

Colonial Rule and the Transformation of Chieftaincy in Southern Africa: A Case Study on Lesotho

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1 INTRODUCTION

The institution of chieftaincy, *borena* or *bokhosi* in Sesotho, otherwise styled "traditional leadership" in contemporary South African statutory parlance, is well established in virtually all countries of Southern Africa. To many, it represents the resilience of pre-colonial traditional forms of governance and perhaps an alternative paradigm from Western-inherited models that, notwithstanding their dominance, have not been very successful in galvanising and animating the mass of the people. To others, chieftaincy is a ubiquitous, but also anachronistic institution that is unable to co-exist with modern life styles, where men and women see themselves as autonomous individuals existing independently of the shackles of collective or quasi-feudal strictures. The democratic credentials of chieftaincy, as an institution rooted in prescriptive norms of birth and patriarchy, are said to be incompatible with, if not in fact directly in conflict with, the nature of modern democracy. Notwithstanding this, chieftaincy in all the countries of the region has fought back attempts to relegate it in the emergent post-colonial democratic dispensations. It is argued on behalf of the institution that its relevance and democratic disposition must be determined not through the prism of alien norms that may have formal, but not substantive, significance, but by its resilience embedded in its daily touch with the experiences of the common folk.

There can be little doubt that the institution is at the cutting edge of debates in respect of its place, role and relevance in contemporary society. What constitutional and political scholars on either side of the debate have seldom done is to understand the institution by grappling with its golden age in the pre-colonial era and to reflect whether the institution we see today is in any way the same. If on the other hand it has morphed, as indeed all institutions are modelled and reshaped by the context of their existence, has this occurred to attune it to the circumstances of contemporary society?

This article is dedicated mainly to the study of the impact of colonial rule on the chieftaincy in Lesotho. In that sense its observations and conclusions are specific. But there can be little doubt that, barring specific details here and there, historical trends impacting on the institution were more or less the same in the rest of the region. The article is divided into four sections: the first part looks at what can be regarded as the ideal state of chieftaincy as a system of government. In general the characteristics analysed here traverse the period before and during the early part of colonial rule. The second section focuses discussion on the impact of colonial rule on chieftaincy during the period stretching from 1871 to 1938. In the third part, the article highlights the new model of governance

established by the Colonial Administration aimed at assuming control over chieftaincy, and critiques its implications on the institution. The final part undertakes an overview of similarities of developments impacting on the institution in a sample of Southern African countries in the post-independence era.

2 GOVERNANCE THE TRADITIONAL WAY

Historically, the Basotho chieftaincy operated against the background of an intricate system of checks and balances. The system was not predicated on the notion of separation of powers, although it was arguably no less efficacious in checking chiefly personal power. As an institution, chieftaincy encompassed in the same breadth executive, legislative, judicial authority and more. Elsewhere, Schapera describes a chief in terms that more or less correctly capture the institution in most nineteenth century Southern African communities as being "at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people".¹ On the face of it these were extensive and awesome powers to invest in one person or institution.

In practice, however, chieftaincy was less about the personal power of the incumbent chief, and more about a system of government. Almost every role-function of a chief was a participatory collective endeavour of members of one or the other of a labyrinthine set of institutions. Elsewhere I have discussed in relative detail the roles of the pitso (public assembly) and the lekhotla² (court or council) as key institutions within which chieftaincy authority expressed its political, administrative and judicial functions.³ A single overarching feature of these institutions was their participatory democratic character. Thus, writing about the pitso, Casalis, a missionary of the Paris Evangelical Missionary Society who lived at Thaba Bosiu during King Moshoeshe I's reign, comments that while the assemblies were of deliberative character as no voting was conducted, they showed which side public opinion leaned and the chiefs knew that they could not act independently of that opinion.⁴

For its part, the lekhotla referred to one or the other of two institutions presided over by the chief, namely a court of law discharging adjudicative responsibilities, or a council which discharged administrative responsibilities. This nuanced distinction between the two was not always apparent to Westerners, as reflected by the following statement by Casalis: "Other important personages are present daily at these deliberations, and they perform the functions of jurymen in civil and criminal cases. They are called Banna ba khotla; literally, men of the court."⁵ A lekhotla in the sense of a more or less closed body of the important men of the realm known as baeletsi was a political-administrative council, some sort of cabinet, and not a court of law. In contradistinction to such exclusiveness, lekhotla in the sense of a judicial court was open to all men of the realm, including visitors, who had full rights of participating at all levels of the process to assist the court in arriving at a fair and just decision.

1 Schapera Handbook on *Tswana Law and Custom* (1934) 62.

2 In the South African orthography the word would be spelt "lekgotla".

3 Mahao "Chieftaincy and the search for relevant constitutional and institutional models in Lesotho" 1993 *Lesotho LJ* 1.

