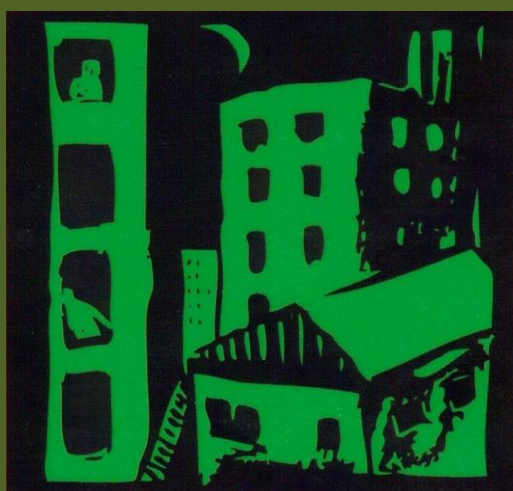


LAW DEMOCRACY & DEVELOPMENT



VOLUME 23 (2019)

DOI: <http://dx.doi.org/10.17159/2077-4907/2019/idd.v23a2>

ISSN: 2077-4907
CC-BY 4.0

Bicameralism in Lesotho: A review of the powers and composition of the second chamber

HOOLO 'NYANE

Associate Professor, Head of Public & Environmental Law, School of Law, University of Limpopo, Polokwane, South Africa

<https://orcid.org/0000-0001-5674-8163>

ABSTRACT

Lesotho has a bicameral parliamentary system based on the British model. While the National Assembly is clearly a representative House elected by the citizenry, the purpose, structure and legislative powers of the Senate as the Second Chamber have been a matter of considerable controversy throughout the history of parliamentary democracy in the country. The National Assembly generally has the upper hand not only in the legislative process but also in the broader parliamentary system – it chooses the Prime Minister, it places its confidence in the government and it can withdraw such confidence. The fact that the model generally gives the National Assembly the upper hand is a matter of common cause. What is in question, though, is the nature and extent of the

limitation of the powers of the Senate in terms of the Constitution. This article investigates this question and contends that the composition of, and restrictions on, the Senate need to be reviewed in order to enable the Chamber to play a meaningful role in Lesotho's parliamentary democracy.

Key words: Constitution of Lesotho, Bicameralism, Senate, National Assembly, Powers of the Second Chamber

1. INTRODUCTION

One of the foundational features of Lesotho's parliamentary design, cast in the British mould,¹ is that it is parliamentary.² As Jennings contends, albeit in the British context, a system is regarded as parliamentary when

“....the people are for the time being represented by the House of Commons, subject always to an appeal to the electorate; because, in consequence, the approval of the House of Commons is necessary for the general policy and, frequently, the specific proposals of the Government; and because all other authorities in the State, including the Sovereign and the House of Lords, must give way to a House of Commons that clearly represents the people”.³

The Lesotho parliamentary design to all intents and purposes fits this description. The electorate does not elect the government directly but, instead, elects the Parliament which in turn chooses the government.⁴ The Parliament is organised into two chambers – the National Assembly and the Senate. While bicameralism dates back to the colonial period, its modern incarnation in Lesotho started with the 1966 Constitution.⁵ It is now retained, almost as it was at independence, under the current Constitution of Lesotho

¹ See Macartney WJA “African Westminster? The Parliament of Lesotho” (1970) *Parliamentary Affairs* 121. At 21 the author metaphorically observes : “Certainly the physical pattern is that of Westminster, down to the dispatch boxes presented by the British House of Commons and the Gentleman Usher of the Black Rod, who looks just as much the part as does his British namesake. In its anxiety not to deviate from British parliamentary practice indeed the National Assembly is officially converted into an upper house for the Speech from the Throne by the simple expedient of a ritual draping of the Speaker's chair with royal purple.” In *Law Society of Lesotho v Ramodibedi* (Constitutional Case No. 1 of 2003), Maqutu J at para [7] shared a similar view : “It seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again when constitutional problems arise Britain is our first reference point.”

² Macartney WJA “The parliaments of Botswana, Lesotho and Swaziland” (1969) *The Parliamentarian* 2.

