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A Journal of Law and Development

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LESOTHO LAW JOURNAL

Vol. 9

1993

No. 1

- Publisher:** Faculty of Law, National University of Lesotho
- Frequency:** Bi-Annually
- Citation:** Lesotho L.J.
- Subscription:** Includes postage by surface mail. Cheques should be made payable to *Lesotho Law Journal*
- Annual:* R50.00 for subscribers in Southern Africa
 US\$50.00 elsewhere.
- One Issue:* R25.00 within Southern Africa
 US\$25.00 elsewhere.
- Agents:** North American readers should obtain subscription directly from our sole North American agents:
- Wm. W. Gaunt & Sons Inc.,
 3011 Gulf Drive, Holmes Beach,
 FLORIDA 34217-2199 USA
- Correspondence:** All correspondence (articles, book reviews, subscriptions, etc.) should be addressed to:
 Editor-in-Chief
 Lesotho Law Journal
 Faculty of Law
 National University of Lesotho
 P.O. Roma, 180
 Lesotho, (Southern Africa)
- Copyright:** The NUL Faculty of Law jointly with the Author. The views expressed in this Journal are those of the contributors and they do not reflect the views of the Editorial Board, the Faculty of Law or the National University of Lesotho.
- Publications:** This issue of *Lesotho Law Journal* was prepared using WordPerfect and typeset by Ntsebo Mabatla and printed by Morija Printing Works.

Chieftaincy and the Search for Relevant Constitutional and Institutional Models in Lesotho: Historical Perspective

Nqosa Leuta Mahao

Introduction

The problem of locating and consolidating constitutionalism in many African countries since independence in the 1960s is well-known to students of constitutional theory. Essentially this has been a crisis of crafting characteristics of the liberal-democratic state, as it has developed in the West, onto an authoritarian state edifice developed under colonial rule. Neither have the conditions *sine qua non* of liberalism and democracy grown to the extent that they give character to the state in the post-colonial era. The social conditions of the liberal-democratic state in the West — the existence of a strong bourgeoisie in whose name the rule of law, diversification of powers, free marketism, etc. defined the liberal character of the state coupled with the political successes by the working class and other marginal classes for a stake in influencing the behaviour of the state, which development gave form to its democratic character, exist only in perverted forms.

In the same way as many other African countries Lesotho is continuously having to confront the consequences of this reality. Its experiment with constitutional government, as understood in the West, between 1965 and 1970 and since 1993 has been in both instances less than rosy. Between 1970 and 1993 it followed a trend well-established elsewhere in Africa by rooting its organisation of political power in the authoritarian creed of developmentalism. That these escapades have at best yielded ambivalent results and most certainly accentuated national disunity explain why some voices advocate a return to a form of government based on the precepts of the pre-colonial Basotho political system. A well-known historian has argued that:

It is important, therefore, for the Basotho people to make a Constitution which has its roots in their history, a constitution which is not cast in a foreign mould. Such a Constitution will always allow the ordinary man and woman to participate meaningfully in the making of the laws in the traditional democratic manner.¹

That pre-colonial Basotho political and constitutional form was called chieftaincy. It has been said that "chieftaincy is customary government improved along as the nation was growing."² It is thus remarkable that chieftaincy has not only demonstrated resilience in "surviving" the onslaught of colonial capitalism, but is in the late twentieth century being presented as an alternative model around which contemporary constitutional dispensation must be devolved. An attempt in this direction during the Monarcho-military rule between 1986 and 1990 aborted when the alliance between the traditional elite and the military miscarried. The mishap has not however deterred those who strongly believe that Lesotho's woes can be redressed by conjuring up chieftaincy and substituting it for Western transplanted forms of political power.

To date the most coherent argument in this direction is the one proffered by Lerotholi in a key note address to the Lesotho Association of Chiefs. Lerotholi extols the virtues of chieftaincy on two grounds.³ First, he contends that in this system the process of governing is not characterised by the separation between the people who are the source of the powers of government and the chiefs who are charged with exercising those powers. Both the ruler and the ruled participate in governance through the *khotla* or the *pitso*. This system of direct participation in governance by the citizens ensures that governmental power resides at all times with them.

On the other hand Lerotholi persuasively critiques the Westminster parliamentary government which has been adopted in Lesotho for

¹ See an article in the Mirror Vol. 3, January 12, 1990 entitled "Lesotho and Westminster Constitutional Model" by Dr M Damane.

² This is from an unpublished paper titled "The state of the Monarchy and Chieftaincy in the Aftermath of His Majesty King Moshoeshoe II" by Chief Makhaola Lerotholi. (the translation is mine).

