

# Re-visiting the powers of the King under the Constitution of Lesotho: Does he still have any discretion?

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## SUMMARY

The powers of the monarch have been a subject of protracted political and legal controversy since colonialism in Lesotho. When the country got independence from Britain in 1966, the long drawn-out gravitation towards British model of constitutional monarch was confirmed in the Independence Constitution. Nevertheless, the Independence Constitution had categories of powers for the monarch. There were powers reposed in the King exercisable “on the advice” and those that were exercisable in his own “deliberate discretion”. When the current Constitution was adopted in 1993, the discretionary powers of the King were effectively abolished; all his powers became exercisable “on the advice”. That the powers of the King under the current Constitution are only exercisable on advice has been a long-held view in judicial policy and in legal scholarship. It was not until 2017 when the Court of Appeal in the case of *Phoofolo v The Right Honourable Prime Minister* suggested that the King may have discretion on whether to accede to Prime Ministers “recommendation” to dissolve parliament or not. The decision of the Court of Appeal in *Phoofolo* has reinvigorated a fresh debate in constitutional scholarship about the real powers of the monarch under the Constitution. The purpose of this paper is to investigate the extent of the legal powers of the monarch under the Constitution – whether indeed the King still has any discretionary power.

## 1 Introduction

The Kingdom of Lesotho acquired statehood in the 1820s after the *lifaqane* wars.<sup>1</sup> The country was formed by King Moshoeshoe and became organised around his kingship.<sup>2</sup> It was later colonised in 1868 by Britain.<sup>3</sup> When the country was preparing for independence, in the early

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- 1 Generally see Thompson *Survival in Two Worlds: Moshoeshoe of Lesotho 1786-1870* (1975); Machobane *Government and Change in Lesotho 1800-1966* (1990) 5-6.
  - 2 Weisfelder “The Basotho monarchy: a spent force or a dynamic political factor?” (Fourteenth Annual Meeting of the African Studies Association, Denver, 3-6 November 1971) at 5; Duncan *Sotho Laws and Customs* (1960) 43.
  - 3 The colonisation of the country was a unique one because it was proclaimed as a British Protectorate on March 12, 1868. The initial idea was to secure the Basotho from further Boer aggression. But in the end, the country became a colony like any other British colony. In November 1871 responsibility to administer the country was transferred to the Cape Colony

1960s, the powers of the monarch was the single most captivating subject of the constitution-making process.<sup>4</sup> Even the political landscape was divided along the same subject.<sup>5</sup> The main question was whether, in the post-independence design, the monarch would have executive powers or be titular in the British style.<sup>6</sup> All indications were that the institution is going to take on British style because of the long history of building the Westminster design in the country.<sup>7</sup> When the Independence Constitution was made in 1966, it became apparent that Westminster triumphed over the voices calling for more executive powers for the monarch.<sup>8</sup> In fact, the 1966 Constitution, without any equivocation, provided that the exercise of the King's powers shall be "in accordance with any constitutional conventions applicable to the exercise of a similar function by Her Majesty in the United Kingdom".<sup>9</sup> Consequently, the executive powers of the monarch shifted to the Prime Minister and the cabinet. The King was to act "in accordance with the advice of the cabinet or a minister acting in the general authority of cabinet".<sup>10</sup> Nevertheless, the Constitution still had powers reserved for the King's "absolute discretion".<sup>11</sup> These are functions that the King

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which gained self-governing status in 1872. See Lagden *The Basutos* (1909); Eldredge *A South African Kingdom: The Pursuit of Security in Nineteenth-Century Lesotho* (1993).

4 Machobane 5-6.

5 Gill *A Short History of Lesotho* (1993).

6 Mahao "Constitutional orders and the struggle for the control of the state in lesotho from 1966 to 1989" 1991 *Lesotho Law Journal* 1; see also the case of *Molapo v Seeiso* 1963 – 66 HCTRL 150.

7 The definition of what a Westminster constitution is has eluded scholars of constitutional and political studies. Anckar "Westminster Lilliputs? parliaments in former small British colonies" 2007 *Parliamentary Affairs* 637. At 637 the author argues that the term "Westminster refers to the main characteristics of British parliamentary and governmental institutions." See also de Smith *The New Commonwealth and its Constitutions* (1964). Also see de Smith "Westminster export model the legal framework of responsible government" 1961 *Journal of Commonwealth Political Studies* 2. For a systematic analysis of the Statute of Westminster 40 years since its adoption in 1931, see de Smith "Fundamental rules forty years on" 1971 *International Journal: Canada's Journal Global Policy Analysis* 347.

8 See Nwabueze *Presidentialism in the Commonwealth Africa* (1973). At 74 the author rightly observes that: "[t]he situation in the Kingdom of Lesotho had been no less disturbing, and provides perhaps the most glaring testimony of the incompatibility of a constitutional Head of the State with the African traditional method of government. The problem was how to make an African King, accustomed by tradition to the exercise of executive authority, abide by the role of a constitutional monarch cast upon him by the Constitution ... King of Lesotho, Motlotlehi Moshoeshe II showed a disinclination to abide by this role, conceiving of himself and his chiefs as the real authorities of the country, just as old".

