recognized".<sup>48</sup> But to the surprise of Bereng, the "sons of Moshoeshoe" again disappointed him by appointing Seeiso's senior widow Mant'sebo as regent paramount chief in the place of the minor heir apparent, Bereng Seeiso. This appointment was gladly accepted by the high commissioner. Perhaps it may be of value to the study of customary law of succession to analyse the manner in which the appointment of the regent was carried out. The procedure pitted the two equally powerful bodies – the "sons of Letsie" and the broader agnatic group of the "sons of Moshoeshoe" - against each other in the appointment of the successor. The "sons of Letsie" claimed that they were the rightful arbiter on matters of succession to the office of *Morena e Moholo*. This controversy had raged for some time – even during the succession dispute between Seeiso and Bereng it had played itself out.<sup>49</sup>

Bereng disputed the appointment of Mants'ebo as regent in the case of *Bereng Griffith v Mants'ebo Seeiso Griffith*.<sup>50</sup> The thrust of his claim was that, in terms of custom and law, the senior wife of the late paramount chief could not hold regency because she was a woman and as such, by law, was incompetent to succeed.<sup>51</sup> The court dismissed the plaintiff's claim in that:

... amongst the chieftain class it has become a very usual practice which probably has arisen through distrust of the child's paternal uncle and fear lest he should abuse the property of the House and usurp the chieftainship that a wife, on the death of her chieftain husband leaving a minor son, has been appointed to hold the chieftainship as Regent ...<sup>52</sup>

Obviously, there is a logical correlation between this view and the latter rule in the latest 1959 version of the *Laws of Lerotholi* to the effect that "if a chief dies leaving a minor son, the senior widow or the younger brother of the deceased chief may act as chief during the minority of such son, and when that son ceases to be a minor the widow or the younger brother shall give

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<sup>47</sup> Jones "Chiefly Succession in Basutoland" 69; Laydevant *Morena N Griffith Lerotholi*.

<sup>48</sup> Haliburton *Historical Dictionary of Lesotho* 90.

<sup>49</sup> In general, see Laydevant *Morena N Griffith Lerotholi*.

<sup>50</sup> *Bereng Griffith v Mants'ebo Seeiso Griffith* 1926-53 HCTLR 50.

<sup>51</sup> According to Tumisang Letsie, Bereng, as the ambitious contender to the substantive position of paramountcy, was probably hoping that he would disguise his bid under regency and with time, like his father Griffith who started as the regent, use his machinations to be confirmed as the substantive holder.

<sup>52</sup> Laydevant *Morena N Griffith Lerotholi* 55.

place to him".<sup>53</sup> What becomes intriguing about this latter rule is that it is not definitive as to whether regency goes to "the senior widow or the younger brother of the deceased chief".

The court went further to dismiss the primogeniture rule as proclaimed by the *Laws of Lerotholi*.<sup>54</sup> In impugning the rule the court held that:

The position, as it seems to me, is that while section 1 of the Lerotholi Code sets out the rule more usually followed, a contrary practice has crept in and is now in force to such an extent as to make it impossible for me to affirm that the section sets forth the custom so well established that it has the force of law.<sup>55</sup>

Despite the tacit impugning of the *Laws of Lerotholi* by the judge, it would seem that section 1 of the *Laws of Lerotholi* stated above is the accurate statement of the law governing succession to chieftaincy<sup>56</sup> in general, and monarchy in particular.<sup>57</sup>

On regency, authorities are also divided as to whether the widow or the brother of the deceased succeeds. Despite the decision in the *Regency Case*, most authorities still emphasise that, according to custom, the widow by virtue of being a woman is perpetually a minor. According to the 1954 Moor Report, "The majority opinion appeared to be against the appointment of woman chiefs". The report goes further to say, "We are not equipped to express opinion either on the correct interpretation of the *Laws of Lerotholi* or how far in the light of past history they represented an exhaustive statement of Basotho custom in respect of succession". In surrendering to the complexity of the subject of chieftainship succession, the report noted:

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<sup>53</sup> Section 3(1) of the *Laws of Lerotholi*.

<sup>54</sup> At *Bereng Griffith v Mants'ebo Seeiso Griffith* 1926-53 HCTLR 50 -60A the Judge said: "Now the Lerotholi Code is in no sense written law. Its provisions, though reduced to print, do not emanate from any lawgiver. The problem immediately before us in respect of section 1 is when the statement it makes is that of a custom so well and firmly established that it has the force of law ..." Also see Juma 2011 *Pace Int'l L Rev* 92.