³ Paper by Chief M. Lerotholi, *ibid*.

institutionalising the exact opposite by divesting the citizenry of its sovereign right to be involved in governing. He argues:

According to this European-wrought concept the nation elects "representatives" who will be its spokespersons and are called "parliamentarians" and they, not the nation, become the "source" of sovereign authority. The "executive repositories" of these sovereign authority is the "Cabinet" constituted by "Ministers" appointed from among the parliamentarians and they must be members of a particular party and to the exclusion of others. Their leader who becomes the ultimate authority in whom executive powers are concentrated is styled the "Prime Minister" to pass him as if he were another Minister in order to disguise the reality that de facto he has taken the place of the King of the Basotho who is relegated to a status of a "Constitutional Monarch" and has no say in government except merely "to assent" whatever the Prime Minister presents as decisions of the government to him.⁴

This model is therefore faulted for making only a small group, those who are elected to Parliament, the source of sovereign power and still more for vesting the exclusive right to govern in a cabinet, an even smaller group selected from the Parliamentarians. Thus the model is seen as first and foremost fundamentally and inexorably elitist although Basotho have been made to believe that it is democratic. Secondly the model is criticised as the source of the sectarian pathology now and then ripping the Basotho nation apart. Lerotholi argues that the germ of this pathology is a special breed among the educated elite called "politicians" who form associations called political parties which are used as its handmaidens in the elite's struggle for power. These political parties, he says, are used to undermine the unity and solidarity of the Basotho as well as the chieftaincy and to herd the nation into the aforesaid alien constitutional model.⁵

Certainly there is an argument to be made for the charges levelled against the Westminster constitutional model. As a species of the liberal democratic representative government it is rooted in a theory which proceeds from the premise that "the people choose from competing elites, the government whose business it is to make policies and laws and provide leadership, and do not themselves attempt to

⁴ M. Lerotholi, *ibid* p 4. (translation is mine).

⁵ M. Lerotholi, *ibid*

decide on issues or influence policy-making."⁶ Arguably therefore this is a system of government by the elite. Naturally in the context of a developing country, such as Lesotho, where the mass of the population is not very sophisticated the power of the elite in relation to the ordinary citizenry can be inordinately awesome. In these circumstances abuses associated with this type of government can be accentuated.

But then the issue is not whether or not the Westminster model is or is not elitist or tends to be divisive, for that is self-evident. The salient question which this paper sets out to probe is whether chieftaincy, as an alternative model, is better suited to resolve the crisis of constitutional government in Lesotho as its admirers would have us believe. The paper looks at chieftaincy both as a political institution and a constitutional framework of government. The first part focuses on the social basis of the institution and seeks to tackle the common assumption that traditional society was undifferentiated. The second and third parts look into constitutional-specific issues relating to the selection of office-bearers and the nature of power and institutional restraints respectively. The paper deliberately does not seek to discuss the excesses associated with chieftaincy especially in the period following the establishment of the Basutoland National Council (BNC) in 1903.⁷ While this experience should correctly form part of the basis of the critique of chieftaincy, often those who hold this model to be a credible alternative argue that the excesses were a consequence of its distortions by colonialism.⁸

The social basis of chieftaincy

An objective analysis of chieftaincy has to start from grasping the place of this institution within the social relations among the Basotho and its relationship with the indigenous state.

The indigenous state in Lesotho evolved from within the political and

⁶ C. Turpin, *British Government and the Constitution*, (London, 1985) p495.

⁷ The best known documentation of the excesses of chieftaincy is Sir A Pim's Report on the Financial and Economic Position of Basutoland (London, 1935). See also R.F. Weisfelder, *The Basotho Monarchy*, (Ohio, 1972).

⁸ This is a position which the first half of the twentieth century was articulated by the Lekhotla La Bafo.

social contradictions of Southern Africa in the first quarter of the nineteenth century. Two important developments were responsible for its rise: the *lifaqane* social revolution and the advent in the interior of the region of Boer Settler contingents.

Evidence however shows that proto-states among the Sotho-speaking communities of Southern Africa had been in existence for several centuries before.⁹ In the same vein the institution and social compact around which the nascent Basotho polity would consolidate, the chieftaincy, had its genesis in that distant past. It derived its legitimacy in the fact of having been part and parcel of societal historical evolution and certainly the only mode of governance known to the people. "From the cradle of the Basotho nation," Lerotholi correctly amplifies, "chieftaincy was the bed-rock of government which bequeathed the Basotho with their security, growth, and success."¹⁰

In order to cast the link between the indigenous state and this critical apparatus, the chieftaincy, in a proper perspective it is necessary to understand the role of the latter first and foremost within the context of productive and distributive relations in the Basotho society. Contrary to popular assumptions, from as far back as available evidence can show, and certainly more decidedly so with the rise of the full-blown state in the nineteenth century, chieftaincy was a class apparatus. Kimble has argued, and it is worth quoting in extenso:

In seeking to understand the class nature of African formations in the period, one has to overcome the formidable obstacle presented by dominant perceptions of the chiefs, both then and now, and in academic as well as popular discourse. These perceptions, evident in Sotho sayings and proverbs and in historical writing ... stress the role of chief as a patriarch; identification of a chief by lineage; the chief as redistributor of wealth to his followers; and the relationship of chief and follower as one of personal dependence. The effect of these views is first, to attribute the basis of a chief's power to his lineage identity which is characterised as the homestead, or family writ large, and, second to divert attention from mechanisms whereby chiefs

⁹ Accounts of ancient chiefdoms are discussed in D.F. Ellenberger and J.C. Macgregor, *History of the Basuto: Ancient and Modern*, (New York, 1912).

