

Succession to chieftainship for women under Lesotho's 1993 Constitution: Assessing the insurmountable challenge placed by section 18(4)(c) of the Constitution on customary law and gender equality

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SUMMARY

This article carefully examines the issues and obstacles placed by the 1993 Constitution of Lesotho, which prohibits women from succeeding to chieftainship under customary law. The Constitution as the supreme law of the land, represents ground-breaking legislation from colonial rule to democratic rule in Lesotho. Moreover, although the 1993 Constitution of Lesotho in its sections 4, 18, and 19 encapsulates gender equality and non-discrimination against women, section 18(4)(c) in the same breath places a restriction on women to fully enjoy their human rights under the Sesotho customary law. The article implores that the protection of customary law under Lesotho's 1993 Constitution must be developed in a manner that includes and elevates the status of women in traditional settings, specifically succession to chieftaincy. The article further proposes that there should be an amendment to section 18(4)(c) to align with the current efforts to promote gender equality and human rights for all individuals in Lesotho.

1 Introduction

The 1993 Constitution of Lesotho establishes the country as "a sovereign democratic kingdom".¹ The Constitution further establishes a human rights regime undergirded by the notion of non-absolutism.² The Constitution establishes fifteen internationally recognised human rights.³ Moreover, the 1993 Constitution specifies customary law as the

1 Nyane "Development of Constitutional Democracy: 20 Years of the Constitution of Lesotho" 2014 *LLJ* 64; The 1993 Constitution of Lesotho (hereinafter the Constitution).

2 'Nyane "Limitation of Human Rights under the Constitution of Lesotho and the Jurisprudence of Superior Courts" 2015 *LLJ* 5.

3 These rights are established under Chapter II of the Constitution as: (a) the right to life; (b) the right to personal liberty; (c) freedom of movement and residence; (d) freedom from inhuman treatment; (e) freedom from slavery and forced labour; (f) freedom from arbitrary search or entry; (g) the right to respect for private and family life; (h) the right to a fair trial of criminal charges against him and a fair determination of his civil rights and obligations; (i) freedom of conscience; freedom of expression; (j) freedom

prevailing customary law of Lesotho, unless modified or otherwise regulated by any parliamentary enactment.⁴

In Lesotho, the legal enactments under customary law are referred to as the Laws of Lerotholi, representing the formalised rendition of official customary law as codified in statutes. The official customary law comprises of what was an oppressive form of customary law developed by colonial and apartheid states that now exists in codes and precedents.⁵ The danger of overusing official customary law, is that, due to its static and inflexible nature and failing to adapt to the evolving needs of the people it is intended for, it poses a risk of detachment from the daily experiences of the indigenous people.

The article therefore submits that the judicial system in Lesotho needs to consider the oral living customary law in the post-colonial era, which can be beneficial for people who identify with this system of law as it exists in the system of living norms that regulate the everyday lives of people in traditional settings.⁶ Customary law as it stands, is corrupted, discriminatory against women, inauthentic, and lacking authority; it is a foreign imposition, a stranger in Africa.⁷ This corrupted version, unfortunately is what is officiated in statutes to constitute customary law.

In Lesotho the Laws of Lerotholi are the official Sesotho customary law that was initially oral in pre-colonial times, and which regulated the Basotho people's ways of living.⁸ The Laws of Lerotholi have endured even after Lesotho's independence and continue to form the post-colonial customary law.⁹

of peaceful assembly; (k) freedom of association; (l) freedom from discrimination; (m) the right to equality before the law and the equal protection of the law; and (n) the right to participate in government.

4 S 154(1) of the 1993 Constitution. Under the interpretation of certain words, customary law refers to the customary law of Lesotho currently in force subject to any modification or other provision made in respect thereof by any Act of Parliament.

5 Moore & Himonga "Living Customary Law and Families in South Africa" in Hall *et al* (eds) *South African Child Gauge* (2018) 61.

6 Moore & Himonga (2018) 61–62. This system of law is dynamic, evolving and context-specific, as it adapts to changes in the beliefs and circumstances of the people it applies to. The adherents of African law saw the official version as a misrepresentation of their culture with which they could not identify. Moreover, this distorted version contradicted the living customary law that embodied the aspirations of Africans and was current in social practice.

7 Costa "The Myth of Customary Law" 1998 *SAJHR* 525.

8 Juma "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" 2011 23 *Pace International Law Review* 95.

9 Juma 2011 *Pace International Law Review* 95.

Unsurprisingly, the first law of the 1903 version of the Laws of Lerotholi was on succession.¹⁰ Succession in Lesotho has always followed the patriarchal line.¹¹ This means that the tradition of male primogeniture has always been a fundamental element in customary law of succession for Basotho, leading to the exclusion of females following the same customary law.

Moreover, section 18(4)(c) of the 1993 Constitution of Lesotho restricts the freedom from discrimination of women regulated by customary law in a traditional leadership of chieftaincy.¹² This section in the 1993 Constitution of Lesotho has been criticised for legitimising the created official customary law that continues to undermine and discriminate against women in traditional settings.¹³ Section 18(4)(c) perpetuates the continuing tensions between customary rules and the virtues of liberal democracy in the Constitution of Lesotho.¹⁴

This article, therefore, unpacks the controversy of Lesotho's Constitution which appears to relinquish its supremacy to customary law regarding matters of succession to chieftainship.¹⁵ The article pays close attention to the fact that the Constitution in its section 4, 18, and 19 provide for freedom from discrimination while the same right is

10 'Nyane "The Constitutional Rules of Succession to the Institution of Monarch in Lesotho" 2019 *PELJ* 2; see also S 2 of the Laws of Lerotholi which provides that "... the succession to the chieftainship shall be by right of birth; that is [...] the firstborn male child of the first wife married: if the first wife has no male issue then the firstborn male child of the next wife married in succession shall be the chief; provided that if a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses."