9 S 76(2) of the 1966 Constitution.

10 S 76(1) of the 1966 Constitution.

11 S 76(2) of the 1966 Constitution.

could exercise without the need for an advice from anybody – not even his Privy Council.<sup>12</sup>

The 1966 Constitution was suspended in 1970.<sup>13</sup> The new Constitution was only adopted in 1993. When the new Constitution was adopted, the absolute discretion of monarch was removed from the panoply of the powers of the King. All the powers of the King are to be exercised in accordance with the advice of five main institutions: the Prime Minister,<sup>14</sup> the Cabinet,<sup>15</sup> the Council of State,<sup>16</sup> Judicial Service Commission,<sup>17</sup> and Public Service Commission.<sup>18</sup> The general view held both in constitutional scholarship and judicial authority has been that indeed under the current design, as opposed to the independence design, the King no longer has functions in which he may act on his own absolute discretion.<sup>19</sup> That notwithstanding, the Court of Appeal in the case of

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- 12 S 80 of the Constitution had established a structure styled Privy Council. In terms of section 80(3) thereof, the main duty of the Privy Council was to advise the King on the exercise of the functions in which the King had absolute discretion. However, section 80(4) provided that: “The King shall not be required to act in accordance with the advice of his Privy Council in any case in which he has obtained its advice”.
- 13 Khaketla *Lesotho 1970: An African coup under the microscope* (1972).
- 14 The Prime Minister advises the King in cases of prorogation and dissolution of parliament (s 83(4)); appointment of ministers (s 87(3)); removal of ministers (s 97(7)); appointment of the nominated members of the Council of State (s 95(2)(i)); appointment of Chief Justice (s 120(1)); appointment of acting Chief Justice (s 120(4)); removal of Chief Justice (s 121(7)); appointment of the President of the Court of Appeal(s 124(1)); removal of the President of the court of Appeal (s 125(7)); appointment of Ombudsman(s 134(1)); appointment of Attorney General (s 140(1)); removal of Attorney General (s 140(8)); appointment of Auditor General (s 142(1)); removal of Auditor General (s 142(7)); appointment of ambassadors (s 143); appointment of the Commander of the Defence Force(s 145(4)); appointment of the Commissioner of Police(s 147(3)).
- 15 S88(2); see also the decision of the Court of Appeal in the case of *President of the Court of Appeal v The Prime Minister and Others* (C of A (CIV) No 62/2013) LSCA 1 (unreported, decided on 4 April 2014) available on <https://lesotholii.org/lis/judgment/court-appeal/2014/1-0> (accessed 2019-11-17).
- 16 On appointment of some members of the National Planning Board (s 105(1)(a)); nomination of eleven senators (s 55); appointment and removal of the members of the Independent Electoral Commission (s 66).
- 17 Appointment of judges of the High Court (s 120(2)); appointment of the judges of the Court of Appeal (s 124(2)); appointment of members of the Public Service Commission (s 136)
- 18 Removal of Director of Public Prosecutions (s 141).
- 19 Refusal to dissolve parliament where the Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho (s 83(4)(a)); dissolution of parliament where the National Assembly has passed a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution (s 83(4)(b)); dissolution of parliament where “the office of Prime Minister is vacant and the King considers that there is no prospect of his being able within a reasonable time to find a person who is the leader of a political party or a coalition of political parties that will command the support of a majority of the

*Phoofolo v The Right Honourable Prime Minister*,<sup>20</sup> ruled that on matters related to dissolution of parliament, the King can act on the advice of the Prime Minister without a need to seek advice from the Council of State. This decision has reinvigorated a question which was otherwise deemed settled of whether indeed the King still has any space under the current Constitution where he can act on his own absolute discretion. The purpose of this article is to investigate this question. In the end, the paper contends the suggestion by the Court of Appeal in the *Phoofolo* case that the King may alone consider whether dissolution of parliament would be in the interest of the country, without a need to consult the Council of State, is incorrect.

## 2 Problematising the notion of “acting on the advice”

In a constitutional monarchy,<sup>21</sup> like Lesotho, the King is ordinarily expected to work “on the advice” from several institutions such as the Prime Minister, the Cabinet, the Council of State or, in some instances, even the Judicial Service Commission. This advisory relationship has been a matter of long scholarly engagement in countries that subscribe to the Westminster constitutional designs. The main question which has captivated the constitutional scholarship is whether the “advice” given to the monarch is mandatory or it remains an advice in the ordinary usage of the word – where the person being advised has a choice on whether to accept the advice or reject it. There appears to be some sense of consensus that, due to the political position that the constitutional monarchs ended up occupying after losing a lot of its powers to electoral politics,<sup>22</sup> the monarch may not ordinarily decline the advice given.<sup>23</sup> The point of divergence is on whether the rule is absolute or it has some exceptions. This divergence of views is also accentuated by the fact that histories and designs of many Westminster constitutional designs differ. In some designs, the exceptions under which the advice may be declined

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members of the National Assembly” (s 83(4)(c)); appointment of Prime Minister (s 87(1)); removal of Prime Minister(s (87)(5)).