³ Jennings I *Cabinet government* 3rd ed (Cambridge: Cambridge University Press 1969) at 13. However, Mahao compares the notion of King-in-Parliament to a similar notion under traditional forms of government called *morena-le-lekhotla* (King-in-Council). See Mahao NL “Chieftaincy and the search for relevant constitutional and institutional models” (1993) 9(1) *Lesotho Law Journal* 149.

⁴ See s 87(2) of the Constitution. See further, ‘Nyane H “Formation of a government in Lesotho in the case of a hung parliament” (2016) 20 *Law, Democracy and Development* 174.

⁵ The 1966 Constitution of Lesotho was the independence Constitution. However, it was by and large a carbon copy of the 1965 transitional Constitution.

(“Constitution”).⁶ The founding clause for bicameralism under the Constitution is section 55 which provides that “there shall be a Parliament which shall consist of the King, a Senate and a National Assembly”.⁷ Although the King appears to be a chamber of Parliament, theoretically he is not. He exists as a member of Parliament by operation of the doctrine of King-in-Parliament which has its taproots in British parliamentary practice.⁸ As Ieraci instructively puts it, the doctrine “stands for the fact that in the English constitutional system, to become a binding law, a rule must be formally enacted by the advice and consent of the King, the Lords, and the Commons”.⁹ The King is therefore advised and assents to the law as it is passed by the two chambers.¹⁰

As such, the powers of the King in relation to Parliament are largely titular: to assent to laws,¹¹ to summon Parliament,¹² to prorogue and to dissolve it.¹³ The predominating chamber, in the parliamentary design in Lesotho is the National Assembly. Its constitutional powers are far-reaching in comparison to those of the Senate: it chooses the Prime Minister,¹⁴ it can withdraw confidence from the Prime Minister and the government,¹⁵ it originates legislation¹⁶, and it has an upper hand in the legislative process.¹⁷ The Senate, which is predominantly aristocratic,¹⁸ has certain substantive powers under the Constitution like the entrenchment of certain clauses of the Constitution. In terms of the Constitution, in order to amend certain of its clauses the consent of the Senate is a requirement.¹⁹ Furthermore, in order for a bill to be enacted into law, it must have been passed by the two chambers of Parliament. However, the Constitution places certain restrictions on the Senate in relation to the legislative process.²⁰ This limitations have been a subject of controversy in Lesotho. The main

⁶ The current Constitution of Lesotho was adopted in 1993.

⁷ Section 54 of the Constitution.

⁸ Dickinson HT “The eighteenth-century debate on the sovereignty of parliament” (1976) 26 *Transactions of the Royal Historical Society* 189.

⁹ Giuseppe Ieraci “‘King in Parliament’. Note for a conceptual scheme of the government-parliament relationship in parliamentary democracies” (1999) available at <https://ecpr.eu/filestore/paperproposal/db8c279d-e3d8-42ad-b5d6-024af8653917.pdf> (accessed 10 April 2019); Bogdanor V *Monarchy and the constitution* (Oxford: Oxford University Press 1995). According to Elton GR *The parliament of England 1559-1581* (Cambridge: Cambridge University Press 1986) at 17. The author posits : “The organisation of parliament into the trinity of the king and the two houses of parliament traces its origins to the medieval times, when, according to one historians of the English parliament, it was the ‘King’s Court of which he was the president but not a member.”

¹⁰ See also McIlwain CH *Constitutionalism and the changing world* (Cambridge: Cambridge University Press 1939).

¹¹ Section 78(1) of the Constitution.

¹² Section 83 of the Constitution.

¹³ Section 84 of the Constitution.

¹⁴ Section 87(2) of the Constitution.

¹⁵ Section 83(4)(b) of the Constitution.

¹⁶ Section 78 of the Constitution.

¹⁷ Section 80(3) of the Constitution.

¹⁸ Section 55 provides : “The Senate shall consist of the twenty-two Principal Chiefs and eleven other Senators nominated in that behalf by the King acting in accordance with the advice of the Council of State.”

¹⁹ Section 85 of the Constitution.