11 Shale "Women and Succession to Chieftainship in Lesotho: The Evolution of Customary Law and the 1993 Constitution" 2014 *LLJ* 94.

12 S 18(4)(c) of the 1993 Constitution. Section 18 which provides for freedom from discrimination of all people shall not apply "[...]For the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or [...]"

13 *Metsing Gender Inequality in Lesotho: The Right of Succession to Chieftainship* (Mphil dissertation 2015 University of Pretoria) 3. It is argued that the Constitution is patriarchal in nature, and it is the very same nature that contains to undermine women's abilities in respectable positions, such as that of the chieftaincy; see also *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and others* (unreported) C of A (CIV) 29/2013. Senate was the firstborn child of the Principal Chief David Gabasheane Masupha and his wife, Chieftainess Masenate Gabasheane Masupha. When the Principal Chief Masupha passed away in August 1996, his first wife, Chieftainess Masenate Gabasheane Masupha became chief as provided for under S 10(4) of the Chieftainship Act. When she passed away the position of chief was open. The family named Lepoqo Masupha, a successor to the throne, the son of the Principal Chief's second wife. The Constitutional Court denied Senate's application of succession and upheld that S 10 of Chieftainship Act does not violate the Lesotho's Constitution.

14 'Nyane 2019 *PELJ* 19.

15 'Nyane 2019 *PELJ* 21.

withdrawn by Section 18(4)(c), specifically as it concerns women succeeding to chieftaincy in Lesotho.¹⁶

This withdrawal by section 18(4)(c) has also led to the ramifications faced by women in Lesotho after the case of *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and others* (unreported) C of A (CIV) 29/2013,¹⁷ which also established a precedent for matters of succession pertaining women assuming traditional roles in Lesotho. As a result, the author ultimately proposes that there should be an amendment of section 18(4)(c), aiming to provide support to the courts, legislature, and academic community in addressing the issue of succession to chieftainship for women in Lesotho.

2 Historical marginalisation of succession to chieftainship in customary law for Basotho women

2.1 Concept of succession to chieftainship in customary law

Succession to chieftainship, also known as traditional leadership is very common amongst African people in traditional settings. That is why it is crucial at this juncture to assist the reader to first comprehend the customary law concept of succession to chieftainship, to better grasp the historical analysis of how women are marginalised in succeeding to become chiefs in Lesotho.

In its ancient form, customary law is a system that aligns itself with its people through communitarianism. This system of law holds that communitarianism cannot be divorced from law within African societies, as it is interwoven with the fashioning of law in traditional Africa.¹⁸ Customary law stretches the communal connotation of an African person as being fully embedded in a community, and this embeddedness in a community plays a crucial role in the construction of African jurisprudence.¹⁹

Under customary law, the law of succession is concerned with the preservation and continuation of the family name and unity within the household and with the successor succeeding to both the status of the deceased and the utilisation of the deceased's property for the benefit of

¹⁶ Nyane 2019 *PELJ* 21.

¹⁷ *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and others* (unreported) C of A (CIV) 29/2013.

¹⁸ Komolafe "African Jurisprudence as Historical Co-extension of Diffused Legal Theories" 2022 *Thought and Practice: A Journal of Philosophical Association of Kenya* 59.

¹⁹ Komolafe (2022) *Thought and Practice: A Journal of Philosophical Association of Kenya* 59.

the family.²⁰ In these early African communities, leadership and succession were traditionally reserved for men. A male relative would be chosen to take over as head or leader for the good of the family.²¹ Women were excluded from this process, as society firmly believed that men were meant to lead and protect their communities.²² The same is true in Lesotho, women have historically been, and in many cases still are, excluded from chieftaincy succession due to long-held cultural beliefs that leadership is a man's role within both the family and society. African jurisprudence conceptualised the functioning of the family collective to mean that the head of the family operated on behalf of the family under the principle of male primogeniture.²³

The principle of male primogeniture denotes that families are governed as productive units of the clan, whereby the head of the family must be selfless in his administration of the family home. This principle of male primogeniture was also protective towards members of the family because it shielded widows, children, and any vulnerable person at risk of exposure to poverty, illnesses, or any form of scarcity.

Moreover, African traditional homes valued the role and office of a traditional leader. Leadership never insinuated oppression or domination; rather, leadership was considered as a position that protects and shields the community's interests. A traditional leader was selected based on his character, nobility, and competency to reign over the community. A traditional leader (often referred to as *kgozi/hosi/inkosi/morena*) was considered the father of his people and a binding and spiritual factor that serves as a symbol of the unity of the group.²⁴

Traditional leadership permeated almost all spheres of their subjects' lives, from politics, economic development, safety and security to health, judicial administration, and cultural and religious spheres.²⁵ In pre-colonial African settings, a traditional leadership hierarchy consisted of a chief, paramount chief, king, or chiefs. Below them were headmen, who were normally representatives of leading families.²⁶ Headmen were responsible for defined geographical areas and reported to the chief.²⁷ The chief, together with his headmen, constituted a council.²⁸ Below the chief and headmen were family or *kraal* heads.²⁹

20 Himonga *et al Post-Apartheid and Living Law Perspectives* 2015 159.

21 Mnisi-Weeks "Customary succession and the development of customary law: The Bhe legacy" 2015 *Acta Juridica* 215, 249.