- 20 *Phoofolo v The Right Honourable Prime Minister* C OF A (CIV) No 17/2017) LSCA 8 (unreported, decided on 12 May 2017), available on <https://lesotholii.org/node/10843> (accessed 2019-11-19).
- 21 Generally see Bogdanor “The monarchy and the constitution” 1996 *Parliamentary Affairs* 407; Blackburn “Monarchy and the personal prerogatives” 2004 *Public Law* 546.
- 22 Bogdanor 16. The author argues that during the 19th century, “two interconnected factors – the expansion of franchise and the development of organized political parties – were to limit, not the power of the sovereign ... but his or her influence.”
- 23 Heard “The reserve powers of the crown: the 2008 prorogation in hindsight” in Smith & Jackson(eds) *The Evolving Canadian Crown* (2012) 87.

are fairly established.<sup>24</sup> In the case of United Kingdom, for instance, Markesinis makes an apt classification of monarchical powers into three.<sup>25</sup> Firstly, there are those powers performed under the prerogative but are not necessarily performed by the crown. These are powers that are performed by Ministers and officials of government under the aegis of royal prerogative.<sup>26</sup> Secondly, there are powers performed by the monarch on the advice of Ministers or government officials.<sup>27</sup> The majority of the powers of the monarch fall under this category. Most of them are real executive powers. In a Westminster constitutional design, executive authority is *de jure* reposed in the monarch but *de facto* exercised by the Prime Minister and the cabinet.<sup>28</sup> As such, in the majority of cases, the executive “advises” the monarch on what to do. The last category is where the monarch acts alone. This category of powers is very rare. In fact, Markesinis sceptically asks whether these powers still exist in relation to the British system.<sup>29</sup>

When Lesotho got independence from Britain in 1966, more or less the same classification was enshrined in the Independence Constitution.<sup>30</sup> However, the two most prominent categories of powers were those in which the King had to work “on the advice” – sometimes called “agency powers”,<sup>31</sup> – and those in which he had absolute discretion. The summary of the nature of monarchical powers under the Lesotho's Independence Constitution was enshrined in section 76(1).<sup>32</sup>

The section embodies the Westminster principle that the King is ordinarily expected to work on the advice from his government. The Independence Constitution, however, had occasions in which the King had absolute discretion.<sup>33</sup> This was in keeping with the longstanding principle of Westminster constitutional designs that while the sovereign is ordinarily expected to work on the basis of the advice provided by his government, there are certain situations where he may act on his own

24 Newman “Of dissolution, prorogation, and constitutional law, principle and convention: maintaining fundamental distinctions during a parliamentary crisis” *National Journal of Constitutional Law* 217.; Blackburn “The dissolution of parliament: the crown prerogatives (house of commons control) bill” 1988 *The Modern Law Review* 837.

25 Markesinis “The royal prerogative re-visited” 1973 *The Cambridge Law Journal* 287.

26 Markesinis 288.

27 Markesinis 288.

28 S 86 of the 1993 Constitution of Lesotho Provides that: “The executive authority of Lesotho is vested in the King and, subject to the provisions of this Constitution, shall be exercised by him through officers or authorities of the Government of Lesotho.”

29 Markesinis 290. The author says: “[t]his was the original form in which the prerogative powers were exercised. The question, however, is are there any powers that can still be included in this category?”

30 S 76(2) of the 1966 Constitution.

31 Palmer and Poulter *The Legal System of Lesotho* (1972) 241.

32 S 76(1) of the Lesotho Constitution of 1966.

33 S 76(2) of the 1966 Constitution.

absolute discretion.<sup>34</sup> Those exceptional situations were: on appointment of senators,<sup>35</sup> appointment of Prime Minister,<sup>36</sup> removal of Prime Minister,<sup>37</sup> performance of Prime Ministerial functions during absence or illness,<sup>38</sup> designation of members of the Privy Council and National Planning Board,<sup>39</sup> allocation of land and disciplinary control over chiefs.<sup>40</sup>

Although the 1966 Constitution provided that these functions may be exercised by the King “in his own deliberate judgment”,<sup>41</sup> it still provided that he would exercise them “so far as may be, in accordance with any constitutional conventions applicable in the exercise of similar function by Her Majesty in the United Kingdom”.<sup>42</sup> Under the 1993 Constitution, because of the political losses that the King experienced since independence and the ascendance of electoral democracy,<sup>43</sup> the King no longer has this category of powers specifically created by the Constitution. He remains only with agency powers – where he acts on the advice. The concept, “acting on the advice of” received a definitive interpretation in the case of *Makenete v Lekhanya*.<sup>44</sup> The case concerned the interpretation of section 6(2) (b) of the Lesotho Order, 1986.<sup>45</sup> The section related to the appointment of Ministers. It provided that the cabinet shall be comprised of “such other members as may be appointed by the King on the advice of the chairman”.<sup>46</sup> The court interpreted the section as thus: “[t]he words ‘on the advice of the chairman’ can only mean, therefore, that the King is obliged to act in accordance with the advice of the Chairman”.<sup>47</sup>

This position is widely shared by other jurisdictions that have the Westminster pedigrees. In the case of South Africa, for instance, the Constitution,<sup>48</sup> provides that, “[t]he President must appoint the judges of all other courts on the advice of the Judicial Service Commission”.<sup>49</sup>

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34 Russell “Discretion and the reserve powers of the crown” 2011 *Canadian Parliamentary Review* 19; Evatt *The King and his Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (1967) 6.