4 Casalis *The Basutos* (1861) 236.

5 Casalis 222.

While the pitso and the lekhlotla institutions are the better known, they were, nonetheless, by no means the only ones designed to furnish a framework within which chieftaincy as a system discharged public roles and made decisions affecting the public. Chief Matete, an authority on the Basotho traditional system of government, adds about five other structures that played varying but important roles as anchors of the chieftaincy.⁶ A much more discreet organ also mentioned by Chief Matete was that of baholisi or batataisi (guardians). Often manned by one or more persons, this organ was established for the chief upon his investiture or on being "placed".⁷ Typical incumbents, according to Chief Matete, were always older in age to their charges – an important factor because of the experience and wisdom presumed to be concomitant with age. Assigned this role by the chief's father after consultations with his own councillors, the incumbent stood *in loco parentis* to the chief. His diffuse authority was to be exercised adroitly such as not to overshadow the chief. It involved the right not only to oversee, guide and counsel the latter, but also to punish him when circumstances dictated.

Thus, both individually and collectively, these institutions defined how chieftaincy as a system of government was conceived, institutionalised and functioned. The chief always had to act *in-council* through those institutions, which not only trammelled his discretionary powers, but also informed the exercise of chiefly prerogatives. In the unlikely event of "the genie jumping out of the bottle" – the chief unjustifiably acting or making pronouncements contrary to the decisions of the institutions – he would be called to order and the infraction nullified. Smith underscores how Europeans who had to deal with King Moshoeshoe I never quite understood that his powers were circumscribed by the will of his people:

"In all affairs, legislative, judicial or executive, he acted by the advice and with the consent of Council. On occasions of great import a Pitso 'folk-moot', or national assembly was called . . . In all matters of importance he could not act without first learning their (the people's) will."⁸

The system predicated on key constitutional principles that ensured a multiplicity of control mechanisms at various levels. The roles of the pitso, the lekhlotla, the baeletsi and the baholisi captured, in one form or another, the essence associated with a myriad of Western constitutional principles such as direct democracy, representative government, and checks and balances.

3 CHIEFTAINCY CHALLENGED

Cape rule in Lesotho ensued between 1871 and 1880, and was marked by a tempestuous and contradictory relationship between the chieftaincy and the colonial state. Prior to that, in 1868, the year Britain annexed Lesotho, a French missionary named Rolland, who later resigned his calling to become a colonial magistrate in Mafeteng, authored a memorandum detailing proposals to restructure the

6 Unpublished notes on the Qachas Nek chieftaincy prepared by Chief Mphosi Matete (2005).

7 Placing was a system of allocating a person to a chieftaincy that seems to have developed during the nineteenth century, and became extravagantly used by chiefs to assign their sons under colonial rule.

8 Smith *The Mabilles of Basutoland* (1967) 39.

indigenous political, social and economic order.⁹ He proposed that the principal target of the colonial administration should be the dislodging of the powers of the chiefs. Rolland suggested that in order to weaken the chief's grip on the Basotho society the source of their powers, namely: the control of land; polygamy; the matsema (communal working parties); and so forth, should be targeted for dismantling. He proposed that the colonial administration should punish bigamy, confer hereditary titles in land and encourage and protect commoners' right to own property. However Rolland cautioned that the campaign should be conducted, "if possible in such a way as not to excite the jealousy or embitter the prejudice of the native".¹⁰

When in 1871 the Colonial Office in London placed Lesotho under the Cape Colony, the latter moved with alacrity to implement Rolland's recommendations, envisaging the emasculation of the powers of the chiefs. Thus the regulations instituted in 1871 sought to oust the powers of the chiefs in the critical areas such as land allocation, the trying of cases and the enforcement of judgments, and the control of the burgeoning commercial trade.¹¹ The regulations struck at the very heart of the material sustenance of the chieftaincy and its source of prestige, a fact acknowledged by the then High Commissioner, who commented in a dispatch to the Secretary of State for Colonies:

"They (provisions of the regulations) may at first strike your Grace as imperfect and peculiar but they are sufficient to strike at the root of some of the most objectionable native customs, and I may assure you go quite as far as ever the Missionaries expected or thought desirable."¹²

The chiefs were later to protest indignantly that "[o]nly we are sorry to not see mentioned the rights and the authority left to our chiefs, who are the captains of the Queen and those that leaved (sic) us to her".¹³ Needless to say, the powers whittled away from the chiefs were transferred to the magistrates, structures established as part and parcel of the colonial state apparatus.

But the assault on the powers and authority of the chiefs was also fraught with contradictions. While the colonial administration's strategic social and political objective was ultimately to emasculate the chieftaincy, other colonial imperatives impelled the establishment of new roles for the institution. Of critical consideration for this purpose was the fact that colonial rule in Lesotho was expressly premised on Basotho picking up the costs for their subjugation. To this end tax, initially in the form of hut tax, had to be collected from each household, an activity that on implementation proved particularly problematic. Burman notes:

"Hut tax was paid on the number of huts – and therefore principally the number of wives – in a kraal (sic), so the number would obviously have varied from year to year and been difficult for the administration to ascertain without seeing the kraal or hearing evidence on the status of its various members".¹⁴

Once the administration had realised that the expansion of the commodity and money economy it was fostering also provided the chiefs with new avenues and

9 Rolland Notes on the *Political and Social Position of the Basotho Tribe* (1868).

10 *Ibid.*

11 See Basutoland Proclamation No 74, 1871.

12 Dispatch from the High Commissioner to the Secretary of State for Colonies, May 2, 1868.

13 Letter from Basutoland chiefs to the Governor's Agent, December 22, 1880 (Cape Archives).

14 Burman *Chieftaindom Politics and Alien Law* (1981) 70.

modes of private accumulation of wealth, it drafted chiefs as its extended organs for tax collection. As a lure, a percentage of the collected tax would be retained by the chief. A majority of the chiefs seized the opportunity, seeing it as a way of enriching themselves.