¹⁰ M. Lerotholi, *op cit*, p 2. (the translation is mine).

accumulated wealth in the first place. In short, these conceptions obscure the fact that the relation between chiefs and followers was one of exploitation (extraction of surplus labour) and this relation entailed mechanisms for the reproduction of chiefs as a social class (and not simply as individuals).¹¹

Thus in reality a chiefs' dominant political and social station was usually a consequence of their overall control of the processes bearing on the production and reproduction of society.

Access to land, which was the most critical of all means of production, whether it was for purposes of erecting a dwelling lodge, growing crops or grazing livestock in this inexorably pastoralist-agricultural society, presupposed that "a commoner's homestead enter into a relationship of allegiance to the chief."¹² A commoner's pledge of allegiance to a chief established a legal relationship of subject and lord. From such a relationship flowed the right on the part of the chief to extract tributary labour from the commoner. This right constituted part and parcel of the whole gamut of a chief's prerogative powers which shall be discussed later, but which included; inter alia, the obligation of the commoner to be dispatched on errands, to do military service, labour on the chief's fields, etc. All of these activities of the commoner potentially enhanced the chief's wealth. It is not uninstrusive therefore that the very meaning of the term *borena* (chieftaincy) connotes wealth. As Casalis noted that "(t)he Basutos (sic) give to the princes who govern them the title of *morena*. The origin of the word is very beautiful; it is formed of the verb *rena*: to be prosperous, to be tranquil."¹³

Thus in material well-being a chief and a commoner occupied the opposed arches on the pendulum in which the former's riches were an expression of the exploitation of the latter. Ashton observed that "(n)ot only is he (the chief) the richest man in the community, *but he derives part of his wealth from the activities of his subjects*, so his

¹¹ J. Kimble, "Clinging to the Chiefs" in H. Bernstein and B.K. Campbell (eds) *Contradictions of Accumulation in Africa*, (London, 1985) p31.

¹² J. Kimble, *ibid* p. 35.

¹³ E. Casalis, *The Basutos*, (Cape Town, 1965) p214.

people say, that he should have their welfare at heart.¹⁴ Indeed being simultaneously wealthy and a commoner were incongruous. Evidence shows that among the communities of Southern Africa, Basotho included, the very idea of a rich commoner was perceived as a threat to the *status quo* of political and social relations. Often a charge of witchcraft would be contrived against a rich commoner, resulting in his wealth being "eaten up" (confiscated).¹⁵

A chief's hegemonic control of the conditions under which social reproduction occurred also impinged on the distributive processes. It negated principles of equitable access to resources between chiefs and commoners and thus guaranteed a domination of these resources by the former despite of the popular belief that traditional society was egalitarian. Chiefs took precedence in the community in the distribution of resources. This entailed the right to choose the best and the biggest share. Schapera comments about a motswana chief that he "has the first choice of a site for building his home, of usable lands, and of grazing for his cattle; and he is invariably the richest man in the tribe."¹⁶ This much can be said about a typical Mosotho chief. Commoners however rationalised this distributive dispensation as revealed in this extract:

A chief's lands were far better and bigger than a commoner's perhaps twenty times bigger, but they were still the lands of the chief, about which we say "They cannot be measured." Even so, the people did not begrudge their chief his lands because we say that the chief is the child of the people, and people ought to work gladly and joyfully to see that their child lacks nothing.¹⁷

The explanation for this intrinsically skewed and unequal distribution of resources cannot be located in the people's overly concern with the welfare of their chiefs. It has to be located in the fact that society had developed to a level where a distinct social class had established exclusive *de jure* control over the main means of production and from

¹⁴ E.H' Ashton, "Political Organisation of the Southern Sotho" Bantu Studies Vol. 12, Part 4, December, 1938 p309.

¹⁵ E. Casalis, op cit p216; See also M. Hunter, *Reactions to Conquest: Effects of contrast with Europeans on the Pondo of South Africa*, (London, 1964) p384.

¹⁶ I. Schapera, *A Handbook of Tswana Law and Custom*. (Frank Cars, 1934) p.63.

¹⁷ S.J. Jingoos, *A chief is a chief by the people*, (London, 1975) pp.174-175.

that position dictated society's terms of reproduction. It can be concluded therefore that from as far as evidence suggests chieftaincy was an institutionalised class political and economic domination.