²⁰ Section 80 (3) of the Constitution.

question is whether these limitations effectively mean that the National Assembly runs the legislative process alone.²¹ Put differently, the question is whether the Senate powers under the Constitution of Lesotho are only revisionary and dilatory. If the Senate only has revisionary and dilatory powers, to what extent can it review and delay a bill?

The purposes of this article, therefore, is to investigate these questions. Methodically, the article follows an exegetic interpretation of the clauses of the Constitution of Lesotho, the decided cases, and the comparative lessons to be learnt from England as the source on which the Lesotho model is based. The article is divided onto four main parts. The first part revisits the conceptual and theoretical debates on the notion of bicameralism and the powers of “second chambers”. The second part traces the development of bicameralism in Lesotho. The third part deals especially with the design and powers of the Senate under the current Constitution of Lesotho. The fourth part discusses the lessons that can be learnt from the United Kingdom.

2. REVISITING BICAMERALISM IN PARLIAMENTARY SYSTEMS: IS THE SECOND CHAMBER ONLY DILATORY AND REVISIONARY?

Theoretically, and perhaps historically, second chambers were used for certain purposes in the design of not only parliaments but also constitutions in general. These purposes have varied from one epoch of history to another and from one State to another. As Shell pointedly contends, “any examination of bicameralism must look at the ideas upon which the concept, not simply its varied institutional forms, is based”.²²

This is true not only for bicameralism,²³ but also for all constitutional designs – the values and ideas that underlie the institutions determine the form taken by the institutions.²⁴ However, it would seem that the ideas that are used to justify the existence of second chambers are older than the institutions themselves.²⁵ This is arguably true for the second chamber in Lesotho; it seems to resonate more with the medieval ideas that undergirded the rise of not only second chambers but also of parliamentarianism in general as the antithesis to monarchism in Western Europe.²⁶

In the 14th century “separate representation for nobility and the church from that of the remainder of society was the *raison d’être* for the two chambers”.²⁷ Due to the pre-

²¹ See Bogdanor V *Power to the people: a guide to constitutional reform* (London: Victor Gollancz 1997) at 119 where the author, referring to British bicameralism, suggests that Britain has “in effect a unicameral system of government but with two chambers of parliament”.

²² Shell D “The history of bicameralism” (2001) 7(1) *The Journal of Legislative Studies* 5 at 5. See also Tsebelis G & Money J *Bicameralism* (Cambridge: Cambridge University Press 1997).

²³ Patterson S C & Mughan A “Senates and the theory of bicameralism” in Patterson SC & Mughan A (eds) *Senates: bicameralism in the contemporary world*, (Ohio: Ohio State University Press 1999) at 1 describe bicameralism as “... an institutional design for a two-house representative assembly”.

²⁴ Russell M *The contemporary House of Lords. Westminster bicameralism revived* (Oxford: University Press 2013).

²⁵ Shell (2001) at 5.

²⁶ Russell M “What are second chambers for?” (2001) 54 *Parliamentary Affairs* 442.

²⁷ Shell (2001) at 6; Elton (1986) at 17.

eminence of the aristocracy at the time, the second chamber acquired the incarnation of the “upper house”,²⁸ thereby connoting the differentiation between classes in society.²⁹ The “upper house” represented the nobility and the aristocracy while the “lower chamber represented the common men of the Realm”.³⁰ In Britain “the House of Lords served as the safety valve of aristocracy against the egalitarian tendencies of the more popular commons”.³¹ Indeed this initial *raison d’être* for second chambers waned over time as democracy gained currency, and consequently the word “aristocracy” fell into disfavour and the justification mutated into being the “safeguard of minorities”.³² As the original ideas for the second chambers gradually became indefensible, new ideas emerged in favour of bicameralism. These were, but are not limited to : giving the country time for second thoughts on legislation, improving legislative bills from the lower house, relieving the congestion of business in the house, and safeguarding certain fundamental institutions to the historical design of the State.³³ The most plausible *raison d’être* is mostly found in federal States where second chambers represent or safeguard the interests of constituent states or regions.³⁴ While the first chambers are mostly used for majoritarian purposes, second chambers are normally used for non-majoritarian purposes.³⁵ As Horgan argues:

