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The Law and the Political Debates in Lesotho: An Assessment of the Retrocession and Integration Discourses

Nqosa Leuta Mahao

INTRODUCTION

The Kingdom of Lesotho is an independent sovereign state and a member of the Organisation of African Unity (OAU) and the United Nations Organisation. This legal personality, however, obscures the dependent status of the country. It is small in size, geographically totally surrounded and economically dependent on the Republic of South Africa. These features place Lesotho closer in resemblance to the territories formally carved out by apartheid within the borders of South Africa for the self-rule of the various ethnic groupings of the black people. In as much as these territories, the Bantustans, were not created to be viable states, Lesotho in its present circumstances will probably never be a viable state. Its existence therefore is dogged by tension between legal independence on the one hand and economic dependency on the other. It is in the context of this reality that two competing propositions are being canvassed about its future.

The dispossession of land belonging to the Basotho nation by the white settlers leaving the former with a small portion of their original territory during the last century forms the crux of the case for the first proposition. The proposition envisages the engagement of South Africa in negotiations for restitution of those alienated territories to Lesotho. This is what the theory of retrocession is about. The acquisition of these territories is seen as crucial to the enhancement of the economic viability of the country and hence to the consolidation of its independence. On the other hand the second proposition postulates a merger between Lesotho and South Africa now that the latter has achieved a democratic political system. This is the essence of the integration discourse. The debates between retrocessionist and integrationist discourses have been conducted largely as if they were exclusively questions of political options. The immense legal implications which in the final analysis may overshadow the political considerations

have not been given adequate attention. If one considers the issue of retrocession, for example, a question which immediately comes to mind is: What leverage does Lesotho have vis-a-vis South Africa if the latter cannot accede to its claims? In regard to integration pertinent questions relate to the constitutional form of that development: Should integration lead to a total dismemberment of Lesotho or to a residual existence within the context of federalism or confederalism?

This paper is an exercise in the double effort of assessing the questions raised above. The paper is divided into three sections. In the first section I map out the debates while the second section is an attempt to discuss the feasibility of retrocession. The last section focuses on the issues pertaining to integration.

THE OPTIONS IN PERSPECTIVE RETROCESSION

The current frontiers between the Kingdom of Lesotho and the Orange Free State, the Eastern Cape Province and Kwazulu Natal regions of South African are a subject of long standing dispute between the two neighbouring countries. In 1976 at the height of tensions between the two countries resulting from Lesotho's refusal to recognise the bogus independence of the Transkei homeland, Lesotho's Foreign Affairs Minister, Mr. C D Molapo, seized the opportunity to also refer to this dispute in his address to the United Nations Security Council. He submitted that large tracks of land in the Free State, Natal and the Cape Province rightfully belonged to the Basotho Nation.[1]

The submissions of Mr. Molapo on territorial claims to the Security Council did not only express the sentiments of the government and the Basotho Nation Party (BNP) both of which he represented on that occasion. The pervasiveness of such sentiments within the country's body-politic cutting across both political party and social standing barriers is a matter relatively well known. Indeed the BNP was considered to be the only party which developed cold feet on the issue until the 1970s when it weaned itself from the tutelage of the South African Government and asserted a radical foreign policy. The Basotholand Congress Party (BCP) had indeed always cast itself in the role of the standard bearer for these sentiments. Indeed the party slogan 'Ea khutla naha' (The land shall be returned) was

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1 Speech by Mr. C D Molapo to the UN Security Council, 21 December, 1976.

until recently regarded as a vivid expression of the BCP's commitment to do everything possible upon its ascent to power to assert the claim for the return of the land. If the two major parties have been vocal on the issue, they however seemed to have differed on the strategies relating to when and how to assert the claim.