35 S 76(2)(a) of the 1966 Constitution.

36 S 76(2)(c) of the 1966 Constitution.

37 S 76(2)(d) of the 1966 Constitution.

38 S 76(2)(e) of the 1966 Constitution.

39 S 76(2)(f) and (g) of the 1966 Constitution.

40 S 76(2)(h) and (j) of the 1966 Constitution.

41 S 76(2) of the 1966 Constitution.

42 The proviso to s 76(2) of the 1966 Constitution.

43 Proctor “Building a constitutional monarch in Lesotho” 1969 *Civilizations* 64; Moodie “The crown and parliament” 1956 *Parliamentary Affairs* 256; Mothibe “Lesotho: the rise and fall of military-monarchy power-sharing 1986–1990” 1990 *Africa Insight* 242.

44 [1991-1996] LLR 486.

45 Lesotho Order 2 of 1986.

46 S 9(2).

47 *Yong Vui Kong supra* para 39-40.

48 Constitution of South Africa, 1996.

49 S 174(6) of the Constitution of South Africa, 1996.

Murray rightly points out that '[i]t is clear that the Judicial Service Commission (JSC) is fully responsible for the choice ... and that the President is constitutionally bound to appoint those it selects.'<sup>50</sup> In Singapore, the Court of Appeal had an occasion in the case of *Yong Vui Kong v Attorney-General*,<sup>51</sup> to determine whether the President has any discretion in a situation where the Constitution provides that in granting clemency to convicts, the President shall act "on the advice of cabinet".<sup>52</sup> The court categorically stated that:

"It is trite law that the Head of State in a Constitution based on the Westminster model, such as the Singapore Constitution, is a ceremonial Head of State who: (a) must act in accordance with the advice of the Cabinet in the discharge of his functions; and (b) has no discretionary powers except those expressly conferred on him by the Constitution. In our local context, Art 22P is not a provision which expressly confers discretionary powers on the President."<sup>53</sup>

The court raises an intriguing point in relation to this established Westminster principle. It contends that where the exception to the general principle will be where the Constitution has specifically granted the head of state such discretionary power – like the 1966 Constitution of Lesotho.<sup>54</sup> It may be added that other situations where the head of state may act on his own discretion are not unforeseeable. For instance, by operation of the doctrine of legality,<sup>55</sup> the head of state may not be bound by an "advice" that is unlawful or unconstitutional.<sup>56</sup> Furthermore, the head of state may not be bound by advice that is palpably against the interest of the country. It can never be the purpose of the Constitution to grant powers that can be used against the interests

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50 Murray "Who chooses constitutional court judges?" 1999 *South African Law Journal* 865. The author at 865 goes on to suggest that: "In Westminster style systems an obligation to act on advice removes any discretion from the actor. Just as previous Constitutions instructed heads of state (or Governors-General) to carry out various acts, so section 174 casts the President in the role of 'Head of State' when appointing those judges and requires him to implement the JSC's decision."

51 [2011] SGCA 9.

52 See Art 22P of the Singaporean Constitution.

53 *Yong Vui Kong* supra para 19. See also the decision of the Court of Appeal of Botswana on the same question in the case of *Law Society of Botswana v The President of Botswana* Civil Appeal No CACGB-031-16.

54 See s 76 of the 1966 Constitution of Lesotho.

55 See *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; 1997 (4) SA 1; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000(2) SA 674 (CC); Hoexter "The principle of legality in South African administrative law" 2004 *Macquarie Law Journal* 16.

56 Heard "The Governor General's decision to prorogue parliament: a chronology and assessment (2009) 18 *Constitutional Forum*. See also Heard "The Governor General's decision to prorogue parliament: a dangerous precedent" available on <http://www.law.ualberta.ca/centres/ccs/issues/heard.php> (accessed 2019-11-08).

of the country or to defeat the fundamental principles of constitutionalism.<sup>57</sup>

### 3 The power to dissolve and prorogue Parliament: Is there any discretion for the King?

Despite a fairly established principle that the head of state would ordinarily accede to the advice of his government, the advice to dissolve or prorogue parliament has always evoked divergent scholarly and judicial opinions.<sup>58</sup> The reason for dissolution and prorogation to be normally controversial is that governments of the day oftentimes use these devices to attain political ends.<sup>59</sup> Dissolution and prorogation are the antique monarchical prerogatives that were created to enable the monarch to control parliament.<sup>60</sup> With the ascendance of electoral politics, and the gradual emasculation of monarchism, the prerogatives effectively shifted to the Prime Minister. Like most prerogatives of the monarch under modern-day constitutional designs, the prerogative to dissolve and prorogue parliament are exercisable on the advice of the sitting Prime Minister. The general consensus in constitutional scholarship within the Westminster constitutional systems is that while there is a general rule that the monarch will accept the advice of the Prime Minister; he may, under certain circumstances decline the advice. The powers that the monarch has to decline the advice to dissolve parliament do not seem to exist in relation to prorogation.<sup>61</sup> This is strange because the threat of abuse of political power by Prime Ministers in relation to dissolution still exists in relation to prorogation.<sup>62</sup> Oftentimes, Prime Ministers find dissolutions to be too drastic. As a result, they find prorogation to be an easier avenue to provide for much

57 See *R (on the application of Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

58 Forsey *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943); Blackburn "The dissolution of parliament: the crown prerogatives (House of Commons Control) Bill 1988" 1989 *The Modern Law Review* 837.

59 Tremblay "Limiting the government's power to prorogue parliament" 2010 *Canadian Parliamentary Review* 16; Horgan "Partisan-motivated prorogation and the Westminster model: a comparative perspective" 2014 *Commonwealth & Comparative Politics* 455.