Secondly, since the Basotho were still somewhat resistant to their new colonial status, the maintenance of law and order was also a critical imperative for the Colonial Administration. Without a significant police force and administrators at the local level throughout the country, it was impelled by these circumstances also to secure the co-operation of the chiefs in enforcing a semblance of good government. Of necessity this expanded, rather than having the effect of shrinking, the prerogatives of the chiefs. Burman highlights the exacting demands made of the chiefs, which included obligations to inform magistrates if they held public meetings, fortified positions, or sent or received ambassadors or messengers from inside or outside the country, and to report on any other matter of importance.¹⁵ Thus Kimble correctly observes that "somewhat ironically, colonial rule served to expand the activities of the precolonial state apparatus it was supposed to replace".¹⁶

Notwithstanding the tentative co-operation with the chiefs, the objective of weakening the Basotho polity continued unabated. A crunch came when the Cape government irregularly sought to enforce in Lesotho the cynically named Peace Preservation Act, which was designed to disarm African kingdoms in Natal and Eastern Cape. The Act was seen as a handy instrument to break "the chiefs' powers of military organisation".¹⁷ The attempt was a grave miscalculation that was to be resolved in a two-year confrontation in the battlefield in the famous Ntoa ea Lithunya (Gun War) from 1880 to 1881. Basotho chiefs broke into two groups: those who co-operated in handing in their arms; and the mabelete (rebels) lead by Lerotholi, heir-apparent to the throne and his uncle Masopha Moshoeshe, who refused to surrender their arms and led a rebellion. The war resulted not only in military defeat for the Cape Forces, but precipitated the collapse of Cape rule in Lesotho. Britain was forced by these developments to resume direct rule over Lesotho after attempts to re-constitute magisterial rule were firmly rebuffed by leaders of the mabelete.¹⁸

4 DEMOCRATIC NORMS AND CHECKS IN DEMISE

After the British resumed direct control of Lesotho in the aftermath of Ntoa ea Lithunya, it became the policy of incumbent Resident Commissioners to repair the damaged relationship between the colonial state and the chieftaincy. In fact, while Cape magisterial rule had attempted to emasculate the chieftaincy, Resident Commissioners premised their rule on appeasement. The thrust of their policy was to strengthen the position and powers of the chiefs, and especially to bolster the authority of the Basotho monarchs. It became the standard policy of

¹⁵ Burman 71.

¹⁶ Kimble "Clinging to the Chiefs" in Bernstein and Campbell (eds) *Contradictions of Accumulation in Africa* (1985) 37.

¹⁷ Kimble 38.

¹⁸ Through the Disannexation Act, 1884, the Cape Parliament nullified its mandate in Lesotho and the High Commissioner promulgated Proclamation No 756 of 1884 to provide for direct British rule over the unruly colony.

the colonial administration to strengthen the position of the monarchs vis-à-vis the other layers of chieftaincy, and that of the chiefs against people of inferior ranks. Sir Marshall Clarke, the first Resident Commissioner, took the initiative of restoring the pre-eminence of King Letsie I (officially called the Paramount Chief), whom the Cape Administration and dynastic feuds had reduced to a mere *primus inter pares*.¹⁹ This policy was to remain in force for the duration of colonial rule in Lesotho. Applied to lower levels of the indigenous government structure, it had the effect of bolstering the authority of whoever had power, against those with less power. Ashton observed that it "inevitably meant that where there was political trouble or rebellion against the chief, the administration tended not to look too closely into the merits of the case, and, in the interest of peace, to give the recognized chief a free hand – and sometimes, material assistance, to quell such disturbance".²⁰

4.1 Planting the seeds of a top-down authoritarian governance

In their endeavours to back the authority of the chieftaincy to the hilt, Resident Commissioners often encouraged the former to resort to authoritarian means to assert themselves. Clarke tersely revealed this approach in a dispatch to the High Commissioner, stating that: "I had previously impressed upon the Paramount Chief the desirability of asserting his authority for the maintenance of order, and observed to him that such action from within the territory was calculated to have more beneficial effect than coercive action from without."²¹ In its desire to maintain order and stability, the colonial Administration condoned or even instigated the use of force where the objective was to subdue a perceived challenge either to itself or to its junior partner, the chieftaincy. Such was the case when in 1898 Paramount Chief Lerotholi invaded and overpowered his uncle, Chief Masopha, for a long time perceived as a rallying force against colonial domination and a threat to the consolidation of the authority of the paramountcy.²²