Since turning its back on the South African government in the 1970s and aligning itself with the Liberation Movement and the OAU policy, the BNP policy on the subject of territorial claim was characterised by ambivalence. On the one hand it appeared reluctant to raise the matter with the then Nationalist Party (NP) government in Pretoria. This reluctance reflected the concern that to do so might be interpreted as collusion with the policies of apartheid whose essence was to alienate barren parts of South Africa and assign them to Africans as their homelands. The matter was therefore to be raised at an appropriate moment when a majority government was in power in South Africa. But a 1990 statement addressed to the Lesotho government by Mr. Lekhooana Jonathan, current BNP General Secretary, seemed to suggest that the De Klerk era had opened an opportunity to engage the South African Government on the subject. Mr. Jonathan argued that:

> Lesotho is still crying for the return of the territory it lost. President De Klerk cannot enter into final talks with neighbouring countries and the people of South Africa before this matter is submitted for his consideration. In any case our party believes that of all South African leaders he is the right man to settle this issue with. We urge the government to move fast on this matter.[2]

The tone of the letter clearly underpinned the fact that in the opinion of the BNP, former President De Klerk was not perceived in the same light as his predecessors. Such a change of attitude gravitating towards doing serious business with the apartheid regime had infact been a pattern of many African States since De Klerk's ascend to power in 1989.

Indications suggest that prior to the February 1990 coup d'etat which eventually removed King Moshoeshoe II from the throne, the government of Lesotho was positioning itself for crucial initiatives on the matter of retrocession. Apparently a forum such as the defunct Convention for

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2 BNP statement reported in the Moeletsi oa Basotho, 25 February, 1990 (Translation is mine).

Democratic South Africa (CODESA) was being anticipated by the Lesotho Government and the thinking was to apply to participate at it with the object of putting Lesotho's case across. When the faction which had developed interest in the matter was deposed, the subject was apparently laid to rest.

The question of what appropriate authority there had to be in South Africa to engage over the lost territory was not perceived as an important one in BCP ranks. In general the party's attitude was that 'the land question' should be resolved with whoever was in power in South Africa. Citing the example of the recent unification of Germany, Mr. Steven Motlamelle, at the time a member of the party's Executive Committee argued that:

> The (second) point is that it is common practice that when a territory has been seized in war, it is restored to its rightful owners when the war is over. It is the Free State alone which was not restored to Lesotho because the British were implicated in its conquest and were biased against Basotho recovering their territory.[3]

The BCP linked the prospect of successfully campaigning for the recovery of the Free State with its own attainment of state power in Lesotho. However in what seemed to indicate either a new thinking in the party or differences of opinion in its leadership, its Deputy President Mr. Qhobela Molapo, and Foreign Minister since the 1993 Elections has cast doubt on the usefulness of such a campaign.[4] But the BCP Government has continued to explore the possibilities of asserting the claim as indicated by, among other, recent consultations with international law experts and historians at the National University of Lesotho on the issue.

Integration

Integration as another vision of Lesotho's future historically can be traced to Pan African unity sentiments also associated with the BCP. Although accorded a lower profile this theme co-existed uneasily with the claim of the Free State in the party's in the 1960s. In an interview with the BBC the party leader Mr. N. Mokhehle indicated in 1990 that he would favour

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3 See Leselinyana La Lesotho No. 21, 18 October, 1991 (Translation is mine).

4 Moeletsi oa Basotho 16 January, 1994

the establishment of a confederal relationship between Lesotho and South Africa. However, antagonism towards the African National Congress (ANC) and the perception that it would in all likelihood form the first government of a democratic South Africa generates visible antipathy to integration within the rank and file of the party.

In recent years a growing number of political and civic organisations have been joining the chorus in support of integration. The leader of the United Democratic Party (UDP) was the first to make the call in 1989 arguing that the conditions which had informed Lesotho's opposition to incorporation into the Union of South Africa at the turn of the century had changed.[5] The National Union of Mineworkers of South Africa (NUM) gave a boost to integration in a resolution motivated by Basotho miners urging for the unification of the two countries.[6] The resolution mentioned the fact that Lesotho's economy was not viable, that Basotho have to look to South Africa for jobs, the impossibility of ever getting the lost territories back, historical and cultural ties between the people of South Africa and Lesotho, etc., as grounds justifying integration.