<sup>55</sup> *Bereng Griffith v Mants'ebo Seeiso Griffith* 1926-53 HCTLR 50 60C.

<sup>56</sup> Succession to a chieftainship other than the monarchy is governed by the *Chieftainship Act* 22 of 1968 (as amended). The primogeniture rule still permeates this legislation. However, the Court, in the case of *Matala v Peete* 1978 LLR 378 379, refined the relationship between the statute and the customary law as thus: "... prior to 1968, succession to chieftainship was governed by Sesotho Law and Custom, as crystallized in Section 2 of Part 1 of the *Laws of Lerotholi* ... Since 1968 the position is now governed by the provisions of the *Chieftainship Act* 22 of 1968 as amended". For the elaborate scoping of all laws governing chieftainship in Lesotho since 1938, see Mohau "Scoping of All Primary and Secondary Legislation".

<sup>57</sup> This position was confirmed by Chief Khoabane, an outspoken member of the College of Chiefs in an interview conducted with him on 15 July 2010.

We have spent much time in an attempt to arrive at a satisfactory solution of this astronomical problem, but the deeper our researches; the more complex we have found it to be...<sup>58</sup>

Notwithstanding the conflicting nature of evidence on the subject of regency, it would seem that wives of late chiefs can still act as regents. Chief Khoabane Theko, one of the grandsons of the Great Moshoeshoe and the current chairperson of the College of Chiefs, confirms that it is a well-established practice that wives of late chiefs can become regents in the stead of minor heirs apparent.<sup>59</sup> This view is in synch with codification now found in the *Chieftainship Act*,<sup>60</sup> that if the chief dies without a male issue "the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief".<sup>61</sup> In terms of this codification, women can not only become regent, but they can also substantively hold the office of chief under certain circumstances.<sup>62</sup>

## 6 Critical analysis of constitutional rules of succession in Lesotho

### 6.1 Development of the constitutional rules of succession

In Lesotho the office of king, which is a successor in title to *Morena e Moholo*, was thrust into the constitutional controversy in a major way in the run-up to independence in the early 1960s.<sup>63</sup> The independence constitutional debate was predominantly centred on whether the king becomes executive or constitutional in the Westminster style.<sup>64</sup> Although the Westminster style appears to have generally triumphed over the customary mode of government, the *Constitution* bowed to custom as it related to succession to the office of king. The independence *Constitution* purported to establish the office of king, in that section 32(1) thereof provided that "... there shall be the Head of State".<sup>65</sup> The *Constitution* further smartly avoided delving into the intricacies of the customary rules of succession regarding the king by simply providing that:

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<sup>58</sup> Basutoland Council *Report of the Administrative Reform Committee* 16-17.

<sup>59</sup> Interviewed on 20 August 2010.

<sup>60</sup> *Chieftainship Act* 22 of 1968.

<sup>61</sup> Section 10(5) of the *Chieftainship Act* 22 of 1968.

<sup>62</sup> However, as it comes to kingship, a woman ('Mants'ebo) has held that office only on regency terms. The main question is still whether the same principle found under the *Chieftainship Act* 22 of 1968 – that women may be substantive holders of the office of chief – can apply to the office of king. The main question would be whether the practice has ossified into customary law.

<sup>63</sup> Basutoland Council *Report of the Basutoland Constitutional Commission* 34-35.

<sup>64</sup> Machobane *Government and Change in Lesotho* 5-6.

<sup>65</sup> See the *Constitution* (Schedule to Lesotho Independence Order 1172 of 1966).

The college of chiefs may at any time designate, in accordance with customary law of Lesotho, the person (or persons in order of prior right) who are entitled to succeed to the office of the King ...<sup>66</sup>

The succession clause did not necessarily provide the rules of succession but delegated that task to the College of Chiefs, which is enjoined to apply customary law in discharging the task. The same principle was later to be endorsed by statute – The *Office of King Order* 1970.<sup>67</sup> Although the *Constitution* and the statute are not comprehensive on the rules of succession, the key principles appear glaring from the post-independence constitutional design. Firstly, the College of Chiefs is the arbiter on who should succeed to the office. Apparently this is the only significant function allotted to the College of Chiefs in terms of the independence *Constitution*.<sup>68</sup> Secondly, customary law is retained as the only law to determine succession to the office of king.