On the other hand the emergence of the Lesotho state around the second quarter of the nineteenth century clearly neither created chieftaincy nor introduced drastically different patterns of relations of production. "Moshesh (sic) (the founder of the Lesotho state) grafted the new ideas on the old conceptions of leadership," asserts Tylden, "without apparently losing in the least his ascendancy over his men."¹⁸ What was new was the zest with which Moshoeshe used his wealth to build his power base as no other Mosotho chief had done before. He loaned cattle to the destitute on the *mafisa* system (a system of allowing someone to have usufruct rights) on an unprecedented scale and provided *bohali* (dowry) for his warriors. As part and parcel of his fighting arsenal he developed a sophisticated military machine that enhanced his capacity to raid cattle in other polities and to provide protection and the means of survival to those who sought allegiance to him. The importance of these innovations cannot be overemphasised on the part of communities uprooted and rendered destitute by the turbulences of *lifaqane*. In this way the pre-colonial Basotho state took shape.

Apparently two elements were concomitant with this development. In the first place rather than establish new class relations, this development, as Kimble correctly observed, "secured the consolidation of power by one aristocratic lineage, Moshoeshe's Bakoena, which stamped its own dynastic identity as a (newly) royal lineage on the institutions of the state".¹⁹ This lineage became the country's ruling class. Secondly a hierarchical system of authority became a necessary logic of the centralisation process dictated by a relatively huge territorial and population base of the state. Moshoeshe's relatives became the basis of this centralisation through a process of what became known as "placing." "Shrewd placings, coupled with strategic royal marriages, abetted the process of political unification, accentuated the trend toward a more hierarchical, centralised system of government," Weisfelder contends, "and further justified Moshoeshe's right to be considered a *morena e moholo* i.e., a "great

¹⁸ G. Tylden, *The rise of the Basuto*, (Cape Town, 1950) p.3.

¹⁹ J. Kimble, "Clinging to the Chiefs," op cit p33.

chief" or possibly a "king."²⁰ In the course of time tiers of authority multiplied, with the *morena* at the base and the *morena e moholo* at the apex of the pyramid.

Thus with the rise of the state chieftaincy was not transformed from being a class rule. Indeed this character was consolidated and more importantly it became a class rule located within a particular family - Moshoeshe's family. A rule by an orligachy was thus established. When the elitist character of the Westminster representative government is exposed this fact about chieftaincy in Lesotho should also not be lost sight of. In a sense it is this exclusive character of chieftaincy which alienates the modern elite.

Chieftaincy and accession to office

How the rulers are selected is always an important matter in any political system. Certainty of the rules governing this matter is the surest way a political order guarantees itself stability. The procedures of selection of office bearers are also always a critical determinant of the extent, if any, to which the rulers have a say over who their rulers should be. Selection procedures also tend to influence the manner of exercising power by the rulers. In the Western political systems, including at Westminster regular elections are the means by which the question of accession to political office is settled. The key function of political parties is to provide the electorate with alternative potential successors to office from which to choose.

It is often the case that students of the Basotho traditional system of government nurture the view that appointments to chieftaincy ultimately depended on popular approval by the people over whom the chiefs were to rule. This is a popular view apparently deduced from the adage "*morena ke morena ka batho*" (a chief if a chief by the people). It is a view also asserted by Sheddick who comments that "(i)n the first place, the appointment of a chief depends in all cases on the approval of the people over whom he is to rule even though his succession is indicated by birth".²¹ These views give the impression that chiefs hold their offices either on the tacit consent or even upon

²⁰ R.F. Weisfelder, op cit, p26.

²¹ V. Sheddick, *Land Tenure in Basutoland*, (London, 1954) p.30; see also J. Jingoos, op cit, p183.

being elected by the people. If this were so there would hardly be any difference between this system and the convention in the Western liberal-democratic systems. Perhaps the only difference would be that, it would seem, a chief once elected his tenure of office was not defined.

But contrary to this impression accession to the office of chief had little to do with the consent of the governed, and virtually nothing to do with elections as conceived by modern political thought. In contrast it is the principle of primogeniture which governs accession to the office of chief. This is a matter in regard to which broadly speaking identical principles governed the selection processes among the Bantu peoples of Southern Africa. Schapera states the general rule thus: "A chief is never elected ... as a rule the chief succeeds automatically to his office by right of birth".²² A successor was thus a person whose position of birth designated him as an heir according to the ordinary rules of succession. His selection was governed by two cardinal principles. The first principle was that "the chieftainship may never be claimed through the female line, nor may women ever become chiefs."²³ In other words the heir had to be a male although in the course of time women could occupy offices of chieftaincy but then, only in regent capacities to secure them for their male offsprings.