A conference hosted by the Lesotho Council of Non-Governmental Organisations (LCN) on behalf of the NUM in 1991 to initiate debates illustrated the range of alignments on integration. Among the new formations which supported integration were the Popular Front for Democracy (PFD), Kopanang Basotho Party (KBP), the Lesotho Liberal Party (LLP) and at the time the biggest trade union federation in the country, the Congress of Democratic Trade Unions (CDU). The royalist Marematlou Freedom Party (MFP) indicated that its attitude would be one of wait-and-see and therefore at that stage it was non-committal. On the other hand the Lesotho Labour Party (LLP) was categoric in its rejection of integration stating that its priority would be to claim the Free State if it became the government of Lesotho after the elections.

Of the two major parties, the BCP and BNP, the latter took the sharpest about-turn from scoffing at the idea of integration as late as 1990 to embracing it unconditionally in 1992. The President of the BNP, Mr. E R Sekhonyana was reported by a South African newspaper as saying that 'If apartheid is dismantled, we see no reason why Lesotho could not be part of South Africa. After all our economy and our day-to-day activities depend

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5 The Mirror, Vol 2, No. 11, 1 December, 1989

6 Resolution adopted by the NUM Congress in Johannesburg, April, 1991

largely on South Africa'.[7] In the same interview Mr Sekhonyana expressed his party's disappointment that the government of Lesotho had not sought to participate in CODESA and pointed out that, that would be a priority of his government if they won the general elections.

This account points in one direction: That a significant body of opinion in the nation is consolidating behind the integration option. It is however not easy to determine the actual size of the potential electoral support behind the option. Nor should the pattern of voting in the recent general elections be regarded as an indication of such support, or antipathy to either positions since this issue did not form any campaign platform of any party. Were a referendum to be called specifically on this issue, it is highly likely that voting patterns would defy party loyalties and betray more openly the lines of divide between the progressive and conservative sections of society.

It is not within the scope of this paper to analyse in detail why integration is suddenly becoming a popular option in the minds of many inhabitants of Lesotho. A penetrating analysis in this respect has been rendered by Professor Weisfelder in a recent paper in which he attributes the development primarily to the geographic location of Lesotho and the failure on the part of a whole range of political institutions to provide vision for the country.[8] It has also been argued that the demise of apartheid would set in train a range of developments which would pose a real threat to Lesotho's separate independent existence and thus impose integration as a necessary alternative to disintegration. It was speculated that these developments would include the dwindling or drying-up of foreign aid grants on which the Lesotho state is so dependent, the uncertain future of and possible cessation of the employment of Lesotho's unskilled labour in South Africa which would aggravate social tension in the country and also lead to the drying-up of the migrant labour remittances - another source of the state's revenue, an exodus of the skilled manpower for better opportunities in South Africa, etc.[9]

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7 The New Nation, 6-12 March, 1992.

8 R.F. Weisfelder, "Roles for Lesotho and the Inner periphery in the new South Africa". Paper delivered at the Annual Meeting of the New England Political Science Association, 4 April, 1992

9 See N.L. Mahao "The Predicament of Lesotho's Security in the 1990s" in M. Sejanamane, *From Destabilisation to Regional Cooperation in Southern Africa* (Institute of Southern African Studies, Roma, 1994).

RETROCESSION AND INTERNATIONAL LAW ETHICAL CONSIDERATIONS V TRADITIONAL PRINCIPLES

From the legal point of view the argument for retrocession is based on a challenge to the validity of South Africa's title to the conquered territories. A recent article by Glavovic[10] while arguing in the context of environmental rights of the formerly dispossessed people makes interesting points which could well be extended to territorial claims.