60 Hicks "British and Canadian experience with the royal prerogative" 2010 *Canadian Parliamentary Review* 18; Ghany "The Evolution of the power of dissolution: the ambiguity of codifying Westminster conventions in the Commonwealth Caribbean" 1999 *The Journal of Legislative Studies* 54. Bogdanor *Monarchy and the Constitution* (1995) 16.

61 See s 83 of the Constitution of Lesotho, 1993; see also Twomey "Prorogation—can it ever be regarded as a reserve power?" 2016 *Public Law Review* 144.

62 Payne "The Supreme Court and the *Miller* case: more reasons why the UK needs a written constitution" 2018 *The Round Table: The Commonwealth Journal of International Affairs* 441.



needed political cool-off period; but the effect is normally the same. In both situations, the Prime Minister removes parliament as a constitutional mechanism created for his scrutiny.

In Lesotho, parliament hardly ever finishes its five-year course.<sup>63</sup> The problem of short-lived parliaments, and prorogations that are used to avoid parliamentary scrutiny, became rampant with the advent of hung parliaments in 2012.<sup>64</sup> In June 2014, hardly two years into a five-year parliamentary term, Prime Minister Thomas Thabane sent the parliament to a nine-months prorogation in order to ward off the impending motion of no confidence against his fledgling coalition government.<sup>65</sup> The King readily acceded to the advice of the Prime Minister. The country went for an early election in 2015. The parliament that was elected thereafter did not finish its five year course either. It also had to be dissolved in 2017 after a successful vote of no confidence against the then Prime Minister, Pakalitha Mosisili.<sup>66</sup> The “Mosisili dissolution” of 2017 is the one that culminated with the decision of the Court of Appeal in the case of *Phoofolo v The Right Honourable Prime Minister*;<sup>67</sup> which decision laid the principle that a Prime Minister who has lost a vote of no confidence can advise the King to dissolve parliament without a need to seek advice from the Council of State.<sup>68</sup>

A brief statement of the facts of this case may be necessary before revisiting the provisions of the Constitution on the matter. In March 2017, it became apparent that the main coalition party, the Democratic Congress, experienced a huge split after the fallout between its leader, Mosisili and his deputy, Monyane Moleleki. The “Moleleki faction” crossed the floor and voted with the opposition on the vote of no confidence. The Prime Minister lost the vote.<sup>69</sup> Upon losing the vote, he advised the King to dissolve parliament; in which case election was

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63 Parliaments in Lesotho since 1993 hardly complete the five-year term due to internal party conflicts within the ruling parties. The main reason for short-lived parliaments is often intra-party conflicts. With the advent of coalition politics, the situation became rife; it even extended to inter-party conflicts. See Shale “Political parties and instability in Lesotho” in Thabane *Towards an Anatomy of Political Instability in Lesotho 1966-2016* (2017) 23.

64 ‘Nyane “The advent of coalition politics and the crisis of constitutionalism in Lesotho” in Thabane *Towards an Anatomy of Political Instability in Lesotho, 1966-2016* (2017) 77.

65 See Weisfelder “Free elections and political instability in Lesotho” *Journal of African Elections* (2015) 50; Letsie “Lesotho’s February 2015 snap elections: a prescription that never cured the sickness” 2015 *Journal of African Elections* 81.

66 See Legal Notice 22 of 2017.

67 *Phoofolo* case.

68 *Phoofolo* case at 3, the court said “The King [is] not required to consult the Council of State where after a vote of no confidence in Government, Prime Minister advises dissolution of Parliament”.

69 Aljazeera “Pakalitha Mosisili loses parliament vote” 1 March 2017 <https://www.aljazeera.com/news/2017/03/lesotho-pakalitha-mosisili-loses-parliament-vote-170301165711605.html> (accessed 2019-11-14).

supposed to be held in three months.<sup>70</sup> The King acceded to the advice and dissolved parliament on 6th March 2017 and declare the 3rd June 2017 as the date of elections. Some opposition members of parliament approached the courts alleging that the dissolution of parliament is not an affair between the King and the Prime Minister – there is also the Council of State in the equation. Their hope was that the Council would have given an advice contrary to Prime Minister’s, and the country would have been saved from yet another election in two years. The main issue for determination was whether indeed the King could consider the advice for dissolution from the Prime Minister without a need for the advice from the Council of State. As stated earlier, the court answered the question in the affirmative. In order to assess the finding of the court it may be proper to quote the relevant section of the Constitution *in extenso* because the court became very literal about the words used in the section. Section 83(4) of the Constitution provides that:

“In the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister:

Provided that –

- a if the Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho, he may, acting in accordance with the advice of the Council of State, refuse to dissolve Parliament;
- b if the National Assembly passes a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution the King may, acting in accordance with the advice of the Council of State, dissolve Parliament.”<sup>71</sup>

Instead of asking a purposive and broader question of whether the King under the Constitution may act without consulting the Council of State, the court became narrow and literal about section 83(4). It narrowly framed the question for determination as thus: “[t]he questions that this Court has to answer is therefore: [d]id the proviso apply? Before that question is considered, it will be helpful to see what light will be thrown on the matter by section 83(4) (b)”.<sup>72</sup> Admittedly, section 83(4) provides that “[i]n the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister”.