These principles guiding succession to the office of king, initially extolled by the independence constitutional scheme, seem to have endured all constitutional dispensations in Lesotho. The current constitutional dispensation, under the 1993 *Constitution*,<sup>69</sup> retains the principles almost verbatim. Section 45(1) thereof provides that:

The college of chiefs may at any time designate in accordance with customary law of Lesotho, the person (or the person's order of prior right) who are entitled to succeed to the office of king ...

In a nutshell, the post-independence constitutional design designated the College of Chiefs as the arbiter on the choice of heir. The only caveat is that the College must apply customary law.

## **6.2 Constitutional procedures and institutions for the selection of the heir in Lesotho**

The College of Chiefs is the constitutional structure envisaged by the *Constitution* to deal with and finalise succession to the monarch.<sup>70</sup> The

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<sup>66</sup> Section 33(1) of the *Constitution*.

<sup>67</sup> *Office of King Order* 51 of 1970. It may be proper to recall the constitutional effect of this statute because it was passed within the context of a suspended independence Constitution. The Order confirmed the principles of succession embodied in the suspended Constitution that, firstly, customary law rules remain the law in accordance with which succession to the Office of King will be determined; secondly, the College of Chiefs (although the Order uses the phrase "the twenty-two Principal Chiefs and Ward Chiefs acknowledged by the Offices of Chiefs Order 1970") was retained as the arbiter to decide the succession to the Office of King; see s 3 of the *Offices of Chiefs Order* 26 of 1970.

<sup>68</sup> Palmer and Poulter *Legal System of Lesotho* 239.

<sup>69</sup> See the *Constitution of Lesotho (Commencement) Order* 5 of 1993.

<sup>70</sup> See s 104 of the *Constitution*.

College consists of twenty-two principal chiefs. The College is logically the successor to the historical body that was called the "Sons of Moshoeshoe", which dealt with issues of the succession to *Morena e Moholo*, amongst others. The "Sons of Moshoeshoe" were the agnatic group of his sons who, through the system of "placing", could exercise regional administrative authority. Originally the group radiated from the four sons of the principal wife of Moshoeshoe, namely Letsie, Molapo, Masupha and Majara. But over time the group expanded, in a rather nebulous or even problematic way, to include all the chiefs of the royal family. Despite its indefinite form, the "Sons of Moshoeshoe" was a very powerful group which constituted itself into a council to decide virtually all matters of significance concerning the nation or deciding the usually conflicting claims from amongst its members. In an attempt to give form and definition to this group, the colonial administration, through the 1959 *Constitution*,<sup>71</sup> for the first time invented the "College of Chiefs".<sup>72</sup> Even then, the College of Chiefs had fairly expansive powers, amongst others, to present for recognition the person of the paramount chief or regent to the colonial administration, or recommend for recognition by the paramount chief a person to hold the office of chief or headman. The College also had the powers to settle disputes concerning the succession to the offices of paramount chief and headman or on any matter that related to their powers.<sup>73</sup>

Territorially the members of the College of Chiefs inherited the wards that were created through the system of "placing" that started during the reign of *Morena e Moholo* Moshoeshoe. Moshoeshoe's original idea with the system of placing was, according to Breytenbach, that "central political powers should be linked with regional and administrative authority and that these aspects of government should be concentrated and centralized in the hands of his Kwena [sic] kinsmen".<sup>74</sup> Jones describes the system of placing rather adroitly as follows:

The placing system, as it developed in Basutoland, must be viewed against this background of peaceful territorial expansion. The system itself originated at an earlier date. Moshesh [sic] found it convenient to administer the massive number of heterogeneous fragments of tribes and villages that had attached themselves to his leadership *by dividing his territory up into the primary units which later became known as wards*.<sup>75</sup>

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<sup>71</sup> See *Basutoland (Constitution) Order* in Council High Commissioners Notice 103 of 1959 (*Basutoland Constitution*, 1959).

<sup>72</sup> Section 73(1) of the *Basutoland Constitution*, 1959.

<sup>73</sup> Section 74 of the *Basutoland Constitution*, 1959. The College was further permitted to adjudicate on territorial boundaries, discipline chiefs and classify them according to their status and hierarchy.

<sup>74</sup> Breytenbach *Crocodiles and Commoners in Lesotho* 41.

<sup>75</sup> Jones "Chiefly Succession in Basutoland" 62. Emphasis added.