22 Mnisi-Weeks 2015 *Acta Juridica* 249.

23 Mnisi-Weeks 2015 *Acta Juridica* 249.

24 Du Plessis & Scheepers "House of Traditional Leaders: Roles, Problems and Future" 2000 *PELJ* 22.

25 Baloyi *The Role of Traditional Leadership in Local Government* (Master's thesis WITS 2016) 25.

26 Nicholson "A Critical Analysis of the Role of Traditional Leadership in Modern South African Law" 2006 *Fundamina* 184.

27 Nicholson 2006 *Fundamina* 184.

28 As above.

29 As above.

The selection of a chief was rooted in ancestry,³⁰ and the prevailing view was that traditional leaders were born into the role rather than selected and trained.³¹ Potential challenges to the office of the chief also acted as an incentive to ensure that chiefs acted appropriately.³² Although historians have shown that women in pre-colonial Southern Africa were neither confined to domestic roles nor oppressed by men (in fact, they were active and played vital roles within their communities), they were still rarely chosen to serve as chiefs.³³ Even though some women held positions of influence,³⁴ such as serving as regents or advisors, traditional leadership remained largely a domain reserved for men.³⁵ Furthermore, traditional leadership in the pre-colonial settings also meant that women and men never viewed themselves as autonomous individuals existing independently of the collective community because leadership was less about personal power and more of a participatory collective effort in the system of governance.³⁶

The system was not predicated on the notion of the separation of powers, although it was arguably no less efficacious in checking chiefly personal powers.³⁷ These were ostensibly extensive and formidable powers to vest in one person or institution for the benefit of the community.³⁸ The democratic accountability was embedded in the constitutional principle of “*morena ke morena ka batho*”, which directly translated means “a chief is the chief by the grace of the people”.³⁹

30 The chiefdom was usually named after the common ancestor of the interrelated clan leaders and was led by the *inkosi/kgosi* who was related to all the heads of the clans through their common ancestry.

31 Nicholson 2006 *Fundamina* 185.

32 As above.

33 Moagi & Mtombeni “Women in Pre-colonial Africa: Southern Africa” 2020 *The Palgrave Handbook of African Women’s Studies* 3.

34 Sesanti “Reclaiming Space: African Women’s use of the Media as a Platform to Contest Patriarchal Representations of African Culture—Womanists’ Perspectives” 2009 *Critical Arts: A Journal of South-North Cultural Studies* 214. For instance, in Zulu culture, King Shaka’s mother, Nandi, “regarded herself as a representative of her family and entitled to political authority as any male member of the society.” Nandi “not only attended the Zulu National Assembly, but the court historian tells us that she was in constant confrontation with the men of the Assembly.” Moreover, although the Balobedu Rain Queens exemplify a rare instance of a pre-colonial African society in which women held chieftaincy positions, such cases were exceptional rather than representative. In most African communities, including those in South Africa, traditional leadership was a domain predominantly reserved for men, reflecting long-standing patriarchal structures in customary governance.

35 Moagi & Mtombeni 2020 *The Palgrave Handbook of African Women’s Studies* 4.

36 Mahao “Colonial Rule and the Transformation of Chieftaincy in Southern Africa: A Case Study on Lesotho” 2007 *Speculum Juris* 207.

37 Mahao 2007 *Speculum Juris* 207. As an institution, chieftaincy encompassed in the same breadth executive, legislative, judicial authority and more.

38 Mahao 2007 *Speculum Juris* 207.

39 Smith *The Mabilles in Basutoland* (1939) 39. The principle in fact means far more because it speaks to the participatory nature of governance which renders it inherently democratic and accountable to the governed.

The colonial conquest in Africa interrupted this office by determining traditional leaders as autocratic.⁴⁰ This indicates that the structure of the traditional hierarchy was substituted with colonial leadership to alter African ideologies towards recognising the omniscience, omnipotence, and omnipresence of the European monarchy.⁴¹ Against this backdrop, a model of African traditions was spawned that persists today despite its underlying lack of integrity and service to traditional communities.⁴²

2.1.1 Women's role in pre-colonial leadership structures in Lesotho

The inclusion of women in kingship or chieftainship positions before colonialism in Lesotho was extremely limited.⁴³ While women occasionally held influence often as regents in times of transition, formal leadership roles such as chiefs or kings were traditionally reserved for men. Pre-colonial Basotho society, like many others in Southern Africa, operated within patriarchal norms that defined leadership and authority as primarily male responsibilities.⁴⁴ The pre-colonial era exemplified an era in which customary law, its values and principles protected the Basotho nation and those served by it.⁴⁵ This era was characterised by a lack of self-interest, whereby people's access to resources was directed by shared entitlement arising from claims of common belonging to their collective households.⁴⁶

Historically, for Basotho, chieftainship was less about the personal power of the incumbent chief and more about a system of government.⁴⁷ Almost every role function of a chief was a participatory collective endeavour of members or one or other of a labyrinthine set of institutions.⁴⁸ For his part, Moshoeshoe I, who became king not by right of birth but by strength of character, always emphasised, *kobo ena ha kea ikapesa, ke e apesitsoe. Ke e apesitsoe ke banna khotla, ka boomo!* ("I did not bestow the crown upon myself. It was bestowed on me by the free will of men at the *kgotla*").⁴⁹ According to Thompson:

Moshoeshoe possessed the charisma of a leader who had emerged in his people's darkest hour and steered them through unprecedented physical and moral disasters to a new plane of prosperity and self-confidence... Yet he remained a man of simple tastes: He retained the

40 Nicholson 2006 *Fundamina* 185.

41 Ranger "The Invention of Tradition in Colonial Africa" in Hobsbawm & Ranger (eds) *The Invention of Tradition* (1983) 211.

42 Ranger (1983) 211–212.

43 Phafoli & Zulu "The Complexity of the Cultural Identity of Basotho in Lesotho" 2012 *A Journal of Contemporary Research* 241.