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70 S 84(1) of the Constitution provides that, Subject to the provisions of subsection (2), a general election of members of the National Assembly shall be held at such time within three months after any dissolution of Parliament as the King may appoint.

71 It is important to note that the parliament of Lesotho is currently considering the Ninth Amendment to the Constitution. The amendment seeks to change paragraph (a), (b) and (c) of section 83(4). The effect of the amendment is that the Prime Minister should not advise dissolution of parliament after the vote of no confidence unless dissolution is supported by two-thirds of the members of the National Assembly. Otherwise the Prime Minister will be expected to resign. See Clause 3 of the Ninth Amendment to the Constitution, 2019.

72 *Phoofolo supra* para 71.

However, the *proviso* thereto provides for three exceptions to the main principle in section 83(4); that is, the *proviso* embodies three circumstances under which the King may dissolve parliament without the advice of the Prime Minister. The first one is that if the “Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho, he may, acting in accordance with the advice of the Council of State, refuse to dissolve Parliament”.<sup>73</sup> The second one is that if a resolution of no confidence is passed against the Prime Minister, and he does not either resign or advise dissolution within three months, the King may then, upon the advice of the Council of State, dissolve Parliament.<sup>74</sup> The third scenario in which the King may dissolve parliament without the advice of the Prime Minister is when the King considers that there is no prospect of finding a person who commands majority in the National Assembly for purposes of appointment to premiership.<sup>75</sup> Even under this scenario, the King is advised by the Council of State.

The Court of Appeal in the *Phoofolo* case took the approach that once the Prime Minister advises the King to dissolve parliament, and none of the exceptions provided for in the *proviso* arises, the King has to comply with the advice without a need to seek advice from the council.<sup>76</sup> This approach is flawed in that it suggests that the process of *considering* is done by the King alone. In that way, it presumes that the King has a discretion, for instance, to determine whether the dissolution is in the interest of the country in terms of section 83(4)(a). While the judgment in effect sought to suggest that the King does not have a discretion, the opposite effect has been attained; that actually the King has a discretion to determine whether the Council of State is necessary or not.

This approach is not in keeping with both the history and purpose of the section in question. Under the 1966 Constitution, the power to dissolve and prorogue parliament was in the absolute discretion of the King; he was not supposed to be advised by either the Prime Minister or the Privy Council.<sup>77</sup> The only requirement was that it was to be exercised

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73 S 83(4)(a).

74 S 83(4)(b).

75 S 83(4)(c).

76 At para 72, the court said: “It is clear, in our view that the second proviso to section 83(4), subparagraph (b) does not directly apply. This is because the main clause of that subparagraph (which empowers the King, acting in accordance with the advice of the Council to dissolve Parliament without having been advised to do so by the Prime Minister) is qualified by a conditional clause, namely, if the National Assembly passes a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution) and that condition was satisfied because the Prime Minister did advise a dissolution within the three day period.

77 S 76(2) of the 1966 Constitution.

in line with the existing conventions in England.<sup>78</sup> When the 1993 Constitution was adopted, the section which specifically embodied circumstances under which the King may exercise absolute discretion was removed. All those powers were to be exercised on the advice. Thus, section 83 has been drafted against this backdrop. As such, the King does not seem to have a space for personal discretion under the current design; even the mere *consideration* on whether the dissolution is in the interest of the country must be taken on advice. In 2017, after the King was advised by the Prime Minister to dissolve parliament after two years,<sup>79</sup> a *consideration* had to be made on whether the dissolution was in the interest of the country in terms of section 83(4)(a) of the Constitution. Such *consideration* is the one that would require the advice of the Council of State. The approach preferred by the Court of Appeal in the *Phoofolo* case lost sight of this important historical and purposive factor. It was carried away by the literal interpretation of the section; contrary to established canons for interpretation of Constitutions.<sup>80</sup>

It would seem that the Constitution treats prorogation and dissolution separately. While the King is expected to exercise both of them upon the advice of the Prime Minister, the Constitution does not create the space to decline the prorogation upon the advice of the Prime Minister.<sup>81</sup> With the discussion of the notion of “on the advice of” discussed above, it can safely be said that the advice of the Prime Minister in relation to prorogation is binding. However, it is not unimaginable in modern constitutional law that devices such as legality, separation of powers and rule of law may still provide exceptional avenues which the King may use to decline the advice of the Prime Minister to prorogue a parliament.<sup>82</sup> The British Supreme Court has already laid the principle in the case of

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78 See the *proviso* to s 76(2) of the 1966 Constitution.

79 On the 1 March 2017 the National Assembly passed a motion of no confidence in the Government of Lesotho. Subsequent to this motion, the 9 Parliament of Lesotho was dissolved with effect from 6 March 2017. The dissolution was done in terms of Legal Notice 22 of 2017.

80 The same court has on several occasions stated that the interpretation of the constitution must be purposive and generous. See for example, *Sekoati v President of the Court Martial* LAC (1995-99) 812; *Sechele v Public Officers Defined Contribution Pension Fund and Others* (C of A (CIV) NO.43B/10) [2011] LSCA 23 (20 April 2011) available in <https://lesotholii.org/ls/judgment/court-appeal/2011/23/> (accessed 2019-11-21).