The case of the chief of the Baphuthi, Mocheko Moorosi, is another example of how the Basotho monarchy and the colonial authorities co-operated to strengthen the hand of the former. In this matter, Lerotholi had decided to "place" his son, Griffith, in Chief Mocheko's ward, thus provoking the latter to question the authority of the new chief over him. To demonstrate his disenchantment, Mocheko migrated into the Cape Colony, from whence he was sent back to Lesotho and tried for offences ranging from resistance to lawful authority and breach of peace, to endangering the peace of neighbouring territories. The Paramount Chief's Court, notably attended by the Resident Commissioner, not only deposed Mocheko as chief, but also banished him, and ordered him never to return to his home until his death.²³ When the High Commissioner visited the territory in 1906, Mocheko pleaded for the review of his plight. In a report to the

19 Machobane *Government and Change in Lesotho 1800–1966* (1990) 75; See also Kimble 38.

20 Ashton "Democracy and Indirect Rule" 1952 *Journal of the International African Institute* 243.

21 Letter from Sir M Clarke, Resident Commissioner of Basutoland to the High Commissioner, dated March 18, 1885 (Lesotho Government Archives).

22 Burman 183.

23 Proceedings of this case were reported in the *Leselinyana la Lesotho*, April, 1903 (Morija Museum and Archives).

Secretary of State for Colonies the High Commissioner, who labelled Mocheko "a source of trouble to the Administration for many years", wrote that he "gave Mocheko to understand that he must acknowledge not only the authority of the Paramount Chief but also the authority of Letsie's representative in the district".²⁴ Cases such as these emphasise how the monarchs were granted free rein, with which they built unfettered prerogatives for themselves. Chiefs at lower levels of the system emulated these examples, comforted by the knowledge that the Administration would not constrain their indiscretions.

In this situation, where the interdependence between the chiefs and the commoners steadily dissolved, it became necessary for the former to rationalise their right to rule on criteria that asserted prerogatives but not responsibilities. Weisfelder notes that "[g]reater emphasis was now placed on prescriptive dimensions such as hereditary rights to rule and the necessity of obedience to any legally established authority".²⁵

4.2 The Pitso relegated and emasculated

The establishment of the National Council (NC) in 1903 further reinforced Paramount Chiefs' powers and authority.²⁶ This body provided for a hundred members, five of whom were appointed by the Resident Commissioner, who was also the President of the Council. Ninety-four members, the overwhelming majority, were to be chiefs and headmen nominated by the Paramount Chief. The power of nomination gave the Paramount Chief immense authority and ensured that chiefs and headmen looked to him for the favour. More so, the Paramount Chief's precedence over all members of the Council was illustrated by his title of "Chief Councillor".

Whether by design or default, the establishment of the NC accelerated the social and political alienation of the chieftaincy. For long periods the chiefs were away in Maseru, the colonial capital, and regular contact with the people waned. Significantly, the creation of this body was linked to the demise of the national pitso that had largely fallen into disuse. In fact, when it was convened, the national pitso no longer performed its role of a forum of robust debates, having degenerated to a mere conveyor-belt of colonial decisions. Neither did the democratic features of the national pitso transfer to the NC. In contrast, the NC suffered from several discernible defects: Firstly, the institution was not established to be a legislative body. The Resident Commissioner unequivocally underlined this fact at its first meeting:

"I think it is well to remind you again that the Council is not a legislative meeting. It is not given the power to make laws – this power is for the High Commissioner. But the Council is for the purpose of consultation and advice. It enables you to show each other and to the government what are (sic) your opinions and desires and suggestions for the improvement of the condition of the people."²⁷

24 Report of the High Commissioner on his visit to Basutoland and the Bechuanaland Protectorate, March 24, 1906, Annual Reports, (Lesotho Government Archives). By 1906 Letsie II had succeeded Lerotholi as Paramount Chief, hence the High Commissioner's reference to Letsie in his remarks.

25 Weisfelder *The Basotho Monarchy: A Spent or Dynamic Political Force?* (1972) 38.

26 Proclamation No 7 formalised the Basutoland National Council's establishment in 1910.

27 Report of the proceedings of the Basutoland National Council, 1908, (Lesotho Government Archives).

Secondly, given the NC's narrow class composition and non-elective procedure of appointing its members, it was not democratic in any sense of the word. That its overwhelming membership consisted of chiefs served largely to advance the exclusive interests of this class. As one Resident Commissioner noted: "In plain point of fact it [the NC] is a body swayed by a large majority who have at bottom only one main object in view, namely the upholding of what they call their own rights and positions."²⁸ In this atmosphere, chiefs increasingly mistook their own concerns for those of the people and the bonds that held the two groups together steadily declined.