“In federal systems, the non-majoritarian principle is customarily related to the role of the second chamber in representing territorially-based constituent units in the federal legislative institutions. Even among federal systems, however, there exists a wide variation in the degree to which non-majoritarianism is reflected in the make-up of, and roles played by, second chambers.”³⁶

²⁸ According to Romaniello M “Bicameralism: a concept in search of a theory” (2016) available at <http://www.amministrazioneincammino.luiss.it/app/uploads/2016/09/Romaniello.pdf> (accessed 11 May 2019). The legislature was class-based and it aimed to preserve the class advantages. Hence, the distinction between the upper and the lower houses was rooted in the class-conscious sense of “upper” and “lower”.

²⁹ Loewenberg G & Patterson SC *Comparing legislatures* (Boston: Little Brown 1979).

³⁰ Russell C “Thomas Cromwell’s doctrine of parliamentary sovereignty” (1997) 7 *Transactions of the Royal Historical Society* 235.

³¹ De Minon MH “The passing of bicameralism” (1975) 23 *American Journal of Comparative Law* 236 at 237.

³² Passaglia P “Unicameralism, bicameralism, multicameralism: evolution and trends in Europe” (2018) 10 *Perspectives on Federalism* E-1.

³³ Shell D *The House of Lords* (London: Harvester Wheatsheaf 1992).

³⁴ Swenden W *Federalism and second chambers. Regional representation in parliamentary federations: the Australian senate and German Bundesrat compared* (Brussels: P.I.E.-Peter Lang 2004). In South Africa, the second chamber is used to represent the provinces. See s 42 of the *Constitution of South Africa*, 1996. See also Mfketi N “Bicameralism in South Africa” (2012) 35(4) *Canadian Parliamentary Review* 17; Malherbe EFJ, “The South African national council of provinces: trojan horse or white elephant”, (1998) *Journal of South African Law* 77.

³⁵ Aroney N “Four reasons for an upper house: representative democracy, public deliberation, legislative outputs and executive accountability” (2008) 29 *Adelaide Law Review* 205.

³⁶ Horgan GW “Bicameralism: factors in the evolution of second chambers in four federations” (unpublished MA thesis, Queen’s University, Kingston, Ontario, 2000) at 2.

The emergence of liberalism also seems to have brought fresh dynamics to the discourse.³⁷ The repugnance of liberalism for the notion of absolute democracy called for liberals to look up to the second chambers as a means of “keeping the country safe from democracy”.³⁸ An overview of the literature on bicameralism demonstrates that the reasons for second chambers vary from one country to another, from one constitutional design to another, and from one historical epoch to another.³⁹ However, one common consideration seems to be pre-eminent – second chambers are not necessarily majoritarian in nature.⁴⁰ They serve to balance and check against both the limitations and excesses of majoritarianism. In order to attain this end, constitutions use factors, such as, the history, and racial and territorial makeup of the country. Nevertheless, the pre-eminence of representative democracy has empowered the first (representative) chambers of parliament over the second (mostly non-majoritarian) chambers.⁴¹

The formal powers accorded to second chambers vary considerably from one country to another and from one constitutional system to another. However, Lijphart has categorised parliamentary systems into two broad categories – symmetrical and asymmetrical.⁴² A system is symmetrical when the powers of the two houses of parliament are the same, or at least more or less the same. In that design the bicameralism is said to be “strong”. Another feature of “strong” bicameralisms is that the membership of the two houses is “incongruent” (not the same).⁴³ A system becomes asymmetrical when the balance of power between the two chambers is very much skewed in favour of one chamber. In that design, the bicameralism in question is said to be “weak” or utterly insignificant. Most of the bicameral systems following the British model have memberships that are incongruent, but are largely asymmetrical. The constitutional powers of the second chamber are relatively weak in comparison to those of the first (representative) chamber. In relation to the mother of Westminster parliaments – the parliament of Britain – Russell contends that the House of Lords enjoys significant formal powers, being able to delay legislation for roughly a year.⁴⁴ He

³⁷ Campion GCB “Second chambers in theory and practice” (1953) *Parliamentary Affairs* 17.