44 Phafoli & Zulu 2012 *A Journal of Contemporary Research* 241.

45 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution* (LLD thesis UNISA) 2.

46 Mahao 2010 *CILSA* 319.

47 Mahao 2007 *Speculum Juris* 207.

48 As above.

49 Mahao "O se re ho moroa 'moroa towel' African Jurisprudence Exhumed" 2010 *CILSA* 321.

common touch, never demanding obsequious behaviour from anyone ... [and] [h]is reputation for justice and clemency was proverbial.⁵⁰

King Moshoeshoe I as a traditional leader exuded warmth towards those he ruled, as he was considered the father of the nation.⁵¹ Moshoeshoe preferred to rule his people by consensus, subtly leading them to his way of thinking in the *Pitso*, the public gathering where either or both events and issues of national importance were discussed.⁵² His open-handed style of leadership thus enabled him to establish a kingdom, which became the envy of many.⁵³

Furthermore, during his reign, some of Moshoeshoe's female contemporaries were female warriors, such as Queen Mmanthatisi (of Batlokwa), Prophetesses Nongcwause (of the Amaxhosa), and Mmantsope (of the Basotho), who were historical figures of note, proving that even then, the 'gender glass ceiling' could be penetrated. Moreover, Princess Mmamochesane Sebetoane (of the Makololo, a provincial governor in her own right) became Regent when her father died in 1851.⁵⁴

Despite the female contemporaries that existed during Moshoeshoe's reign, Duncan,⁵⁵ places emphasis that succession to chieftainship in Lesotho is primarily determined by birthright. This means the position passes to the firstborn son of the chief's first wife.⁵⁶ If the first wife does not have a son, the title then goes to the firstborn son of the next wife in order of marriage.⁵⁷ However, if a chief dies without leaving a male heir, the chieftainship is passed on to the next eligible male according to the

50 Thompson *Survival in Two Worlds: Moshoeshoe of Lesotho, 1786–1870* (1975) 212.

51 Thompson (1975) 213.

52 Mofua "The Exemplary Ethical Leadership of King Moshoeshoe of Basotho of Lesotho in the Nineteenth Century Southern Africa" 2015 *Journal of Public Administration and Governance* 24. Citizens, strangers, and passers-by alike had the right to participate in public fora such as the *kgotla* or the *pitso*.

53 Mofua 2015 *Journal of Public Administration and Governance* 24. Indeed, ostensibly, each of the powers vested in the king was exercised in council in the same sense as the powers exercised by the King-in-Council of the Westminster model. During the colonial era, because Europeans failed to understand Moshoeshoe's way of leadership, hence, they tended to accuse Moshoeshoe of being a despot, wielding sole and untrammelled power. When the Europeans demanded instant decisions from Moshoeshoe, he often told them that he did not have constitutional powers in those matters and needed more time to consult his people, "they thought it a mere subterfuge to gain time."

54 Mofua 2015 *Journal of Public Administration and Governance* 25.

55 Duncan *Sotho Laws and Customs* (2006) 44.

56 Duncan (2006) 44.

57 Duncan (2006) 44.

established order of the family houses.⁵⁸ Thus, succession to chieftaincy in Lesotho is through the male line only.⁵⁹

It is also important to note that both precolonial and postcolonial scholars have pointed out that, while women in Lesotho were rarely given formal chieftaincy titles, they still held remarkable power within the system.⁶⁰ In many cases, queens and mothers of chiefs acted as key advisors to male rulers, quietly guiding and influencing major decisions from behind the scenes.⁶¹ This behind-the-scenes influence is a vital element of governance in many Basotho communities, even though it is not formally recognised in customary law.⁶²

In addition, Lesotho's customary law allows women to take on leadership roles in specific situations, most commonly through regency.⁶³ When a chief dies and the heir is still too young to lead, the late chief's widow or another senior woman in the family may step in as regent, overseeing the affairs of the chieftaincy until the heir is ready to rule.⁶⁴ These regency periods are vital for ensuring continuity and stability during times of transition.⁶⁵ Although they don't signal a permanent move toward female leadership, they do highlight the adaptability and practicality of customary law in addressing leadership gaps.⁶⁶ This also challenges the notion that customary law is rigid and unchanging, as some versions of legislated customary law suggest.

Looking at the precolonial and the current situation of women within the chieftaincy system in Lesotho, Semuli argues that, even though women can sometimes be acknowledged as regents, Sesotho customary law still doesn't truly serve them fairly.⁶⁷ Whether as daughters or as mothers, women remain disadvantaged when it comes to issues of chieftaincy succession. When a girl and a boy are born into the same family, they are equal by birth, yet the law places the girl beneath her brother in matters of inheritance and traditional authority.⁶⁸ Likewise, a mother's position is often diminished to that of a dependent under her son's control.⁶⁹ This clearly reflects an imbalance and highlights the deep-rooted unfairness embedded in the system. This injustice is worth challenging, especially when we consider how neighbouring countries

58 Duncan (2006) 44.

59 Duncan (2006) 44. Since the founding of the Kingdom of Lesotho by Moshoeshoe, the principle of chieftaincy was patrilineal succession.

60 Semuli *Matriarchy, Kingship Institution and the Question of Succession in Lesotho: The Case of Princess Senate Gabasheane Masupha* (Master of Arts Dissertation, National University of Lesotho, 2024) 39.

61 Semuli 39.

62 Semuli 39.

63 Semuli 40.

64 Semuli 40.

65 Semuli 40.

66 Semuli 40.

67 Semuli 43.

68 Semuli 43.

69 Semuli 43.

like South Africa have made real strides in allowing women to hold chieftaincy positions. While South Africa's history of marginalising women in traditional leadership mirrors that of Lesotho, the country has since moved forward, both in practice and through legal reforms that promote gender-inclusive succession laws.