4.3 Judicial power abused

A significant departure from Cape rule introduced by direct British rule was the restoration of judicial powers to the chieftaincy. Hence, Proclamation No 2B of 1884 envisaged Rules and Regulations that would restore the judicial powers of the chiefs in all cases involving Africans in the territory. Section 4 proclaimed that:

"It shall be lawful for any Native chief in the said territory, appointed by the Resident Commissioner, to adjudicate upon and try such cases, criminal and civil, and to exercise jurisdiction in such a manner and within such limits, as may be defined by any rules established by the authority of the Resident Commissioner."²⁹

A critical backdrop, however, was the substantially changed context in which the resurrected powers were to be exercised, where the traditional check systems were, by-and-large, losing their hold and relevance. It should be remembered that before colonial rule, the fear of a rebellion or desertion, the existence of a weak central state, the effectiveness of the pitso and lekhotla institutions and the fact that chiefs had to look inwardly to the labour of their people for generating their wealth, served as constraining considerations on the exercise of chiefs' powers. In the new situation these considerations were no longer critically important to the chiefs. Weisfelder summarises the social and political context that had developed thus:

"Rapid population increasingly doomed the pitso as a viable deliberative assembly and raised the economic and social costs of abandoning a despotic chief. Massive, regularized immigration of Basotho to jobs in South Africa destroyed the everyday face to face communication and sense of communal participation in the lekgotla, leaving village activities to the aged, the infirm, or generally those least able to resist the ambitious chiefs. The monetization of relationships meant that the chiefs were no longer the sole providers of the community and were swiftly tempted to disregard their other obligations to the citizenry."³⁰

While this development was part of the internal dynamics within the Basotho society, it was also fostered by the colonial regime, if not deliberately, at least as an indirect consequence of some of the legal and political measures it institutionalised. To avoid the rebellion of a Ntoa ea Lithunya type, the colonial administration had to be extremely cautious in its handling of the chiefs. That caution was the *raison d'être* for a despondent attitude towards the chiefs that allowed them a great deal of latitude. This would soon become the source of concern as

28 Resident Commissioner JC Strurrock, quoted by Edgar *Prophets with Honour* (1985) 5.

29 Proclamation No 2B of 1884.

30 Weisfelder *The Basotho Monarchy: A Spent or Dynamic Political Force?* 37.

they became increasingly corrupt and negligent of their duties. A situation developed where chiefs were neither controlled from below by the people, nor from above by the Administration.³¹

This was the backdrop that furnished chiefs with the opportunity to assert their personal prerogatives, increasingly to dispense with consultative processes, and to conceive themselves not bound by opinions of their courtiers. Judicial processes became exposed to this new context and transformed by it. Shorn of popular participation and transparency, judicial decisions become susceptible to all manner of profligacy such as bribery, nepotism and favouritism. Massive abuses in the chiefs' courts in the 1920s and 1930s were to become a source of grave concern.

Weisfelder observes that these patterns were not accidental, but a consequence of the Colonial Administration's *laissez-faire* approach to the monarchy and chieftaincy, which "allowed a total, if unintentional, recasting of patterns of authority and responsibility . . . by making possible for successive monarchs gradually to transform the previously responsive, 'pyramidal' structure of chieftainship into a more authoritarian, 'hierarchical' format". "It is not surprising," he contends, "that the pitso and lekhotla, institutions geared to the earlier interdependent, reciprocal relationship between the rulers and the ruled, became far less significant when demand for the redress of grievances could be treated as illegal disruption of the accepted political fabric."³² Meanwhile organisations such as the Lekhotla la Tsoelopele (Basutoland Progressive Association), a platform of the emergent missionary educated elite, the Lekhotla la Bafo (Commoners' League) and the general public relentlessly put pressure on the colonial authorities to do something about the degeneration.

In 1928 the colonial authorities attempted to promulgate a proclamation reforming the chieftaincy in response to the pressures. The NC shot down the initiative, expressing the view that any attempt to interfere with the authority of the chiefs was contrary to the spirit underlying British "protection". One member eloquently admonished the Resident Commissioner for the initiative in very strong words thus:

"The Resident Commissioner should not make Native laws, he should advise and confirm the chiefs of Basutoland who are appointed by God, by birth, and who were confirmed by Queen Victoria, King Edward, King George, The Prince of Wales and the Duke of Connaught, and many Governors. All the Resident Commissioners have confirmed the chieftainship of Basutoland. The above gentlemen have left to Moshesh (sic) the making of his own domestic laws. The subject is surprising, that we have you making our domestic laws. Advise and see if it will be rejected . . . Give advice, that is why you are (sic) sent here by the Imperial Government."³³

The statement adequately captured the measure of independence the chiefs had accumulated, and their resolve to defend what they considered to be their birth right prerogatives. In the event, the reforms had to wait for another ten years before they could be instituted.

31 Pim Report on the Financial and Economic Position of Basutoland (1935) 48.

32 Weisfelder *The Basotho Monarchy: A Spent or Dynamic Political Force?* 36.

33 Quoted in Pim's Report 26.

5 AN ALIEN MODEL IMPOSED

The period between 1884 and 1938 is often classified as one of *laissez-faire* or "parallel rule" to underscore the fact that, instead of asserting its authority over the chieftaincy, the Colonial Administration in Lesotho ruled side-by-side with it. 1938 signified a turning point in the relationship as a result of the recommendations of a Commission headed by Sir A Pim.³⁴ Sir Pim's report threw into sharp relief the chaotic situation that ensued in the trail of unchecked chiefly prerogatives, and gave birth to the reforms proclaimed in 1938.