Glavovic attacks the validity of land dispossession on a number of grounds basing himself on natural law and morality. His point of departure is that if the Voortrekkers (the white settlers) occupied vacant lands, then there was no act of dispossession. But if on the other hand the indigenous people were displaced from their lands, then 'there is perhaps greater justification for restoration of their traditional rights'.[11] Reflecting on the validity of the treaties purportedly signed with the leaders of the African tribes by which they purportedly ceded land to settlers, he argues in the following terms:

> Treaties were not used extensively in South Africa for acquisition of land from the indigenous people. However, when they were used, questions relating to their interpretation and legality and the morality of the process become relevant in weighing the merits of recognising or reintroducing aboriginal rights. Even if the process is viewed as power-based and the imposition of the conqueror's will, natural-law principles and ethical considerations cannot be entirely ignored. What precisely did the tribes surrender-was its ownership of land, its tenure, or sovereignty over it? Other questions relate to the authority of the contracting parties, whether they were truly ad idem, and whether the tribal representatives understood the terms of contract.[12]

The pertinence of these questions to Lesotho's case cannot be overemphasised. Historians record the fact that King Moshoeshoe I, during whose reign Basotho lost most of their lands, always professed his incompetence to alienate any land of the Basotho which by virtue of his office he only held in trust. In terms of the customary system transactions

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10 P.D. Glavovic "Environment 'Group' Rights for Indigenous South Africans" *South African Law Journal* (1991) Vol. 108, no. 1, pg.67

11 Ibid at 71

12 Ibid at 72

alienating land without proper authority entered with him would be null and void. Perhaps equally interesting is an occasion at which under pressure Moshoeshoe was made to sign a treaty recognising new territorial boundaries demarcated by Sir George Grey, then the Governor of the Cape Colony. It is reported that Moshoeshoe signed the treaty only under strong protest making it clear that he would not be permanently bound by its terms.[13] It appears that that treaty would be the clearest example of an agreement which was null and void for lack of consensus.

The important question to pose however is: To what extent do the arguments raised above constitute part of the principles of international law in the settlement of territorial disputes? At the very best these arguments bring into sharp relief tension in the body of intertemporal law between principles which evolved during the hey-days of colonialism and those which are making in-roads in the aftermath of the decline of colonialism. Traditional international law recognised at least four modes of territorial acquisition, namely, cession, treaty, conquest and occupation. In examining the history of the dispossession of the lands of the Basotho nation each of these modes seem to have come into play at one stage or another. However a point is made by Glavovic that given the probability that the Voortrekkers acquired lands as individuals and not as a sovereign state, these customary international law principles would not apply.[14] Indeed incidents of land acquisition where the settlers did not represent any state authority are abundant. But so are acquisitions made by the Free State acting as a sovereign entity. But assuming that the position was the former, it is probable that the doctrine of state succession would render the principles of customary international law now applicable.

In determining which of these principles are applicable, the new principles which are tempered by ethical considerations and the old principles which glorified force the era in which the act of dispossession took place would be a crucial factor. In the case under consideration since dispossession occurred in the old era, then the old principles of intertemporal law would in all likelihood be the correct principles to apply.

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13 J. Halpern, *South Africa's Hostage*, (Penguin African Library, 1965) at 72

14 See P.D. Glavovic *op cit* at, footnote 20.

Territorial Integrity

In our age the inviolability of territorial integrity is a principle whose embrace is growing. The doctrine of *uti possidetis* was developed in Latin America for this purpose. The doctrine, according to Dugard, stipulates that 'Colonial boundaries, however, arbitrarily drawn by the imperial power, are to be respected'.[15] For their part the states of Africa have underscored their attitude to territorial integrity in two ways. Firstly, the OAU Charter incorporates the respect of territorial integrity into its objects.[16] Secondly and poignantly, an OAU resolution adopted in 1964 commits member states to respect the boundaries of each other.[17] There can be no doubt that the adoption of especially the resolution was prompted by the realisation that the boundaries of most member states were drawn arbitrarily and any attempts to rationalise them could trigger the instability which would leave not a single country unaffected.