The second principle related to the selection of an heir to a chieftaincy among usually many male claimants. This is aptly stated by Kuper in relation to the Swazis thus:

The fundamental principle underlying the selection of an heir is that power is inherited from men, and acquired by them, but it is transmitted through women, whose rank, more than any other single factor, determines the choice of successor.²⁴

What this principle addressed were the complications which often arose out of polygamous marriages which were particularly common among the aristocratic class who had the wealth to marry as many wives as it permitted as well as a right to draw on the wealth of their subjects for such purposes. In these circumstances the heir to the

²² I. Schapera, *op cit*, p53.

²³ E. H. Ashton, *op cit*. p300.

²⁴ H. Kuper, *An African Aristocracy: Rank among the Swazi*, (New York, 1947) p91.

office of the chief would be the eldest son of the senior wife, i.e. the first wife married by the chief.²⁵

While birth designated the heir-apparent the formal selection process itself rested with a council consisting of members of the chief's lineage which met upon the death of the chief.²⁶ Its duty was to verify the credentials of the claimants. The council deliberated and determined the rights of the claimants by deciding which one of them had a prior right over others. It was a standard practice, however, that whenever the lineage council had concluded its deliberations and "picked on" the successor to a chieftaincy a *pitso* would be held where he would be formally introduced as the new chief. While on occasion those attending the *pitso* could candidly express views about the suitability or otherwise of their new chief, there is no evidence to the effect that the *pitso* reserved the right to veto the appointment. It seems that the family councils' decision was regarded as conclusive of the matter.

Arguably the mode of selection of holders of political office in the chieftaincy system is its Achilles heel. The ethos of contemporary society are inexorably embedded in the principle of "mandate" where the governed would like to believe that they have control over their leaders, if not on a continuous basis, then at regular intervals whose opportunity is often provided by elections. The utilitarian value of this principle is founded on the premise that there is no better guarantee for the retention of a leader's allegiance to his followers. It also makes it possible for the followers to deselect a leader if their experience informs them that he was not the best person for the job. These goals may not have mattered in a setting of a subsistence economy society whose governance was relatively less complex and the wheels of change were oiled by collective social mores. But contemporary society highly values a leader's personal abilities and competence because much of its progress or lack of it can depend on it. For that reason the power to elect political leaders is a more assuring advantage of modern constitutional thought.

²⁵ G.I. Jones, "Chiefly succession in Basutoland" in J. Goody (ed) *Succession to High Office*, (Cambridge, 1966) p.61.

²⁶ G.I. Jones, *op cit*, p61.

While only half of the struggles by mankind have been over the spoils of power half has been over how power itself can be civilised. In the liberal-democratic mode the latter struggles are the more important. "The idea that the sheer magnitude of the state's power is a threat to its citizens, and that this threat must somehow be tamed," comments Sher, "has long been a prominent theme of liberal thought."²⁷ This attitude is operationalised by the separation of executive powers from judicial and legislative powers inter se and vice versa, institutionalised normative restraints, powers of judicial review over executive and legislative acts, etc. Central to this mode of organising state power is the need to secure a niche of individualism and self-fulfilment by the citizen that is not swamped by the expediencies of government. The Westminster model is crafted on these ideas albeit somewhat imperfectly.²⁸

A critical characteristic of the indigenous constitutional dispensation was that it drew its inspiration from an altogether different philosophy moulded by the total subordination of the individual to society in the Durkheimian characterisation of mechanical solidarity. In consequence all authority was vested in the chief alone.²⁹ This characteristic was an expression of the fact that "the classic division of powers enunciated by political philosophers (had) no counterpart among the Sotho".³⁰ As aptly described by Schapera the chief was "at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and the magician of the people."³¹ He was the political and administrative head of his area of jurisdiction. In that capacity it is difficult to say where his authority ended.³² He had powers to issue orders of all kinds in the name of

²⁷ G. Sher, "Rights, Neutrality, and the Oppressive Power of the State" In *Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy*, Vol 14, No2, May 1995, p184.

²⁸ It is not only the doctrine of separation of powers which is problematic in this model but so also are the normative restraints because of the absence of a Bill of Rights in the British system.

²⁹ D.F. Ellenberger and J.C. Macgregor, *op cit*, (New York, 1965) p.265.

³⁰ E.H. Ashton, *op cit*, p307.

³¹ I. Schapera, *op cit*, p62.

³² E.H. Ashton, *op cit*, 307.

public good or for private purposes. His subjects were obliged to carry out all "lawful" orders and any unjustifiable failure to comply was visited with sanctions. He had the right to assign his subjects on errands of various sorts, or to summon them to work in *letsema* (communal working party) in activities deemed to fall within the ambit of social obligation. Usually *letsema* was summoned to work on *masimo a lira* (fields whose yield was used in public-related functions such as the feeding warriors, etc), on the fields which were owned by the chiefs' senior wife and on the fields which belonged to the office of the chief.³³