³⁸ Campion (1953) at 20 argues: “In the nineteenth century... throughout Europe, many of whom, while calling themselves ‘Liberals’, had a profound repugnance to ‘dependence on an elected majority’ (which they contrasted with ‘constitutional liberty’) and looked to a Second Chamber for the means of ‘keeping the country safe from democracy’.”

³⁹ Miller J, Hammond TH & Kile C “Bicameralism and the core: an experimental test” (1996) 21 *Legislative Studies Quarterly* 83; Lijphart A *Democracies. Patterns of majoritarian and consensus government in twenty-one countries* (London: Yale University Press 1984).

⁴⁰ Mulgan R “The Australian senate as a ‘house of review’ ” (1996) 31 *Australian Journal of Political Science* 191.

⁴¹ Riker WH “The justification of bicameralism” (1992) 13(1) *International Political Science Review* 101.

⁴² Lijphart A *Patterns of democracy. Government forms and performance in thirty-six countries* (New Haven: Yale University Press 1999).

⁴³ Llanos M & Nolte D “Bicameralism in the Americas: around the extremes of symmetry and incongruence”, (2003) 9(3) *The Journal of Legislative Studies* 54.

⁴⁴ Russell M “Upper house reform in the United Kingdom and Australia” (2001) 36(1) *Australian Journal of Political Science* 27 at 31. However, the author is quick to concede at 32 that “ the United Kingdom cannot be said to have exhibited ‘strong bicameralism’, since the upper house has tended to play a marginal role in policy making”.

argues that by international standards it could be categorised “as only a ‘moderately’ asymmetrical power, given the very weak powers of some second chambers”.⁴⁵ While the British second chamber has a delaying power of about a year, and the Irish second chamber only three months, the Spanish Senate has only two dilatory powers.⁴⁶

It could be observed therefore, that while there are marked variations globally, it would seem that Westminster based second chambers largely have asymmetrical or moderately asymmetrical powers in relation to the first (representative) chambers.⁴⁷ They do not have the power to choose the government.⁴⁸ Neither do they have the power to veto legislation or government policy. They are limited to review which is effected through a “cooling-off” period of varying durations. The one-year dilatory power given to the House of Lords in Britain can, in certain political situations, be tantamount to a veto power, regard being had to the fact that political programmes are normally hastened.

3 DEVELOPMENT OF LESOTHO’S MODEL OF BI-CAMERALISM

A study of the development of bicameralism in Lesotho helps in explicating some of the peculiar nuances of its Second Chamber under the present design. It helps explain why the Chamber has taken on the hybridity of combining traditionalism with the received British features; together with the composition and powers of this Chamber as they obtain today under the Constitution. This section traces the development of bicameralism in Lesotho during two different but equally important historical epochs – the colonial period and the post-independence period.

3.1 Evolution of bicameralism during the colonial period

The development of bicameralism in Lesotho can be traced back to the period between 1900 and the 1960s.⁴⁹ This period not only impacted on the pre-existing traditional models, but was also very influential on the institutions that were later to be adopted in Lesotho post-colonially.⁵⁰ In 1903 there was one important constitutional development which occurred in Lesotho. This was the year when the first National Council was convened.⁵¹

⁴⁵Russell “Upper house reform” (2001) at 31.

⁴⁶ Laver M “The role and future of the upper house in Ireland” (2002) 8(3) *Journal of Legislative Studies* 49.

⁴⁷ Bogdanor (1997).

⁴⁸ Bogdanor (1997).

⁴⁹ ***Lesotho gained independence from Britain on 4 October 1966. See further Gill SJ A short history of Lesotho from the late Stone Age until the 1993 elections (Moriya, Lesotho: Morija Museum & Archives 1993).***

⁵⁰ See Basutoland Council *Report on Constitutional Reform and Chieftainship Affairs* (Maseru: Government Printer 1958)

⁵¹ See Basutoland Council Proceedings of the Basutoland National Council (1903-11), Maseru. The Basutoland Council was inaugurated in 1903. See further Gocking R “Colonial rule and the 'legal factor' in Ghana and Lesotho” (1997) 67(1) *Africa* 61; Ashton H *The Basuto* 2 ed (London: Oxford University Press 1952).