While the political significance of the OAU resolution needs no further emphasis its legal status and relationship with the *uti possidetis* doctrine is uncertain. A prominent African international law jurist has suggested that the adoption of the resolution did not amount to the formal adoption of *uti possedetis*.[18] He argues therefore that the provisions of the OAU Charter and the resolution amount to political decisions and the fact that African states have maintained colonial boundaries 'does not necessarily mean that they had to do so out of a sense of legal obligation under the rules of state succession'.[19]

It can however be argued that even if *uti possidetis* as such was not adopted by the OAU, thirty years since the resolution was adopted and followed, it has certainly evolved into a principle of African customary international law. Brownlie argues that 'the general principle, that the pre-independence boundaries established by law remain in being, is in accordance with good policy, and has been adopted by governments and

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15 J. Dugard "Walvis Bay and International Law," South African Law Journal Vol. 108, Part 1, February, 1991. *op cit* at 88

16 See Article 3.3 of the Charter of the OAU

17 See OAU Resolution on Border Disputes, 21 July, 1964.

18 Y. Makonnen, *International Law and the New States of Africa* (Addis Ababa, 1983) at 34

19 *Ibid.* at 460

tribunals concerned with boundaries in Asia and Africa'.[20] This statement clearly underscores the existence of a principle of customary international law if not of a universal character, certainly of a regional one.

What are the implications of this principle on Lesotho's territorial claims against South Africa? Obviously as a member of the OAU Lesotho is bound to adhere to those principles that are binding on all member states. Thus if the assertion that evidence points to the existence of a principle of customary international law emanating from the OAU resolution which guarantees the inviolability of pre-independence boundaries is correct, then there is no reason why that principle should operate against other states and not against Lesotho. Berat opines that Apartheid South Africa could not rely on this principle because it was not a member of the OAU.[21] But South African has since May 1994 been a member of the OAU and has assumed all its rights as such. In any case this argument would be valid if no distinction is made between the resolution and a principle of customary international law which has its pedigree in the resolution. It must be stressed however along with Brownlie that 'the principle is by no means mandatory and the states concerned are free to adopt other principles as the basis of settlement'.[22] In other words if the concerned states agree to redefine their frontiers, international law would not be an impediment. Thus in the final analysis whether South Africa would want to cede land to Lesotho would entirely be in its discretion. That option is nevertheless unlikely. It would have a domino effect as some of South Africa's neighbours would be tempted to follow suit and claim territories that were alienated from them in the last century.

Self-Determination

In special circumstances cession of territory can also violate the principle of self-determination. A conclusion to this effect was reached by a

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20 I. Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 1979) at 138

21 This argument is made in L. Berat's recently published book, *Walvis Bay, Decolonization and International Law*, (New Haven and London, 1990) at 166.

22 I. Brownlie *op cit* at 138.

Commission of Inquiry[23] which investigated the legality of an attempted transfer of the Ka-Ngwane region to the Swazi government in terms of an agreement between the South African government and the former. Observing that self-determination was a peremptory norm of international law from which no derogation by treaty or state practice was permitted, the Commission argued that the granting of independence to whites in 1910 had not fulfilled this principle. The consent of all the people of South Africa to any transaction transferring any part of the country was held to be a necessary element of self determination.

> Decisions to transfer or otherwise give up part of the national territory - as part of the national patrimony of all the people of that country - are decisions which affect directly the political destiny of all groups among the people of that country. Accordingly, the right of all groups to have a say in decisions concerning the dismemberment of the national patrimony is an integral element of self determination.[24]

The Commission concluded that given the unrepresentative character of the then South African government, the proposed cession of Ka-Ngwane was an infringement of the right of self determination of all the people of South Africa.

This observations are pertinent in two ways: Firstly, they spelt in unambiguous terms the incompetence of the apartheid government to cede any part of South Africa. In the light of that incompetence whatever agreement could be concluded by the regime and those in Lesotho who were in a hurry to do business with it would be of no avail in law. The second implication has an application which goes beyond the life of the Apartheid system. It is central to how the people of South Africa conceive their right of self-determination. I have argued that 'self-determination is understood by the vast majority of the African people to mean precisely having rights and full citizenship in a unitary South Africa under one government'.[25] Thus although a 'legitimate' government has a right

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23 See Report of The Commission of Inquiry into Ka-Ngwane, 13 March 1984 at 35

24 *Ibid* at 35

25 N.L. Mahao "Some Legal and Political Issues in Respect of Lesotho's Options in the Context of a Future Democratic South Africa" in S. Santho and M. Sejanamane, *Southern Africa after Apartheid* (Sapes Trust, Harare, 1991) at 202

within the limits of international law to cede land, even the present Government of National Unity (GNU) would be politically constrained by the fact that the people want to exercise their self determination within a territorially intact South Africa. Alienation of territory is associated with apartheid and would evoke resentment and resistance. In these circumstances the prospects of transfer of sizeable land to Lesotho even under the present government appear to be dim.