In extra-ordinary circumstances chiefs had the right to impose *sethaba-thaba* (tax paid in cattle) upon their people.³⁴ *Sethaba-thaba* was often levied to meet the obligations of the chieftdom. They also had powers to allot land for residential or crop production purposes. It was their duty also to designate which areas were available for the grazing of livestock and which ones were reserved (*maboella*). They determined the appropriate time for convening *lebollo* (initiation institution), for beginning the ploughing season, etc. Ellenberger and Macgregor also point out that "all rights over trees, reeds, and thatching-grass (*liremo*) were vested in the chief, so that no one could build or thatch a house without his leave".³⁵

Although the bulk of social norms regulating standards of behaviour were derived from custom "the chiefs had the right of making laws, and publishing regulations required by the necessities of the times".³⁶ Furthermore, while the fact that chiefs possessed legislative powers is beyond contention, indigenous constitutional jurisprudence did not seem to distinguish between pronouncements of a chief which were mere expressions of opinion and those which constituted a statement of the law. If, however, in ordinary discourse it was possible to make such a distinction, the criteria employed to do so must have been very diffused. Sesotho idioms which had a jurisprudential content seem, on the other hand, to reinforce the view that all the pronouncements

³³ J. Kimble, "Towards an Understanding of the Political Economy of Lesotho," (unpublished M.A. Thesis, National University of Lesotho, 1978) p70.

³⁴ D.F. Ellenberger and J.C. Macgregor, op cit p.265.

³⁵ D.F. Ellenberger and J.C. Macgregor, ibid p266.

³⁶ E. Casalis, op cit p228.

of a chief amounted to "law". These idioms include one which says "lentsoe la morena ha le oele fatse" (a chief's word cannot be ignored) and another which says "lentsoe la morena le aheloa lesaka" (a chief's word is venerable). These idioms give the impression that there was no distinction drawn between a law and a mere wish of a chief.

Under every chief there convened from time to time a *lekhotla* (court) presided over by him to hear litigation. Every kind of complaint and dispute was justiciable. In the words of Casalis "it was not strictly the duty of the chief to seek out crime in order to punish it but rather to hear the complaints which (were) brought to him, and if they (were) well founded, to see that justice (was) performed".³⁷ Procedure in the proceedings allowed the parties to be in charge of the process, to lead evidence, cross-examine witnesses and above all any one in attendance had a right to give evidence or to cross-examine a witness. The system was, to borrow from Skweyiya, "characterised by popular participation in the process of justice distribution".³⁸ But although the public participated in the judicial process, the right to impose sentences was the sole prerogative of the chief. He was also entitled to part of the court fines. Kimble elaborates that "(s)itting in the public courts, the chiefs were entitled to the collection of fees and fines. If found guilty, the defendant had to pay twice - his fee to the court and compensation to the accuser."³⁹

Against these enormous powers concentrated in the chiefly class there were institutional restraint which served to minimise the abuse of power and to secure the rights of the individual. Three of these are worthy of brief discussion. Firstly, there was the freedom of speech which formed the very foundation of the customary constitutional rights of the Basotho. It was a right guaranteed to every member of the community without regard to station in society. It was expressed

³⁷ E. Casalis, *ibid*, p224.

³⁸ Z.S. Skweyiya, "Chieftaincy, the Ethnic Question and the Democratisation Process in South Africa" (Occasional paper series, University of the Western Cape, 1993) p7.

³⁹ J. Kimble, "Towards an Understanding of the Political Economy of Lesotho" *op cit* p74.

in the idioms "moro khotla ha o okolloe mafura" (in court a spade is called a spade) and "moaa khotla ha a tsekisoe" (criticism at a public meeting cannot be visited with sanctions). The constitutional right to express oneself freely and to criticise authority as underlined by these idioms is often, without exaggeration, perceived as one of the two important democratic aspects of traditional society. As a matter of common practice speakers at the *pitso* or *lekhotla* would always preface their cutting remarks by invoking these idioms as a reminder to the rulers that freedom of speech was a constitutional right. No reprisals could be visited on any subject who exercised his right to disapprove of a chief's conduct. As Casalis observed:

Freedom of thought and freedom of speech are the foundations and the guarantee of the national rights of (Moshoeshoe's) subjects. They are allowed to express their opinion on the chief's conduct quite openly, if they disapprove of it, they say so with a virile and eloquent boldness which the most fiery Roman tribune would have envied.⁴⁰

Close parallels can be discerned between freedom of speech at a *khotla* or *pitso* with the Westminster concept of parliamentary privilege.

It was indeed the case therefore that any chief who entertained the temptation to abuse his powers understood very well that his conduct could be the cause of his embarrassment at his earliest appearance at the *lekhotla* or *pitso*. That prospect, with its grievous political implications of open revolt, if there was a growing perception that he was generally bent on unscrupulous indiscretions, always served to arraign the use of the chiefs' powers within the confines of acceptable norms.