2.1.2 The colonial era: A period of persistent exclusion of Basotho women from chieftainship succession

The intrusion of colonialism in Lesotho, therefore, as Mahao coins it, corrupted, alienated and re-crafted the indigenous institutions to suit the colonists' interests to the exclusion of women.⁷⁰ According to Mahao, this shift in leadership meant that the men placed in positions of power began to pursue their own self-serving interests, which resulted in the complete marginalisation of women.⁷¹ Women who had once been valued as trusted advisors to kings were now treated as second-class citizens, expected to follow orders without questions.⁷² While it's true that even in the precolonial era women rarely held chieftaincy titles, this study has argued that women in Lesotho were still respected contributors to leadership, even if their influence was indirect. Colonial rule, however, disrupted this balance and introduced a system rooted in absolute male dominance.

Mohlabane further recounts that colonisation in Lesotho was undergirded by a complex racist and sexist logic, which was also the underpinning logic for the construction of African womanhood.⁷³ The westernised image of a woman infused into Lesotho during this colonial era was that which Casalis (one of the first French missionaries to enter Lesotho) maintained with great conviction: "The Sotho village is divided into two realms, that of women (the houses) and that of men (the cattle *kraals/khotla*) [...] woman's realm is connected with fertility and she is not to enter the man's realm lest she disturb it with her potency (or conversely, lest she pollutes it)".⁷⁴ Undoubtedly, this familiarly represents the western image of a woman as perpetually relegated to the domestic hearth, lest her disorder destabilises the man's world.⁷⁵

As a result, the effect of colonialism on customary law and culture brought about the distortions and misinterpretations of the African culture, which left Basotho women vulnerable and further marginalised.⁷⁶ The African culture was now centered on patriarchy and the gendered law. This also meant that many of the regency and advisory

70 Mahao 2010 *CILSA* 319.

71 As above.

72 As above.

73 Mohlabane *(Re)-Construction of Womanhood in Lesotho: Narratives of 'Unmarried' Basotho Women (Methepa)* (Phd thesis 2020 UP)25.

74 Mohlabane 25.

75 Mohlabane 26.

76 Peart "Section 11(1) of the Black Administration Act No 38 of 1927" 1982 *Acta Juridica* 102. For instance, there have been cases where customary marriages "referred to as customary unions" were declared repugnant as

roles women had occasionally held before colonialism were gradually taken away during the colonial period. Basotho society began to treat women almost like children, expected to obey without being allowed to contribute meaningfully. Despite further marginalisation of the colonial rule, Shale⁷⁷ accounts that in 1940, history was re-written when for the first time in Lesotho's history, a woman became a regent again.⁷⁸

'Mantšebo Seeiso, (the widow of the late chief Chief Seeiso Griffith who died after a very short reign from 1939 to 1940), was the woman who got appointed as regent for a minor, because Chief Seeiso did not have male heirs in his house and the first male child in the second house was not yet of age to succeed his father.⁷⁹

Moving away from the colonial mindset that placed leadership solely in the hands of self-centred men, Mofumahali 'Mantšebo's leadership was so unusual for that time among the Basotho that people who lived during her reign actually referred to her as "*ntate* 'Mantšebo", a title normally reserved for men.⁸⁰ Mofumahali 'Mantšebo's 21 years of ruling addressed the stereotypical beliefs of the time (which sadly still exist to date in Lesotho) that women are not and cannot be good leaders. The colonialists were not genuinely concerned with the rights of the Basotho people and, thereof, the marginalisation of the rights of women; instead, they were preoccupied within infusing individualism and materialism for their benefit, which contrasts with the communal worldview of the Basotho people.⁸¹

they were potentially polygamous and considered inconsistent with the principles of civilisation. Likewise, *lobola* was regarded as a form of payment for having a wife and thus, considered uncivilised.

⁷⁷ Shale 2014 *LLJ* 92.

⁷⁸ Shale 2014 *LLJ* 92.

⁷⁹ *Mabereng Seeiso v 'Mants'ebi Seeiso* (1926-53) HCLR 212. The case is commonly referred to as the 'Regency Case' since it concerned the appointment of a Regent during the minority of the present King, the son of the late Paramount Chief Seeiso Griffith who died in 1940. The parties disputing the right to act as regent were Seeiso's widow, 'Mantsebo, and his junior brother, Chief Bereng. Section 1 of the Laws made no reference to the right of widows to succeed to the chieftainship and declared that succession was by right of birth (not marriage) and followed the line of males. Lansdown J rejected Chief Bereng's claim, which was based, in part, on Section 1 and upheld 'Mantsebo's right to be recognised as Regent and acting paramount chief.

⁸⁰ Shale 2014 *LLJ* 92. Although she acted on behalf of Prince Bereng, who was a minor then, Mofumahali 'Mantšebo's 21 years of ruling did away with the stereotypical beliefs of the time (which sadly still exist to date) that women are not and cannot be good leaders.

⁸¹ Nunn "Law as a Eurocentric Enterprise" 1997 *Law and Inequality* 347.