While the College of Chiefs is mainly constituted of the patrilineal sons of Moshoeshoes, there are other three non-Kuena dynasties of Makhoakhoa, Bataung and Batlokoa that have since the reign of Moshoeshoe been co-opted to the stratum of principal and ward chiefs, who today constitute the 22 principal and ward chiefs who comprise the College of Chiefs and double as senators.<sup>76</sup> Rather than being the arbiter of matters of succession, the main traditional function of this institution has been "to assist and advise the King on any decisions to be taken on the central or upper political level".<sup>77</sup> In the post-independence constitutional designs, this politico-administrative function of the College of Chiefs has gradually shifted to the cabinet until today, when the College cannot exercise this function at all in terms of the *Constitution*.<sup>78</sup>

Even in its sole function of "designating" a person to hold the office of king, it would seem that the College has very limited powers during the determination of succession, particularly in recent times where polygamy is no longer common within the royal family. Customary law fairly easily predetermines succession. According to Chief Khoabane, the chairperson of the College, "it seems our work as the College is to glorify and confirm what is ordinarily a matter of common course under Sesotho law – the first born male child of the previous king will ordinarily succeed".<sup>79</sup> This view is in conformity with the approach taken by superior courts in dealing with the role of a family council in the succession to lower-tier chieftainship. In the case of *Letsoela v Chief of Kolojane and Another*,<sup>80</sup> the High Court properly redefined the role of the family council thus:

The most important words in the subsection are "in order of prior right". These words mean that members of the family who nominate the successor do not have a free hand to choose whoever they like. They must follow the provisions of section 10 of the Chieftainship Act 1968 in which the order of prior rights is set out in detail...I am of the view that in the instant case the family of Letsoela nominated the wrong person because the late Chief Moifo has a son and a widow.<sup>81</sup>

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<sup>76</sup> Breytenbach *Crocodiles and Commoners in Lesotho* 40. These Principal and Ward Chiefs have always manned the predecessor institutions of the current Senate in various epochs of history. They were initially incorporated into the Nation Council in 1903-1910, the Basutoland Council in 1910-1959 and the Basutoland National Council in 1960-1965. They have since independence hitherto manned the upper chamber of parliament – Senate.

<sup>77</sup> Breytenbach *Crocodiles and Commoners in Lesotho* 43.

<sup>78</sup> The function of advising the King on matters of government has drifted to cabinet. See s 88 of the *Constitution*.

<sup>79</sup> Interview on 22 August 2012 at Maseru. Author's own translation.

<sup>80</sup> *Letsoela v Chief of Kolojane* CIV\APN\131\91. The decision was confirmed on appeal in *Letsoela v Chief of Kolojane* 1995-1999 LAC 280. Also see *Meli Ntsoele v Mamolomong Ramokhele* 1975 LLR 130.

<sup>81</sup> *Letsoela v Chief of Kolojane* CIV\APN\131\91 para 16.

Unlike the floods of litigation inundating the courts on the succession to lower chieftaincy, the constitutional rules of succession to the higher office of King have hardly received judicial attention. The application of section 45 became the centre of dispute in the case of *Khauoe v Attorney General and Another*.<sup>82</sup> *In casu*, there was a dispute over the reinstatement of a former king who was dethroned by the military council in 1990 in terms of Order No 14 of 1990.<sup>83</sup> After the dethronement, the College of Chiefs designated his elder son, Prince Mohato, as king of Lesotho. When the former king returned from exile in 1992, the College of Chiefs again designated him as head of state. This was done through the *Office of King Restatement of Former King Act* of 1994.<sup>84</sup>

Rather strangely, the Act made provision for both the reinstatement of former king and succession of the son, Mohato. In 1995, the son accordingly left the throne and his father was reinstated. The applicant,<sup>85</sup> who was not necessarily claiming any right himself, challenged the constitutionality of the Act contending that it violated section 45 of the *Constitution* because the latter provided that designation to the office of king was to be in accordance with the customary law of Lesotho. According to custom, so the contention goes, the son succeeds the father and not the other way round. Unfortunately, the court become procedural and dismissed the application on the ground that the applicant lacked *locus standi*.<sup>86</sup> Although there was an extensive reliance on section 45 of the *Constitution*, which is the main succession clause in the *Constitution*, it is still controversial whether this case turned on succession *strictu sensu* or just on a process of regularising the monarchy. It would be recalled that the turn of political events in 1990 pitted the king against the military junta, thereby provoking the latter to send him into exile. While he was in exile the Military Council proclaimed the *Office of King Order* of 1990. According to section 21 thereof, the deposed king was taken to have "ceased to be King and Head of State on the coming into operation of this Order". Presuming that this was a normal case of succession, the College of Chiefs was convened to determine succession, and they selected Prince Mohato, the eldest son of the deposed king. Clearly, this was not the case of a king who voluntary abdicated either because of ill-health or age, neither was it a case where the former king was dead – all of which would have constituted regular circumstances which