The reforms assumed two dimensions: On the one hand through the Native Courts Proclamation, 1938, judicial powers were removed from the chiefs and vested in remunerated court presidents. On the other hand, the Native Administration Proclamation, 1938 sought to streamline the structure of the chieftaincy and formally to place it under the authority of the Colonial Administration and the Paramount Chief. Towards this end, the power of recognising and de-recognising chiefs was created and vested in the High Commissioner, who could delegate such powers to the Resident Commissioner.³⁵ For his part, as the junior partner of the Administration, the Paramount Chief was required to give his consent to every act of recognition or de-recognition of a chief or headman.³⁶ Thus, the Proclamation introduced a principle whereby accession to chieftaincy and the retention of this office depended on the discretion of the Resident Commissioner and the Paramount Chief. It marked a deliberate policy on the part of the colonial state to assume control over the chieftaincy, and was a drastic departure from custom enshrined in a code known as the Laws of Lerotholi, according to which accession to chieftaincy was by right of birth.³⁷ In this manner, the colonial state arrogated unto itself the authority not only to determine who could accede to a chieftaincy, but also who could hold the office. By creating the right for the Paramount Chief to give or withhold consent to a chieftaincy appointment, it strengthened the authority of this office over all chiefs in the country.

Coupled with the introduction of remuneration for gazetted chiefs, the reforms fully integrated the chieftaincy into the colonial state apparatuses and effectively supplanted its political and social autonomy. While chiefs were opposed to the reforms, the struggle for the succession to the throne between Princes Seeiso and Bereng after the death of their father, Paramount Chief Griffith, in 1939 furnished the Colonial Administration with the opportunity to coax Seeiso to endorse the reforms, in return for him being recognised as the new monarch.

Armed with the Native Administration Proclamation, the Administration proceeded to de-recognise some chiefs and headmen, many of whom had proliferated over the years as a result of the over use and abuse of "the placing" procedure. The Administration nonetheless remained discreet in its use of the statutory power to appoint candidates of its own choice to the chieftaincies. However, when Paramount Chief Seeiso died in 1940, it relied on this statutory power to influence the choice of Chieftainess 'Mants'ebo, Seeiso's principal wife, as the

34 Pim's Report *ibid.*

35 See s 3(1) and (2) read with sub-s (3).

36 Section 3(1).

37 Customary law succession is described in Section 2 of the Laws of Lerotholi.

successor to the throne.³⁸ This debacle was replayed in the courts of law, where the community of interest shared by the executive and judicial arms of government was thrown into sharp relief by two contradictory judgments dealing with essentially identical principles.

In *Bereng Griffith v 'M'ants'ebo Seeiso Griffith*,³⁹ the plaintiff petitioned the High Court to set aside the decision to appoint the defendant as Regent and Acting Paramount Chief. The gist of the plaintiff's case was that under Sesotho law and custom a woman (whether maiden, wife or widow) was a perpetual minor entirely under the control of either her husband, father-in-law or male head of her husband's family. He contended that as such a woman would never control property or be appointed as chief. The court ruled that, whereas the position as stated correctly reflected early Sesotho custom, a practice had evolved, particularly among the chiefly class, whereby women had become chieftainesses during the minority of their husbands' heirs-apparent. It ruled that it would be inconsistent with that position that such a woman should be subject to the control of some male person who would administer her property. In the words of the judge: "[I]n the case of a woman chief or headman the official position has always carried with it the guardianship of her children and the control and administration of the property of her House, subject of course, to the limitation that the heir of such property is the son for whom she is acting as regent." This ruling confirmed the appointment of 'M'ant'sebo as the Regent and put to rest Bereng's quest for the throne.

The purported principle in the above ruling was however surreptitiously reversed and jettisoned in *'M'abereng Seeiso v 'M'ants'ebo Seeiso*.⁴⁰ Both the litigants in this case were widows of the late Paramount Chief Seeiso. Chieftainess 'M'abereng, the second wife of Seeiso, was the biological mother of the minor heir-apparent, Bereng Seeiso. She petitioned the court to grant her the right to inspect the records of the estate of the late Seeiso, to determine whether they were correctly administered on behalf of her son.⁴¹ Aware of the implications of the case for the Regency, the High Court took a different interpretation of the law, holding that "[t]here is not the slightest doubt that under Basotho Law no woman relative has ever had any authority in the matter" of inspecting the records of her husband's estate unaided by her son's paternal uncles. The decision turned on the principle that women were perpetual minors who, unassisted, did not have *locus standi in judicio*. While it may appear surprising that

38 Since the Paramount Chief had left a three year old heir-apparent, his brother, Chief Bereng Griffith, the erstwhile contender for the throne, was according to custom a logical choice for appointment as Regent. It is claimed that colonial officials, who were not disposed towards Bereng because of his perceived hostility to the colonial regime, discreetly manipulated Seeiso's former Councillors and members of the royal family to frustrate Bereng's appointment in favour of Chieftainess 'M'ants'ebo.

39 (1926-53) HCTLR 50.

40 (1926-53) HCTLR 212.