3 Constitutional marginalisation of succession to chieftainship for Basotho women

The Constitution of Lesotho sets up a system of human rights based on the idea that these rights are not absolute.⁸² Moreover, section 4(1) indicates that human rights limitations in Lesotho shall be predominantly special because they are contained in individual rights provided for under the Bill of Rights.⁸³ Nyane contends that from the foregoing, the purpose of a human rights limitation as a concept is to balance the rights of an individual and those of others with whom they live as a community.⁸⁴ The most common community norms that seem to impose limitations on the individual's freedom are morality, the rights of others, security, public order, and other general social interests.⁸⁵

Another limitation in the Constitution of Lesotho is found in sections 18(1) and (2), in what may be styled an equality (non-discrimination) provision.⁸⁶ This is one of the most complexly drafted clauses of the Constitution because it does not simply establish a right and then provide for its limitation in the usual pattern.⁸⁷ Instead, the section starts with the limitation. It is worth mentioning that the section is riddled with the limitations of the right than the content of the right itself, which, in truth, threatens the enjoyment of this right in Lesotho.⁸⁸

Furthermore, calls have also been made for the amendment of section 18(4)(c) to exclude discriminatory customary laws from the categories exempted from the prohibition of discrimination under section 18(1).⁸⁹

82 Nyane 2015 *LLJ* 5.

83 S 4 (1) of the 1993 Constitution: “[...] the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

84 Nyane 2015 *LLJ* 5.

85 Nyane 2015 *LLJ* 5.

86 Nyane 2015 *LLJ* 18.

87 S 18 (1) and (2) of the 1993 Constitution provides that, “(1) Subject to the provisions of Subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority”.

88 Nyane 2015 *LLJ* 19. It saves certain types of legislation that are justifiable limitations on the right to equality and non-discrimination. Among the laws that may impose permissible limitations on the right are laws that make provision for the application of customary law. See also S 18 (4) (c), which articulates that- Subsection (1) shall not apply to any law to the extent that that law makes provision- (c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law.

89 Mohau “The Constitution of Lesotho Divides the Government into the Legislative, Executive, and Judicial Branches” 2014 *LLJ* 10; See also Maope

Maope posits that a constitutional amendment is not necessary to remove discriminatory laws and practices saved by section 18(4)(c).⁹⁰ Maope proclaims that all parliament must do is enact ordinary legislation repealing the various laws and practices referred to under Section 18(4)(c).⁹¹

Although Maope's argument for leaving the Constitution as is and changing various laws and practices residing under section 18(4)(c) might seem convincing, the author considers Maope's argument to fall short because not amending the Constitution leaves loopholes for discriminatory laws that would have recourse to under section 18(4)(c). The Constitution as the supreme law has the power to determine and rid laws that are discriminatory from the onset, hence it is important to amend any clause in the Constitution that may hinder the promotion of non-discriminatory laws or legislation.

Even more confusing in this dilemma with section 18(4)(c) of the Constitution, as it relates to succession to chieftainship, is the question of whether chieftainship as it falls within the customary law domain is immune from the prohibition of discrimination in section 18(4)(c), or whether its regulation by statute through the Chieftainship Act, 1968 has removed the immunity provided by section 18(4)(c), and is, therefore, subject to constitutional scrutiny.⁹² This debate was at the core of arguments in the prominent case of *Senate Masupha v Magistrate Berea and Others* which will be discussed in the following section. Section 18(4)(c) of Lesotho's Constitution continues to stand as one of the most stubborn barriers to women's access to traditional leadership, because it shields discriminatory customary laws from constitutional scrutiny. As long as section 18(4)(c) remains intact, any new or reformed law can still be undermined by reverting to this constitutional "safe harbour" for discrimination. This is especially devastating for women who are the only daughters or only surviving children in their families yet are automatically excluded from succession to chieftainship purely because of their sex. In rural areas, where knowledge of legal processes is limited and access to justice is already unequal, women have no real way to challenge such exclusion, they cannot turn to the Constitution for protection because the Constitution itself blocks them. This article therefore argues that, amending section 18(4)(c) is not just a legal technicality; it is an urgent constitutional correction needed to close the loophole that legitimises gender discrimination and to finally give

"A Note on Discrimination and Section 18 of the Constitution of Lesotho" 2004 *LLJ* 395.

90 Maope 2004 *LLJ* 395.

91 Maope 2004 *LLJ* 395. See S 26 of the 1993 Constitution, which stipulates that nothing in this subsection shall prevent the making of laws in pursuance of the principle of the state policy of promoting a society based on equality and justice for all citizens of Lesotho, thereby removing discriminatory law.

92 Shale 2014 *LLJ* 96–97.

women, especially rural women a clear, an accessible path to claim leadership roles they are fully entitled to.

4 Judicial marginalisation of succession to chieftaincy for Basotho women

Customary law in Lesotho seems bound by colonial influence. Although Lesotho is a proclaimed democratic nation, much of its regulation is very western, even in customary matters. This limits the state insofar as improving the rights of women in contemporary traditional society, as there is still a lingering patriarchal regulation to the law. Shale,⁹³ 'Nyane⁹⁴ and Metsing,⁹⁵ posit that this is a huge setback in advancing the rights of women regulated by customary law, as customary law in its living state is not static and rigid.

The author holds the same contentions, that if the living customary law is not utilised by the courts of law, common law principles which are western in nature, will always override the customary law principles and ultimately continue to marginalise the rights and status of women in Lesotho. *Senate Masupha v Magistrate Berea and Others*, is one example that indicates further marginalisation of women to succeed to chieftainship in post-colonial Lesotho.⁹⁶ The issue before the court in this case was whether the customary principles and principle of male primogeniture conflicted with the provisions of the Constitution and whether they violated the principles therein about freedom from discrimination and equality before the law as to render the customary law void to such extent and unenforceable.⁹⁷

The court held there was no conflict between the customary law of succession as codified in section 10 of the Chieftainship Act and the Constitution. Any doubts in that regard should be removed by section 18(4)(c) of the Constitution, which states:

Subsection (1) shall not apply to any law to the extent that that law makes provision for the application of the Customary Law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law.⁹⁸

The court further alluded that chieftainship is an institution of customary law.⁹⁹ The Constitution is highly protective of customary law rights relating to these practices. The court indicated that it is fair to say it may be time to move away gradually from the undesirable outcomes of

⁹³ Shale 2014 *LLJ* 100.