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<sup>82</sup> *Khauoe v Attorney General* 1995-1996 LLR & LB 470.

<sup>83</sup> *Office of King Order* 14 of 1990.

<sup>84</sup> *Office of King (Reinstatement) Order* 10 of 1994.

<sup>85</sup> The applicant was an attorney who alleged that by virtue of being an attorney he had a duty to ensure compliance with the *Constitution*.

<sup>86</sup> However, the Court observed at *Khauoe v Attorney General* 1995-1996 LLR & LB 470 488 that "if Act No 10 of 1994 had amended customary law, which it did not, the Constitution empowers it to modify or amend it. The modification of customary law cannot entitle the applicant to bring the action in this court".

would necessitate the normal succession processes to fall into motion. By his own account, the deposed king, when he later came back, testified that:

... according to customary law I am entitled, capable and willing to hold the office of King. My son, Letsie Mohato Bereng Seeiso fully supports this. Since my return to Lesotho in 1992 no recognition was given to me by the government of the day and by the present government ...<sup>87</sup>

Clearly, this was not a normal contest between two claimants to the throne but just a political irregularity which according to Gill, "...like the nullification of 1970 elections, sets a bad precedent for solving future political tensions and disputes in Lesotho".<sup>88</sup> As it was, therefore, it could be argued that the *Khauoe* case was misconstrued from the start as a case of succession and the court in its reasoning also proceeded on that basis – whereas the case could either have been just an application for a declaratory order when the former king came back from exile or left to political solutions to regularise the previous military regime's irregularities. The reinstatement of the father was therefore largely a process of regularisation rather than succession, although the matter was treated by the College of Chiefs as a matter of succession.

The recent decision of the Court of Appeal in Lesotho on this tension is in the case of *Senate Masupha v Senior Resident Magistrate for the Subordinate Court of Berea and Others*.<sup>89</sup> Although the case relates to the application of customary rules to the lower tier of chieftainship – principal chieftainship – it attests to these continuing tensions between customary rules and the virtues of liberal democracy in the *Constitution*. *In casu*, the appellant was an unmarried woman whose father was, until his death, the principal chief of Ha 'Mamathe, Thupa-Kubu and Jorotane in the Berea district. The father was succeeded by his widow, the appellant's mother. Upon her death in December 2008, the office of principal chief fell vacant.

In February 2009 a family meeting was held pursuant to which Lepoqo David Masupha, the then minor son and only issue of a subsequent marriage entered into by the appellant's late father, was named as successor to the chieftainship, and a regent was appointed pending his majority. The decision of the family council was based on the customary rule of primogeniture, which has since been codified under section 10 of the

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<sup>87</sup> Paras 4.6 and 4.7 of Founding Affidavit of Constantine Bereng Seeiso in the case of *Constantine Bereng Seeiso v Dr Ntsu Mokhehle* CIV/APN/103/94. This was the case in which the applicant was seeking the "setting aside of the first respondent's establishing and appointing of a Commission of Inquiry into the purported removal of His Majesty King Moshoeshe II from his Office".

<sup>88</sup> Gill A *Short History of Lesotho* 243.

<sup>89</sup> *Senate Masupha v Senior Resident Magistrate for the Subordinate Court of Berea* (unreported) C of A (CIV) 29/2013.

*Chieftainship Act*.<sup>90</sup> The appellant challenged the decision of the family council on the basis of the principle of non-discrimination<sup>91</sup> and equality<sup>92</sup> enshrined in the 1993 *Constitution of Lesotho*. Both the High Court and the Court of Appeal were unanimous in dismissing the challenge. The main reason as extolled by the Court of Appeal was that since the *Constitution* itself sanctions the limitation to the rights to equality and non-discrimination on the basis of customary law, it cannot be argued that the customary rule of primogeniture is unconstitutional.<sup>93</sup> The court simply confirms that the tension between the values of liberal constitutionalism and those of customary law have permeated, in a major way, the post-colonial constitutional designs in Lesotho.