Secondly there was the *pitso* institution which was convened from time to time. This was a convocation to which, as noted by Legassick, all full male members of the community would be invited by the chief to participate.⁴¹ In theory all important matters affecting the welfare of the community had to be thrashed out and decisions shaped by

⁴⁰ E. Casalis, quoted in L.L.B. Machobane, *Government and Change in Lesotho*, (London, 1990) p.23.

⁴¹ M.C. Leggasick, "The Grigua, The Sotho-Tswana, and the Missionaries," (Phd Thesis, U.C.L.A., 1969) p48.

collective wisdom at a *pitso*. Procedurally one of the chief's counsellors explained the subject of discussion, according to Casalis, while "taking care to let his own personal opinion appear as little as possible".⁴² Following this presentation of the agenda, a debate would be allowed to ensue and anyone who had an opinion was given an opportunity to voice it. The debate was conducted in the spirit of freedom of speech and openness. At the end the chief wound up the deliberations and stated what he believed was the preponderant or correct opinion and by virtue of this ruling it became the adopted decision of the *pitso*. Thus the importance of the *pitso* in infusing popular views into the decision-making processes cannot be over emphasised. Together with the *lekhotla* it constituted the other democratic facet of the traditional dispensation with regard to its consultative value and the high degree of freedom of expression which permeated its proceedings. It meant that chiefs did not take major decisions *in vacuo*.

The extent to which the *pitso* was critical on the decision-making processes beyond the appearances is nevertheless difficult to assess. It is clear that as a medium of decision-making the *pitso* was not immune from manipulation. This is a point appositely noted by Weisfelder:

To be sure, a leader and his councillors could use their control of the agenda, their roles as moderators, their applause for views congenial to their own, and a myriad of other levers to manipulate the emerging popular consensus, particularly at large and cumbersome national gatherings.⁴³

From this perspective *pitso* may not have been any more important than to legitimise decisions already taken by the chiefs and their cohorts. But a fundamentally critical deficiency of the *pitso* system lay in two related aspects. Firstly, there was no system of ascertaining the preponderant opinion of the participants. As Casalis explains "the assemblies (were) entirely of a deliberate character and voting (was) never introduced".⁴⁴ The reason why voting was not essential was precisely because as Weisfelder states "the ultimate decision was also the domain of the sovereign who did not necessarily have to echo the

⁴² E. Casalis, op cit, p234.

⁴³ R.F. Weisfelder, op cit, pp.19-20.

⁴⁴ E. Casalis, ibid, p236.

general trend of thought although he was expected to have listened to all opinions and to refute the contrary arguments".⁴⁵

It is therefore obvious that important as the *pitso* system was, to the extent that it made the views of the ruled known to the rulers, it was not an alternative decision-making arrangement to the prerogatives of the chiefs. The latter's prerogative to make decisions, contrary to populist theories, was at all times exclusive and not shared with the former. The *pitso* was no more than an institutional conveyor belt which availed a myriad of opinions and helped the chiefs to make informed choices when they exercised their decision-making powers. From that tangent, therefore, it fell short of the much vaunted perception that cast it as a vivid example of direct democracy.

Lekhotla la baeletsi (council of advisers) was another institution which was found in every chiefdom and it played a critical role in advising the chief in the administration of the affairs of the realm. No rule of custom seems to suggest unequivocally how the *lekhotla* had to be constituted. In general, however, there were three sets of people who seem to have become part of the chiefs' informal council of advisers. The first set was the chiefs' senior relations; uncles and brothers. The second set was individuals whom the chief appointed on their presumed merits as men of substance. Thirdly there were leaders of communities within his jurisdiction. It was imperative that before a major decision could be taken the chief must consult his advisers. Schapera observed that:

In order to get anything done the chief must first gain the co-operation of his advisers and headmen, who play an important part in restraining his more arbitrary impulses. Any attempt to act without them is not only regarded as unconstitutional, but will also generally fail.⁴⁶

Consultations with the council could either be held in private or in public where, in the case of the latter, members of the general public were free to participate in the deliberations. Moreover, consultation was a continuous element of the political process which was not confined to either the council or the *pitso*. The chief was also free to invite individual members of the community in private to hear their

⁴⁵ R.F. Weisfelder, op cit,

⁴⁶ I. Schapera, op cit, p84.

opinion on any matter. The significance of the role of the council, however, lay in the fact that it could not be by-passed without such an act inviting lack of co-operation on the part of the people without whose support the machinery of government was likely to grind to a halt. In return for their support to the chief, it was imperative that he mastered the art of taking their inputs seriously, and often at the expense of circumscribing his legally limitless right to take decisions.

But just like in the case of the *pitso*, the council was not *strict sensu* a decision-making body but only an advisory institution. Legally "the chief ... (was) not bound to take the advice given, though his decisions (were) inevitably influenced by his knowledge thus acquired of his people's attitude".⁴⁷ The extent to which the council "shared" in the decision-making process, therefore, must be understood to be limited to influence rather than to a legal exercise of power. Its significance was indirect in so far as a chief's failure to act on its advice, as opposed to seeking its advice, could precipitate unpalatable political consequences rather than direct legally-based sanctions.