INTEGRATION AND PROSPECTS

A discourse which postulates integration, on the other hand, must come to grips with the implications of that concept on the sensitive issue of sovereignty. Elsewhere I have made the point that integration pre-supposes that Lesotho will have the political sovereignty it is currently enjoying either diminished or lost altogether depending on the nature of the envisaged integration.[26] In its political sense sovereignty is a delicate matter which is rendered sacrosanct because it is symbolic of a people's history and sometimes underpins vested interests. While international law does not constrain states to do as they see fit with their sovereignty, the constitutions of the states usually lay procedures relating to tempering with sovereignty. Both political and legal implications of sovereignty are discussed below in relation to the evaluation of the Lesotho's option of integration.

Integration and the Constitution

Lesotho's sovereignty is entrenched in its Constitution. Section 1(i) of the Constitution declares that 'Lesotho shall be a sovereign democratic Kingdom'.[27] Alteration of this status can be realised through the procedures defined in the Constitution. Section 1(i) is among those clauses of the Constitution whose alteration requires more than the approval of Parliament. A bill to that effect would also need the approval of the electorate.[28] Thus in so far as integration would impinge on the constitutional status of the state, it must be approved by the people of

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26 N.L. Mahao, "The Predicament of Lesotho's Security in the 1990s". *op. cit.* at 189

27 The Constitution of Lesotho, 1993

28 See Section 85 (3)(a). The Constitution of Lesotho, 1993

Lesotho in a plebiscite. The NUM resolution was in this regard perspicacious because it proposed that the support of the people for integration should be tested in a referendum. A clause in the resolution reads:

> That the political integration of Lesotho into a future non-sexist democratic South Africa can only be effected after a referendum in which the people of Lesotho have freely and democratically affirmed their will to such a development.[29]

Sovereignty and Integration

The constitutional character of integration is another matter of considerable importance. Genuine fears are often expressed that having survived as a separate state for almost two hundred years Lesotho would simply vanish from the map through integration. Such fears undoubtedly feed on the assumption that integration can only lead to one consequence - the dissolution of the Lesotho state and the dismemberment of its political institutions. Secondly, it is a fact that political independence has created conditions in which certain sections of society have benefitted and established stakes in the fact of independence regardless of how tenuous and thorny that independence has been. As far as these formations are concerned loss of privileges is a logical consequence of integration.

The perception that integration should necessarily lead to the dissolution of Lesotho is evident in some of the discourses currently in circulation. Some of the arguments proceed from the premise that there is little value in preserving sovereignty which is meaningless from the point of view of the majority of citizens.[30] Some expositions of this perspective have even suggested that the dissolution of Lesotho into South Africa is necessary in itself if only because it would free Basotho from the impediments placed on their progress by artificial sovereignty.

Other versions of dissolution rear their heads in propositions which juxtapose Lesotho with South Africa's former Bantustans. A good example of this was the reported proposition by the President of the BNP that 'Lesotho should be treated similarly to that of (sic) the so-called TBVC

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29 Resolution of the NUM, *op. cit.*

30 See for example *The Mirror*, Vol. 3, No. 38, 9 August, 1992

states, (Transkei, Bophuthatswana, Venda, and Ciskei)'.[31] The fate that awaited these entities in the process of the decolonization of South Africa was inevitably that of dismemberment and dissolution. Thus even though negotiations have lead to a quasi-federal reorganisation of South Africa, the former Bantustans were not as such the repositories of residual provincial powers. While admittedly Lesotho bears resemblance in many respects to the former Bantustans, however its history is different. Even more important is the fact that unlike the Bantustans, it has a legal personality which derives from its special history and international recognition. To place it in the same status as the former Bantustans is tantamount to ignoring this important distinction. In joining South Africa therefore Lesotho does not necessarily need to dissolve as happened to the Bantustans. Nor is dissolution the only option implied by integration, although it is certainly one of several options.