## 7 Comparable lessons from South Africa

The South African constitutional edifice is distinguishable from that of Lesotho in that it has a more comprehensive scheme dealing with the relationship of customary law with the *Constitution*.<sup>94</sup> Whilst diversity of cultures is respected by the *South African Constitution*,<sup>95</sup> section 39(2) of the *Constitution* specifically requires a court interpreting customary law to promote the spirit, purport and objects of the *Constitution*.<sup>96</sup> This is the fundamental distinction between the place occupied by customary law in the *Constitution of South Africa* and the place it occupies in Lesotho. Under South African constitutional jurisprudence as confirmed by courts of law,<sup>97</sup> customary law derives its validity from the *Constitution* – not the other way round.<sup>98</sup>

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<sup>90</sup> Section 10 of the *Chieftainship Act* 22 of 1968 (as amended) codifies the rule thus: "(2) When an office of Chief becomes vacant, the first born or only son of the first or only marriage of the Chief succeeds to that office, and so, in descending order, that person succeeds to the office who is the first-born or only son of the first or only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection."

<sup>91</sup> Section 18 of the *Constitution*.

<sup>92</sup> Section 19 of the *Constitution*.

<sup>93</sup> See *Senate Masupha v Senior Resident Magistrate for the Subordinate Court of Berea* (unreported) C of A (CIV) 29/2013 paras 18, 19.

<sup>94</sup> Himonga and Bosch 2000 *SALJ* 306.

<sup>95</sup> See s 31 of the *Constitution of the Republic of South Africa*, 1996. Also see Tebbe 2009 *Journal of Religion* 466; Mubangizi 2012 *JiWS* 33.

<sup>96</sup> Rautenbach 2008 *J Comp L* 119; Albertyn 2009 *CCR* 165.

<sup>97</sup> In the case of *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51 the court held that: "while in the past indigenous law was seen through the common law ... it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law but to the Constitution".

<sup>98</sup> Mmusinyane 2009 *PELJ* 136.

In particular, the Constitutional Court has in the case of *Bhe v Magistrate, Khayelitsha*<sup>99</sup> ruled that the primogeniture principle in the context of succession to private estates is unconstitutional. The court found that the principle of primogeniture violates section 9(3) of the *Constitution*. The discrimination is unjustifiable and it "entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order".<sup>100</sup> While the *Bhe* case was decided in the context of inheritance to private estates, an opportunity arose in the case of *Shilubana v Nwamitwa*<sup>101</sup> to determine whether primogeniture can similarly be abolished in relation to succession to chieftainship. The case arose out of peculiar circumstances wherein the traditional authorities, rather unusually, decided to enthrone a female as a successor to chieftainship. The court confirmed this decision of the traditional authorities; that it is in keeping with the new constitutional order.

In Lesotho the *Constitution* appears to relinquish its supremacy to customary law when it comes to matters of succession to the office of King.<sup>102</sup> This general deference of customary law by the *Constitution* is not unique to section 45 (succession clause). It also provides the basis for the clawback clause in the equality clause in the *Constitution*. The *Constitution* provides for the freedom from discrimination.<sup>103</sup> However the same right is withdrawn by section 18(4), which provides that the freedom from discrimination may be derogated by "any law to the extent that such law 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>104</sup> Clearly the drafters had in mind the rules of succession under customary law. Hence, the country made the reservation to the *Convention on the Elimination of All Forms of Discrimination against Women* to the effect that:

The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's Constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship.<sup>105</sup>

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<sup>99</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

<sup>100</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 91.

<sup>101</sup> *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

<sup>102</sup> 'Nyane 2019 *De Jure* 65.

<sup>103</sup> Section 18(1) of the *Constitution* provides that: "subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect".

<sup>104</sup> Section 18(4)(c) of the *Constitution*.

<sup>105</sup> The reservation was deposited on 25 August 2004. United Nations 2019 [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_en#33](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en#33).

As result of this strong deference to customary law by the *Constitution*, the courts of law are equally hamstrung. Hence, in the case of *Senate Masupha v Senior Resident Magistrate for the Subordinate Court of Berea*,<sup>106</sup> both the High Court and the Court of Appeal were in unison that in terms of customary law, and due to its strong position in the *Constitution*, a female could not be permitted to succeed to chieftainship.