⁹⁴ 'Nyane 2019 *PELJ* 21.

⁹⁵ Metsing 16.

⁹⁶ *Senate Masupha v Magistrate Berea and Others* (unreported) C of A (CIV) 29/2013.

⁹⁷ *Senate Masupha v Magistrate Berea and Others* para 30.

⁹⁸ *Senate Masupha v Magistrate Berea and Others* para 53.

⁹⁹ *Senate Masupha v Magistrate Berea and Others* para 53.

customary law in this regard.¹⁰⁰ It further held that it is significant to point out that in acceding to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Government of Lesotho expressed reservation and specifically excluded itself from the provisions of that convention or treaty insofar as it concerns customary practices relating to succession to the throne or chieftainship.¹⁰¹

The court stated that it could not ignore this for purposes of that case or at all.¹⁰² By so doing, the court averred that it would be failing to consider the deliberate and considered view of the executive arm of government and legislature,¹⁰³ and further held that it was not permissible in those circumstances.¹⁰⁴ In considering the circumstances of this case, the court concluded that the applicant could not be regarded as having been discriminated against based on her sex; but, even if that were the case, it did not violate the constitutional provision to the extent that section 10 of the Chieftainship Act might be declared unconstitutional.

Metsing, in commenting on *Senate Masupha's* case, sternly declares that although cultural customs and norms have been used as the reason why women in Lesotho cannot succeed to and inherit the throne, the situation has hidden depths and insights.¹⁰⁵ Culture cannot be an excuse for gender inequality, as culture in its living state is not static; the main reason hindering this matter is a power issue.¹⁰⁶

Ever since the invasion of the colonists, chieftainship in Lesotho has been about retaining insecure men's power over women and maintaining the patriarchy that was infused during the colonial era.¹⁰⁷ For the judicial system in Lesotho, the colonial system appears more expedient rather than formulating a tradition that could advance gender equality for women amidst evolving circumstances related to the succession to chieftainship. In addition, 'Nyane avers that in Lesotho, the 1993 Constitution appears to relinquish its supremacy to customary law regarding succession to chieftainship.¹⁰⁸

Shale argues further that in the *Senate Masupha's* case, the court, in failing to decide whether succession to chieftainship remains a customary law phenomenon or has been transferred into the statutory realm by the Chieftainship Act, has also entrenched in the minds of many the misconception that as long as section 18(4)(c) remains in the Constitution, nothing could be done to remove discriminatory laws in the

100 *Senate Masupha v Magistrate Berea and Others* para 53.

101 As above.

102 As above.

103 As above.

104 As above.

105 Metsing 16.

106 Metsing 16.

107 Metsing 16.

108 'Nyane 2019 *PELJ* 21.

legal system of Lesotho.¹⁰⁹ This misconception persists despite many efforts to dispel it.¹¹⁰

In furtherance to this, Lesotho's Laws of Lerotholi are also a perfect example of codified rules that have lost their practicability in many respects, even as their authority is perpetuated in a momentum of skewed political and social transformation.¹¹¹ While demands for the widening of democratic space and the expansion of regimes of rights have created serious contests against rigid and extant traditional rules in other African states, Lesotho has remained insular to such changes, which should disturb the legislature, jurists and academics, who are devoted to the change of laws that seem stagnant in advancing justice and equality.¹¹² Lesotho still has a long way to go regarding its development to customary law and promoting the rights of women as protected by the Constitution in the current dispensation.

5 Further legislative impediments of succession to chieftaincy for Basotho women

Only after independence were some issues with the Laws of Lerotholi recodified into different pieces of legislation.¹¹³ Matters relating to succession to chieftainship thereto were codified into the Chieftainship Act No 22 of 1968; section 10 provides as follows:

- a When an office of the Chief becomes vacant, the first or only son of the first or only marriage of the chief succeeds to that office, and so, in descending order, that person succeeds to the office who is the first[-]born or only son of the first and only marriage of the first and only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions with this subsection.¹¹⁴
- b If when (*sic*) an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first[-]born or only son of the marriage of the chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority if marriages according to customary law, that person succeeds to the office who is the firstborn or only son of the senior marriage of the chief or a person who but for his death or incapacity would have succeeded to that office in accordance with the provisions of this subsection.¹¹⁵
- c When an office of Chief becomes vacant and there is no person who succeeds under the two preceding subsections, the only surviving wife of the chief or the surviving wife whom he married earliest succeeds to that office of Chief and when that office thereafter again becomes vacant, the

109 Shale 2014 *LLJ* 100.

110 As above.

111 Juma 2011 *Pace International Law Review* 144.

112 As above.

113 Shale 2014 *LLJ* 93.

114 S 10(2) of the Chieftainship Act.

115 S 10(3) of the Chieftainship Act.

eldest legitimate surviving brother of the male chief who held the office last before the woman, succeeds to that office, or failing which an eldest brother, the eldest surviving uncle of that male chief in legitimate ascent, so in ascending order according to the customary law.¹¹⁶

Shale contends that this section continues to reinforce the customary exclusion of women from chieftainship;¹¹⁷ worse, it stifles the evolution of the customary practice that would otherwise accommodate women as times change.¹¹⁸ All three subsections detailing the order of succession expressly refer to male children to the exclusion of the female children of chiefs.¹¹⁹

Shale further accounts that although subsection (4) has opened room for women into chieftainship, the category of unmarried women being daughters of chiefs remains outside the provisions of section 10.¹²⁰ This inclusion of women only marks a small departure from the discriminatory practice of the total exclusion of women.¹²¹ In terms of this section, unlike men, women only qualify for chieftainship upon marriage into the families of chiefs.¹²² This section sustains the plight of inequality and discrimination against women in the Basotho nation.¹²³

Most of the laws and policies passed before and after the 1993 Constitutional dispensation in Lesotho reflect the colonists' perceptions of how the Basotho people should lead their lives, and these laws place women in a marginalised position, treating them as minors and secondary citizens in the group to which they belong. Succession to chieftainship for Basotho women is conducted and dealt with through the lens of common law and the strict application of the created official customary law. Official customary law contains western legal principles that are gendered and patriarchal in nature.