81 See s 83 of the Constitution of Lesotho, 1993.

82 Monahan *Constitutional Law* (2006). At 75-76 the author captures the argument pointedly in that: “As a general rule, the governor general should continue to act on the advice of the prime minister, assuming that he/she continued to enjoy the confidence of the House and should leave issues of legality or constitutionality to be adjudicated before the courts. ... There may be one exception to this rule arising where a government was persisting with a course of action that had been declared unconstitutional or illegal by the courts. In the event that the government sought the governor general’s participation in a decision or action that had previously been declared unconstitutional, it might well be appropriate for the governor general to refuse to approve or participate in the illegal or unconstitutional conduct”.

*R (on the application of Miller) (Appellant) v The Prime Minister*,<sup>83</sup> that prorogation may not be used by the Prime Minister to avoid scrutiny. The court therein pointedly said:

“... the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.”<sup>84</sup>

Thus, it can be equally contended in relation to Lesotho that although the Constitution itself does not provide for exceptions in which advice for prorogation of parliament may be declined by the King. The King may not be expected to agree to advice that is palpably unlawful or unconstitutional. The authority derived from the *Miller* case is that it is unconstitutional to prorogue parliament with a view to avoid scrutiny.<sup>85</sup> This is because the animating doctrine of parliamentary accountability is violated by prorogation whose patent purpose is to avoid scrutiny.<sup>86</sup> As such the prorogation of parliament by Prime Minister Thabane in 2014 would hardly pass the constitutional mast because it was done with a view to avoid an already filed motion of no confidence.<sup>87</sup>

## 4 The King's right to be consulted and informed

While ordinarily the King is obliged to work in accordance with the advice of either the Prime Minister or his government in general, the Constitution gives him the rights to be consulted and to be fully informed concerning the general conduct of the governmental matters. The Prime Minister has a corresponding obligation to “furnish him with such information as he may request in respect of any particular matter relating to the government of Lesotho”.<sup>88</sup> What these rights entail is always a matter of tight secrecy as the actual encounter between the King and the

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83 *R (on the application of Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

84 *R (on the application of Miller) v Prime Minister* para 50.

85 *R (on the application of Miller) v Prime Minister* para 50.

86 *R (on the application of Miller) v Prime Minister* para 48. The court said: “That principle is not placed in jeopardy if Parliament stands prorogued for the short period which is customary, and as we have explained, Parliament does not in any event expect to be in permanent session. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model”. For further application of the doctrine in practical situations see the cases of *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240; (*Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1).

87 On the 10th March 2020, Prime Minister Thabane again prorogued parliament citing the outbreak of the Corona virus. The prorogation has been challenged in the courts on the ground that it was not procedural. It remains to be seen how the courts will resolve it.

88 S92 of the Constitution.

Prime Minister are hardly ever published; neither have these rights been a subject of judicial pronouncement in Lesotho. However, the contents of these rights may not be hard to fathom because they have their taproots from the British constitutional scheme. The Constitution of Lesotho only provides for the two rights, the right to be consulted and the right to be informed. However, the rights are originally three – the right to be consulted, the right to encourage and the right to warn – as formulated by the eminent British monarchist, Bagehot.<sup>89</sup> In practice the right to be consulted means the Prime Minister has regular consultation meetings with the Prime Minister on all matters of government; the King even has a right to see all cabinet papers. There is therefore no part of government business that may be deemed 'secret' against the King. Although the Constitution of Lesotho does not expressly provide for the right to warn, it may be argued that this right is implied in the two rights expressly provided.<sup>90</sup> It may be absurd to give the King, who is the *de jure* repository of the executive authority in Lesotho,<sup>91</sup> only the rights to be consulted and informed without him having an opportunity to advise and warn.<sup>92</sup> The King's right to be informed corresponds with his overarching constitutional schematisation where the Constitution vests executive powers in the King exercisable on the advice of his government.

Ordinarily, the monarchs, or heads of state in parliamentary systems,<sup>93</sup> use these rights to warn governments about certain dangers in policy direction and the procedural improprieties in executing certain

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89 Bagehot *The English Constitution* (1991). At 113 Bagehot formulates the rights rather adroitly as thus, “[t]o state the matter shortly, the Sovereign has, under a constitutional monarchy, three rights—the right to be consulted, the right to encourage and the right to warn. And a King of great sense and sagacity would want no others.”

90 Brazier expands the three rights expounded by Bagehot into the rights to five rights, namely: the rights to be informed, to be consulted, to advise, to encourage, and to warn. See Brazier “The monarchy” in Bogdanor (ed.) *The British Constitution in the Twentieth Century* (2003) 69. See also the endorsement of this expanded formulation in UK Cabinet Office *The Cabinet Manual* (2011) 8.

91 S 86 of the Constitution provides that: “The executive authority of Lesotho is vested in the King and, subject to the provisions of this Constitution, shall be exercised by him through officers or authorities of the Government of Lesotho”.

92 Twomey “From Bagehot to Brexit: the monarch’s rights to be consulted, to encourage and to warn” 2018 *The Round Table: The Commonwealth Journal of International Affairs* 420.