## 8 Conclusion

The purpose of this article has been to study the rules of succession governing accession to the office of king in Lesotho. The paper showed that the *Constitution of Lesotho*, since independence in 1966, has consistently embodied a clause on succession to the office of king. What is striking, though, with the *Constitution*, is its deference to customary law.

Two important aspects appear problematic about this design. Firstly, besides establishing the office of king, the *Constitution* can generally be regarded as wanting on the guidelines governing accession to that office. Secondly, by demonstrating such consistent deference to customary law, the constitutional design of Lesotho appears to abdicate its supremacy to customary law.<sup>107</sup> This downplaying of the *Constitution* in favour of customary law became rife in Swaziland since 1973, and its consequences have been dire.<sup>108</sup>

Furthermore, reliance on customary law for the rules of succession to such high office – although it assists in retaining the traditional and customary content of this office – has also proved problematic over the years. This may primarily be due to the fact that customary law is a fairly dynamic system of law and in the process marred by uncertainties which ultimately render the system open to abuse.<sup>109</sup> This is confirmed by the relative disagreement on the rules of customary law governing succession. This divergence of views on customary law even transcends the efforts intended at codifying the

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<sup>106</sup> *Senate Masupha v Senior Resident Magistrate for the Subordinate Court of Berea* (unreported) C of A (CIV) 29/2013.

<sup>107</sup> 'Nyane 2019 *De Jure* 65.

<sup>108</sup> For instance, in Swaziland customary law has been used as the basis for absolutism. See Proctor 1973 *African Affairs* 273; Picard 1984 *JCAS* 291; MacMillan 1985 *JMAS* 643.

<sup>109</sup> For the methods of ascertaining customary law, see Palmer and Poulter *Legal System of Lesotho* 101-105. See further Poulter 1975 *JSAS* 181. The author believes that: "Students of African affairs who come fresh to the field of customary law research will immediately be struck by three notable facts. First, it is a domain frequented as much by anthropologists as by lawyers. Second, it is an area presently experiencing rapid growth in terms of fieldwork ... Third, despite this ... progress towards consensus regarding the most appropriate research techniques to employ seems to be emerging only rather slowly."

system, such as the Lerotholi Code. Confirming the fluidity of customary law in 1943, Judge Lansdowne in the regency case pointed out that:

In a country like Basutoland where customary practices are in general inconstant, tending under the influence of Christianity, education and other forces, to the improvement of a primitive social system, to the elimination of feudal privileges, and to the evidence from the idea of the family unit towards a larger appreciation of the rights of the individual, *it is found undesirable to endeavour to reduce custom to written law, for thereby that which is in the course of wholesome development would tend to become static.*<sup>110</sup>

Thus, even codes such as the Lerotholi Code cannot be regarded as safe records of customary law.<sup>111</sup>

Lastly, the patriarchal nature of customary law poses a unique challenge to the contemporary constitutional theory. The rule of primogeniture, which prefers males to families, is experiencing considerable problems in co-existing with the contemporary ethos of equality and dignity. The South African jurisprudence has taken a bold step forward to impugn the rule.<sup>112</sup> Arguably, since the South African context is not remote, as it retains both hereditary and elected rulers, it may safely be expected that Lesotho will follow its precedent. Lesotho already has deviations both in customary law<sup>113</sup> and in statutory law<sup>114</sup> from the primogeniture rule. These can provide a strong springboard for the abolition of the rule.

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<sup>110</sup> *Bereng Griffith v Mants'ebo Seeiso Griffith* 1926-53 HCTLR 50 58. Emphasis added.

<sup>111</sup> Juma 2011 *Pace Int'l L Rev* 92.

<sup>112</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

<sup>113</sup> *Bereng Griffith v Mants'ebo Seeiso Griffith* 1926-53 HCTLR 50 58.

<sup>114</sup> Section 10(5) of *Chieftainship Act* 22 of 1968. Also see the case of *Majara v Thelingoane* CIV/T/642/97.

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### **List of Abbreviations**

Afr Secur Rev	African Security Review
CCR	Constitutional Court Review
J Comp L	Journal of Comparative Law
JCAS	Journal of Contemporary African Studies
JIWS	Journal of International Women's Studies
JMAS	Journal of Modern African Studies
JSAS	Journal of Southern African Studies
Pace Int'l L Rev	Pace International Law Review
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
UN	United Nations