41 The political undercurrent of this action was that, as the biological mother of the heir-apparent, 'M'abereng wanted to be appointed as administrator of the estate of the late Paramount Chief on behalf of her son. If she succeeded on that aspect, there would be no reason why she would not later assert one of her ambitions – to be appointed as Regent and Acting Paramount Chieftainess in the place of 'M'ant'sebo. There was also no doubt that her suit had been influenced by the ruling in *Bereng Griffith v 'M'ants'ebo Bereng Griffith*.

the rulings in the two cases were different, it is quite clear that the judge sensed that sticking to the principle upheld in the earlier case would destabilise the Regency.

The 1938 Proclamations were not the last set of reforms to directly affect the chieftaincy. In 1948 the Basutoland Council Proclamation was promulgated, directly impacting on the privileges of the chieftaincy. Among other things, it reduced the number of chiefs and headmen nominated by the Paramount Chief to the reformed Basutoland Council by almost twenty-five.

The poignancy of these reforms is that while they asserted the authority of the colonial state over the chieftaincy, they did little to restore the control of the people over these institutions. This model of governance did little to reverse the culture of authoritarianism, then deeply ingrained in the workings of these institutions. Thus, judged against this trend, which took root in about fifty years, the reforms of the 1930s and 1940s have rightly been classified as "a revolution introduced by the Government and designed to transform into a 'Native Administration' of the Lugard-Cameron model, the political system of the Basuto".⁴²

The impact of the reforms was without doubt dramatic, not only upon the entire system of governance, but also on the authority, self-esteem and confidence of the chieftaincy; a chieftaincy that had definitely entered its twilight phase. The institution was also harmed by the outbreak of *liretlo* (ritual murders) in which many chiefs were allegedly involved. The most senior chief in the territory, and *de facto* head of the royal dynasty, Bereng Griffith, and the former acting Paramount Chief, Gabashane Masopha, were among those convicted and sentenced to death for their involvement in *liretlo*.⁴³ There is little doubt that the recourse to the superstition of *liretlo* was a direct consequence of the uncertainties and pressures wrought by the 1930's and 1940's reforms concerning the chieftaincy.⁴⁴ An institution that for decades had considered itself too strong to be touched by the colonial state, even as it enjoyed the protection and patronage of the latter, woke up towards the end of colonial rule to find its powers clipped, its prestige diminished and the prospects of decolonisation set to emasculate it still further.

6 POST-INDEPENDENCE REGIONAL PATTERNS: DOWN A SLIPPERY SLOPE

The inexorable trajectory of relegation of chieftaincy set in motion by colonial rule in Lesotho, and similar developments in all Southern African countries, was not halted, but instead reached its culmination at independence in the 1960s and later, when the region freed itself from colonial rule and Apartheid. This development assumed two constitutional directions: Firstly, by-and-large the chieftaincy was pushed still further away from exercising legislative powers, either in its own right or through parliaments, the contemporary repository of these powers. Secondly, chieftaincy in all countries appears to have been completely "tamed" and irrevocably subordinated to the authority of the modern state, and now such chieftaincies operate as the latter's extension.

42 Jones *A Report of the Recent Outbreak of "Diretlo" Murders in Basutoland* (1951) 40.

43 *Bereng Griffith Leretholi and Others v The King* (Privy Council Criminal Appeal) (1926-53) HCTLR 149.

44 Jones *A Report of the Recent Outbreak of "Diretlo" Murders in Basutoland*.

6.1 A tenuous legislative role

In the post-colonial period, the dominant role once enjoyed by the chieftaincy in the proto-legislative organs of colonial government is now largely perceived to be inconsistent with the concept of democracy based on non-prescriptive elective principles. This perspective is institutionalised through varying degrees of exclusion of the institution from the hub of legislative power, ostensibly because its role would dilute the "democratic" element of the emergent elected dispensation. This trend took the form of creating a separate "upper" House, styled "the Senate" for the senior layers of the chieftaincy in Lesotho.⁴⁵ The role of the Senate is that of a subsidiary House, with powers to scrutinise and delay legislation, but without either authority to initiate or veto Bills from the National Assembly, the elected "lower" House.

Botswana and South Africa opted for a model that put chieftaincy representation wholly outside Parliament. Thus, the House of Chiefs or the Council of Traditional Leaders are not Houses of Parliament, but act as sounding boards, each to be consulted by the National Assembly or to make recommendations to the national government only on matters that may alter the powers of the chieftaincy, the organisation, powers or administration of customary courts, customary law or tribal organisation or tribal property.⁴⁶ A third model recently adopted by post-colonial Zimbabwe is arguably one of a few exceptions where the President enjoys the prerogative to nominate a number of chiefs directly into the National Assembly.⁴⁷

6.2 An adjunct of the State

The other direction of post-colonial constitutional development is characterised by the consolidation of the annexation of the chieftaincy as an adjunct of the modern state, a process also historically set in train under colonial rule. In this regard, three broad principles seem to operate. First, the Chieftainship Acts contain provisions that place the chieftaincy under the administrative oversight authority of a cabinet minister.⁴⁸ Secondly, while designation to succeed to a chieftaincy is characteristically left to be determined in accordance with the customary law, it ultimately falls to a cabinet minister to give the final stamp of approval for the designation.⁴⁹ Thirdly, as with the colonial state, the post-independence authorities have appreciated the importance of retaining for the chiefs limited residual powers of maintaining law and order, crime prevention

45 In terms of s 55 of Constitution of Lesotho, principal chiefs are *ex officio* members of the Senate. The Council of State advises the King on the nomination of eleven additional members of the Senate.