93 For instance, article 78 of the Indian Constitution of 1949 provides that: It shall be the duty of the Prime Minister:

- (a) to communicate to the President all decisions of the council of Ministers relating to the administration of the affairs of the union and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
- (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

laws.<sup>94</sup> Speaking in relation to India where the Constitution has equally codified this conventional rights of heads of state in a Westminster design, Malik contends that:

“It is noteworthy that President's right to call for information is central to his function under the Constitution, to persuade the council of ministers and state all his objections to any proposed course of action and to reconsider the matter as he is the guardian of the Constitution and has to protect the Constitution and the laws ... office.”<sup>95</sup>

It may be contended that this applies in equal measure to Lesotho. The rights envisaged under section 92 of the Constitution of Lesotho arguably entail the King's rights to express his disagreement to, or at least advise against, a certain government course of action. However, it must be recalled that neither the Prime Minister nor his cabinet is responsible to the King. The government is responsible, and as such accounts to parliament.<sup>96</sup> As such, the King's rights under section 92 are subject to the cardinal constitutional principle that the King must work in accordance with the advice of his government.<sup>97</sup> The Constitution of Lesotho, perhaps at variance with other Westminster designs, is a bit brute against the King if he refuses the advice of his government. It provides that if the King refuses the advice of his government, the Prime Minister will do the act and that act will be deemed to have been done by him.<sup>98</sup>

## 5 Conclusion

The foregoing analysis demonstrates that the Constitution of Lesotho remains fundamentally Westminster-based.<sup>99</sup> Hence, the powers of the King remain, by and large, exercisable on advice of his government. The

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94 Towmey 420.

95 Malik “President's right to seek information under article 78 of the Constitution of India” 2015 *Journal of the Indian Law Institute* 187.

96 S 88(2) of the Constitution provides that: “The functions of the Cabinet shall be to advise the King in the government of Lesotho, and the Cabinet shall be collectively responsible to the two Houses of Parliament for any advice given to the King ...”

97 Quentin-Baxter “The Governor-General's constitutional discretions: an essay towards a re-definition” *Victoria University of Wellington Law Review* 289.

98 S 91(3) of the Constitution provides that, “where the King is required by this Constitution to do any act in accordance with the advice of any person or authority other than the Council of State, and the Prime Minister is satisfied that the King has not done that act, the Prime Minister may inform the King that it is the intention of the Prime Minister to do that act himself after the expiration of a period to be specified by the Prime Minister, and if at the expiration of that period the King has not done that act the Prime Minister may do that act himself and shall, at the earliest opportunity thereafter, report the matter to Parliament; and any act so done by the Prime Minister shall be deemed to have been done by the King and to be his act”.

99 Macartney “African Westminster? the parliament of Lesotho” 1970 *Parliamentary Affairs* 121.

suggestion by the Court of Appeal, in the *Phoofolo* case, that when advised by Prime Minister to dissolve parliament the King can “consider”, without the involvement of the Council of State, whether the advice is “in the interest of the country” or not is correct. The correct process, looking at the broader schematisation of the Constitution,<sup>100</sup> is that when the Prime Minister advises the King to dissolve parliament, the Council of State has to sit and “consider” whether the dissolution is in the interest of the country; and consequently advise the King accordingly. It is then that the King may accept or reject the advice for dissolution by the Prime Minister. As such, it would seem that there is no discretion, or some space to act alone, for the King in relation to dissolution.

In relation to prorogation, it would seem the process is different. The matter is between the King and the Prime Minister; there is no Council of State in the equation. As a general rule, the King will ordinarily accede to the Prime Minister’s advice.<sup>101</sup> However, as demonstrated above, it would seem that the King may not be bound by the advice that is unconstitutional or in some way unlawful. The Supreme Court of England in the *Miller* case has already indicated that when parliament is prorogued with a view to avoid scrutiny or when it is broadly intended to defeat parliament to execute its constitutional mandate, it will be regarded as unconstitutional.<sup>102</sup> As such, the King may not be expected to comply with such an advice for prorogation.

The King can also use his rights to be consulted, to be informed and to be consulted to raise the issues he may have with the advice received from his government.<sup>103</sup> As demonstrated above, however, these rights are intended for harmony between the King and his government rather than for acrimony. While the King may use these rights to warn and advise his government, he may not prevail when his government insists on its position;<sup>104</sup> as long as the advice from government is constitutional and lawful.<sup>105</sup> Under the Lesotho design, the government has a broader space of operation because of the animating principle of

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100 As demonstrated in the foregoing discussion, the 1993 constitution, unlike the 1966 Constitution, has removed all manner of discretion for the King.

101 Monahan 75.

102 Payne 441.

103 Malik 187.

104 See Jennings *Cabinet Government* (1969) 337, quoting from the *Esher Papers* thus: “If the Sovereign believes advice to him to be wrong, he may refuse to take it, and if his minister yields the Sovereign is justified. If the minister persists, feeling that he has behind him a majority of the people’s representatives, a constitutional Sovereign must give way”.

105 Jennings 337.



democracy.<sup>106</sup> The rights of the King to be consulted and to be informed – even when it is interpreted to include the rights to warn and advise – may not be used to limit the government operational space.<sup>107</sup>

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106 Referring to the British design, on which the Lesotho system is cast, Jennings at 13-14 contends that: “The fundamental principle is that of democracy. ... The Queen, the Cabinet, the House of Commons and even the House of Lords are the instruments which history has created as, or political conditions have converted into, instruments for carrying out the democratic principle ... The Revolution of 1688 finally settled that in the last resort the King must give way to Parliament. The Cabinet was the means by which the King on the one hand made certain that his actions had parliamentary approval and on the other hand enabled him to control Parliament through its majority”.

107 Brazier *Constitutional Practice: The Foundations of British Government* (1999) 187.