6 Comparative perspectives from South African jurisprudence

The South African constitutional edifice can be distinguished from that of Lesotho in that it has a more comprehensive scheme dealing with the relationship of customary law with the Constitution.¹²⁴ The first notable feature of South African jurisprudence is the way the 1996 Constitution has a protective stance towards customary law, in extending the

¹¹⁶ S 10(4) of the Chieftainship Act.

¹¹⁷ Shale (2014) *LLJ* 94

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ As above.

¹²¹ As above.

¹²² As above.

¹²³ Metsing 9.

¹²⁴ Himonga & Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?" 2000 *SALJ* 306.

obligation on the courts of law to interpret customary law to promote the spirit, purport and objectives of the Constitution in section 39(2).¹²⁵

The importance of customary law is also reinforced by section 39(3),¹²⁶ which states that the Bill of Rights does not deny the existence of any other rights or freedoms recognised or conferred by either common law or customary law, or legislation, to the extent that they are consistent with the Bill of Rights. Lesotho's Constitution lacks in this regard; there are no provisions holding official customary law accountable for infringing on the rights of women.

Second, 'Nyane'¹²⁷ argues that in Lesotho the Constitution appears to relinquish its supremacy to customary law in matters of succession to chieftainship, conversely, under the South African constitutional jurisprudence, as confirmed by courts of law, customary law derives its validity from the Constitution, not the other way around.¹²⁸ This is a notable change Lesotho should consider when amending the Constitution.

Third, the South African Constitutional Court in the case of *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC)¹²⁹ ruled that the principle of male primogeniture in the context of succession to private estates is unconstitutional as the principle violates section 9(3) of the Constitution.¹³⁰ This principle was also dismissed in *Shilubana v Nwamitwa* 2009 2 SA 66 (CC),¹³¹ in which, in its strict application through section 211(2),¹³² of the 1996 Constitution, the court allowed a

125 See S 39(2) of the 1996 Constitution. This section stipulates that when interpreting any legislation and when developing common law or customary law, every court, tribunal, or forum *must promote the spirit, purport and objects of the Bill of Rights* (author's emphasis).

126 See S 39(3) of the 1996 Constitution. This section states that the Bill of Rights does not deny the existence of any other rights or freedoms recognised or conferred by common law / customary law or legislation to the extent that they are consistent with the Bill of Rights.

127 'Nyane 2019 *PELJ* 21.

128 'Nyane 2019 *PELJ* 21. See also the case of *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51 the court held that: "while in the past indigenous law was seen through the common law [...] it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law but to the Constitution".

129 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

130 *Bhe v Magistrate, Khayelitsha* para 91; S 9 of the 1996 Constitution provides that everyone is equal under the law and should be accorded equal protection and benefit from the law.

131 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

132 S 211(2) of the 1996 Constitution, (1) recognises the institution, status and role of traditional leadership according to customary law; (2) a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to or repeal of, that legislation or those customs; and lastly, (3) holds that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

traditional community to develop their custom by deciding to enthrone a female as a successor to chieftainship.

Through the development of customary law that is required by the 1996 Constitution, the courts in South Africa have attempted to eradicate old notions of patriarchy and the male domination incompatible with the guarantee of equality under the new constitutional order.¹³³ In Lesotho on the other hand, as exemplified by the *Senate Masupha* case, customary law is strictly applied in a discriminatory manner, excluding women from succeeding chieftainship roles. Unfortunately, this discrimination is protected by the 1993 Constitution, which silences traditional leaders in influencing the development of customary law or rules.

7 Conclusion

Considering the longstanding marginalisation of Basotho women who are regulated by customary law under Lesotho's 1993 Constitution, and the persistent struggle to develop customary law in its living state regarding succession to chieftainship, there is a necessity that has risen to ensure that women's rights in Lesotho are safeguarded through the evolution, restructuring, and formalisation of their legal framework, emphasising the crucial need for specific reforms. This argument stems from the restrictions placed by section 18(4)(c) of the Constitution, which does not allow women to succeed to chieftainship in Lesotho.

This article argued that section 18(4)(c) perpetuates the continuing tensions between customary rules and the virtues of liberal democracy in the Constitution of Lesotho. This section in the 1993 Constitution of Lesotho, legitimises the discriminatory nature of the created official customary law penned in statutes such as the Laws of Lerotholi and the recent Chieftainship Act, perpetuating the ongoing issues of undermining women in traditional roles.

The article in examining the state of customary law in Lesotho as it relates to succession to chieftainship for Basotho women, delved into how the legal community, particularly the judiciary and legislature, approaches, interprets and comprehends it. In Lesotho, the customary law governing the succession to chieftainship for women remains highly inflexible, a characteristic protected by the Constitution. Hence, the article advocates for the amendment of section 18(4)(c) to align with the Constitutional Bill of Rights and the protection of women.

¹³³ 'Nyane 2019 *PELJ* 21.