From the above discussion of the powers of the chiefs and institutional devices within which these powers were exercised the following poignant observations can be made. Firstly, the concentration of all powers in the chiefs created ample opportunities for abuse. Confiscation of the wealth of rich commoners on fabricated charges was but a typical example which was a direct consequence of a system in which a chief could simultaneously be a prosecutor, complainant, law-maker, judge as well as being entitled to the fines imposed by the courts. Abuses may have not been on a large scale in the early days of the state because of the fragility of political power. But in the twentieth century they had become rife and gnawed at the very fabric of society. It is not surprising therefore that the reforms Proclamations of 1938 were targeted at whittling some of these awesome powers from the chiefs.⁴⁸

Secondly, despite the defect mentioned above the system had a

⁴⁷ E.H. Ashton, *op cit*, p312.

⁴⁸ In 1938 the colonial authorities promulgated two Proclamations, the Native Administration Proclamation N0 61 and the Native Courts Proclamation No 62, which brought reforms to the chieftaincy including the removal of the judicial prerogatives of the chiefs.

definite edge over Westminster, as Lerotholi has asserted, in affording the governed a direct say in government through the institutions of the *pitso* and *lekhotla*. Participatory government such as existed in this model is something which modern liberal-democracy is yet to achieve. The weakness related to the fact that through the exercise of their prerogative powers the chiefs could ignore popular views and opinions if from a political assessment point of view the costs were unlikely to be dire. Nevertheless it is quite clear that freedom of speech as a constitutional right of the Basotho was not only good in itself but also was a critical pillar of transparent and conscientious government.

Conclusion

It is not easy to make objective value-based comparisons between chieftaincy as a constitutional model and contemporary Western-derived constitutional government. The deficiencies of the Westminster system are glaring especially for a country such as Lesotho which is yet to develop a common psyche which is transcendental to cleavages in the nation developed by colonial and contemporary life, towards institutions of government, their powers and relationships. In the absence of such uniting and transcendental values, democracy understood primarily to mean the existence of antagonistic sects tends to institutionalise conflict. In these circumstances political parties tend not to embody alternative programmes but act as centres of a ritualised bickering. Of course even in advanced countries it has been argued that "the system positively incites sectional appeals and highlights areas of conflict rather than reconciliation. In industry and in local government, it makes problems intractable by manufacturing disagreements beyond the real differences of opinion felt by the electorate. Indeed, by putting unrealistic alternatives before the electorate, it paradoxically obscures the very real choices which need to be made in an advanced industrial society."⁴⁹ Nevertheless the institutions of the state and the rules of the power-play in such countries are strong and resilient because they have evolved with society and have an almost universal appeal.

But it is in regard to the possibilities for affording the citizenry with alternative programmes and the frequency to change its rulers in

⁴⁹ V. Bogdanar quoted in C. Turpin, *op cit*, pp527-8.

which the Western model of democracy appears to hold advantage over chieftaincy. As one of its supporters has observed "(t)he development of modern mass parties has in stabilized constitutional democratic regimes provided for a certainty of succession far superior to that of alternative methods. To this certainty must be added the great advantage of thereby making it possible to change rulers rather frequently."⁵⁰ Needless to say that these are elements whose importance must be appreciated in the context of a society whose development technically makes direct participation no longer feasible at certain levels of government and hence government by representatives a necessary evil.

On the other hand the dispensation based on chieftaincy also displays both negative as well as positive features. On the flip side leadership selected by the criteria of birth and confined to the male gender is out of tune with contemporary ethos. Such criteria necessarily excludes as able and competent persons who would otherwise avail their services for the good of society. It deprives society the optimal use of all its human resources. On the other hand not many exponents of chieftaincy would argue that the alienation of some of the powers such as judicial and legislative from the chiefs has been fatal to the system of chieftaincy. The reforms of the 1930s alluded above are a good testimony to the fact that the system can be "face-lifted" to respond to the exigencies of the time.

Arguably the strongest appeal of chieftaincy was in so far as it afforded participatory and direct democracy, albeit within confines discussed above, in relation to all the processes of executing, legislating and adjudication. At one level participatory democracy was inimical to the Western liberal thought because the socially dominant classes were not prepared to go all the way with democracy. This led to the treatment of representative government and the alienation of the citizenry from government as if it were a desirable ideal. It is desirable that while not the entire principles on which chieftaincy was based can be fine-tuned to the needs of modern day political discourse, certainly those of them, such as the opening of our political system to direct participation by the electorate at all levels where it should be practicable, should be refined and adopted. This would improve the functioning of our institutions of government by establishing a close

⁵⁰ C.J. Friedrich, *Constitutional Government and Democracy*, (London, 1968) p 587.

bond between them and the people. This development would help to legitimise government and animate the people.