On the other hand there are several grounds why it may be important to opt for a form of integration that leaves some residual sovereignty in the Lesotho state.

Firstly, admittedly the disappointment with the legacy of independence has generated attitudes which devalue independence for the sake of independence. But such attitudes juxtapose with those which are strongly attached to that independence because the experience of the people about independence is not the same. A federal, quasi-federal or even confederal integration neither presuppose the dissolution of the Lesotho state nor its complete loss of sovereignty. Its distinctive existence within the larger South Africa would be secured by law and expressed in residual sovereignty. One writer defines a constitution as federal if (1) two levels of governments rule the same land and people (2) each level has at least one area of action in which it is autonomous and (3) there is some guarantee of the autonomy of each government in its own sphere.[32] Thus in a federal or quasi-federal system the pro-independence group and the integrationists would each not lose out. Assuming that a majority of the citizens of Lesotho would vote for the unification of their country with South Africa, it would be a bad political judgment to completely ignore the feelings of those who are opposed to the idea by swamping them into a unitary state. They could easily become a secessionist force and undermine stability and

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31 The New Nation *op. cit.*

32 Ricker cited in I Bernier, *International Legal Aspects of Federalism* (Longman, 1973), at 4

the objectives of unity. Federalism in some form or another on the other hand would accommodate their urge for some form of self-determination within the context of a larger community.

Secondly, Lesotho has its own social institutions which have developed overtime and are an integral part of society. In the meantime as the legacy of apartheid is laid to rest, the old institutions in South Africa will have to give way to new ones which shall express the character of the new society. Dissimilarities of social institutions are always some of the important pointers to the character of an appropriate constitutional model. Factors which make for a federalist system are captured by Livingston who states that 'the essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces - economic, social, political, cultural - that made the outward forms of federalism necessary'.[33] As the NUM resolution amply illustrates, similarities in some of these factors are what make unification necessary. In the same vein, however, the dissimilarities in some of them qualify the form of that unification.

Thirdly, it is common practice, which makes good sense, that when sovereign states merge, they opt for some form of federalism. This allows for the development of a single national outlook to grow as an organic process rather than an imposition of the law. A common tendency is that an all-embracing national character will assert itself and steadily displace the peculiar features with passage of time. Fourthly, a point has been made that the intractable dispute over the conquered territories may be resolved by ceding land to a Lesotho which is part of a federal state.[34] In this way South Africa would not have lost its title over them because this exercise would essentially be an aspect of demarcation of domestic boundaries.

CONCLUSION

This paper has attempted to fill the void in the current debates about future options available to the Kingdom of Lesotho by canvassing questions of law pertinent to the debates. It is more than apparent that a whole gamut of international law principles inclines against the retrocessionist

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33 Livington cited in I Bernier *ibid* at 3

34 R. Weisfelder, *op. cit.*

discourse. South Africa's title over the disputed territories is unassailable in terms of traditional modes of territorial acquisition. While ethical considerations are increasingly becoming part of international law, they however, would be precluded from applying to developments which unfolded in the nineteenth century. The inviobility of territorial integrity underpinned by the principle that colonial boundaries must be accepted forms part of African customary international law. While this principle is not peremptory and therefore it would not stand in the way of an agreement in favour of cession of land if the ceding state wishes so, it is unrealistic to expect that the South African government would want to do so. The main reason for this pessimism is that the struggle for the complete decolonization of South Africa was fought, among others, to prevent the balkanisation of the country. Self-determination, a peremptory principle of international law, also invalidates cession of any South African land in which all the people of the country are excluded from expressing their consent or otherwise. In the light of these huddles in international law it is just as well that judging from tendencies in Lesotho's political landscape opinion is gravitating away from retrocession to integration. Difficulties with the integrationist option are on the other hand of a different kind. They are at the political rather than legal level. The debates among the integrationist lobby in Lesotho are concerned with the constitutional form of integration.