46 See s 88(2)(a), (b), (c) and (d) of the Botswana Constitution, and s 7(2) of the South African Council of Traditional Leaders Act 10 of 1997.

47 This arrangement is otherwise criticised as a ruse to allow the President to dilute the results of popular elections in favour of his party in the event of the latter failing to secure the necessary majority.

48 See generally the provisions of Part II of the Botswana Chieftainship Act of 1966; provisions of Part VI of the Lesotho Chieftainship of 1968.

49 See s 4(b) of the Botswana Chieftainship Act. The essence is retained in s 5 of the Lesotho Act, which provides that the succession shall be subject to the approval of the King acting on the advice of the Minister. Section 111(1) and (2) of the Constitution of Zimbabwe similarly confers the authority to recognise designation to a chieftaincy to the President.

and the promotion of the welfare of the people under their respective jurisdictions.⁵⁰ These residual administrative functions are subject to revocation or extension, as the post-colonial authorities may deem expedient.

In South Africa, a far more revolutionary challenge to the conceptualisation of chieftaincy/traditional leadership as it has historically evolved turns around the change of the rule of succession. Historically, succession is informed in a majority of communities by the principle of male primogeniture, or female primogeniture in a minority of others.⁵¹ Central to the challenge is the apparent conflict between the principle of primogeniture and the constitutional ethos of equality and non-discrimination. In the watershed case of *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the RSA* the Constitutional Court ruled that the principle of primogeniture violated critical pillars of the Bill of Rights especially the provisions of equality, human dignity and the rights of children.⁵² A chorus of critics and interest groups has assumed that the ruling applies *mutatis mutandis* to render the primogeniture principle in the context of chieftaincy succession unconstitutional.⁵³ It could be argued that the jury is still out, as the ruling was indeed limited to the issue of inheritance in the private sphere, rather than succession to a chieftaincy, which is public office. Indeed, it may well be that when the courts are eventually called upon to make a determination on the consistency of chieftaincy succession with the provisions of the Constitution, the key question to resolve would be whether or not it is discriminatory *per se* to reserve accession to a public office to members of a particular class, identified as such by their birth. It is apparent therefore that the issue in chieftaincy succession vis-à-vis the provisions of the constitution raises broader constitutional questions than the primogeniture principle.

The landscape portrayed by constitutional developments directly impacting on the chieftaincy in the countries surveyed above bears testimony to one consistent trend: that notwithstanding the commonplace belief that de-colonisation would restore African culture and the institutions around which it is anchored, the pattern of events points in the opposite direction. In almost all these countries, the post-colonial state has intermittently continued the role initiated by the colonial state of upstaging the chieftaincy as the centre of governance and placing it under the strictures of its control. Its future has never been more uncertain.

7 CONCLUSION

Chieftaincy was the central organ of government in traditional African society. While it operated in a complex and indeed different manner from the Western

50 See ss 6 and 7 (Lesotho Act) and ss 15 and 17 (Botswana Act). The South African Traditional Leadership and Governance Framework (Amendment) Act 41 of 2003 provides that traditional leaders shall discharge functions accruing to them under customary law and custom.

51 The Balubedu in the Limpopo Province are a good example of a community whose chieftaincy succession is based on the female primogeniture principle.

52 2005 1 SA 580 (CC).

53 It is contended, however, that this interpretation is misguided in the sense that it fails to make an important distinction between the primogeniture principle in customary law as it applies to private inheritance, as against its application in the public succession sphere. This distinction between inheritance and succession under customary law was eloquently articulated in the minority judgment of the court delivered by Ngcobo J in the case.

concept of separation of powers, it was nonetheless embedded in effective systems of checks and balance and also functioned in a highly democratic and responsive manner. With colonial Lesotho as an example this article has attempted to give an historical perspective of how the institution shed these characteristics. Rather than seeing the transformation as one in which the institution was solely an object manipulated by the colonial state, the article highlights how over a period of fifty years, chieftaincy was equally responsible for the social circumstances that over time created constitutional developments leading to its steady decline and marginalised role in society.

In the end, the article provides an overview of the institution's position in the post-independence dispensations of the region. A salient feature that emerges from this overview is of an institution that has indeed entered its twilight age. Post-colonial regimes have further accentuated its marginal role in the critical area of legislative processes. While it retains some administrative roles, there is little doubt that it does this at the behest of the modern state, perhaps only because the latter is yet to develop an alternative, equally effective apparatus of rural governance. It can be speculated with a degree of certainty that when such an apparatus emerges and has proven its capacity to serve the State's writ, chieftaincy's fate will have been sealed.