At the twilight of the 19th century it became apparent that the institution of the *Pitso* (a traditional assembly) as a real participative process was declining and losing its original meaning.⁵² Until 1874 when the British governor's agent, Col. CD Griffith, instigated that it should be held annually, the *Pitso* had been held irregularly.⁵³ The major blow to the *Pitso* was made during the annexation period when the premier of the Cape Colony, Thomas Scanlan, visited Lesotho to discuss the form of government that the country would follow. He made "proposals" that came to be known as "*Scanlan's Constitution*", which proposed a council.⁵⁴ The proposals suggested a council that would be constituted of chiefs, half of whom were to be nominated by the paramount chief, and the other half by the governor's agent. The meeting of the council was to be convened by the governor's agent. Letsie, who was the paramount chief at the time, largely agreed with the terms of Scanlan's Constitution.⁵⁵ In the period 1879–1886, annual *Pitsos* were interrupted and were held irregularly again. With the passage of time, rather than being a platform for consultative rule making and governance, the *Pitso* turned into the one-way avenue by which chiefs and government merely informed the nation about the decisions already taken, and for introducing distinguished government guests.⁵⁶ In fact, this was consonant with what High Commissioner, Sir Alfred Milner, wrote in 1899:

"I agree that the proposal of a Council should be encouraged. The general Pitso of the Nation is too large and unwieldy an assembly for discussion. It is useful as giving an opportunity to the Government to make any announcements it desires to the people and for gauging popular feeling. But it is incapable of serious debate or of formulating resolutions of any value."⁵⁷

Consequently, at a national *Pitso* in 1899, the chiefs present are reported to have agreed to the formation of a council. The High Commissioner's formal approval was received in May 1903.⁵⁸

When it became clear that the *Pitso* was falling into disuse, the paramount chief resorted to the informal body of his leading scions, called "Sons of Moshoeshoe", as his body of counsellors and advisers.⁵⁹ However, it would seem that this body dealt more with succession disputes for both the paramountcy and the lower-level chieftaincy –

⁵² Pim A *Basutoland: The Financial and Economic Position of Basutoland* (Pim Report) (Cmd 4907, HMSO 1935). For a discussion of the progressive decline of the efficacy of the *pitso* see Wallman S "Lesotho's pitso: traditional meetings in a modern setting" (1968) 2(2) *Canadian Journal of African Studies* 167.

⁵³ Basutoland Council (1958) 'Historical introduction' at 15-35.

⁵⁴ Basutoland Council (1958) at 34. See also Council Papers vol 1. Due largely to some Basotho chiefs' disenchantment with Cape rule, the proposals were largely rejected by the chiefs.

⁵⁵ Basutoland Council (1958).

⁵⁶ Hailey L *Native administration in the British African Territories Part V. The High Commission Territories: Basutoland, The Bechuanaland Protectorate, and Swaziland* (London: HMSO 1953) at 72.

⁵⁷ In a letter dated 20 April 1899. See Council Papers vol 1.

⁵⁸ See Basutoland Council (1903-11) at 30.

⁵⁹ According to Moor Sir H *Basutoland: Report of the Administrative Reforms Committee (Moor Report)* (April-July 1954) para 11: "'Sons of Moshoeshoe' was an amorphous body. Originating as the name implies as a family Council concerned with the settling of domestic disputes and safeguarding the succession to the Paramountcy, it now includes members whose presence it would be difficult to substantiate on grounds of consanguinity, and without any statutory authority exercises considerable influence on matters of national importance."

and not so much with the general affairs of society. As Lord Hailey observes, "...the authority exercised by the 'Sons of Moshoeshoe' in regard to succession not only to the Paramount chieftaindom but to other chieftaindoms has given this body an exceptional position in the indigenous organization".⁶⁰

As a result, the decline in the utility of the *Pitso* and the emergence of the body called the Sons of Moshoeshoe⁶¹ caused the colonial administration to start to make proposals about a formal Advisory Council.⁶² While the idea of the council was opposed by the majority of chiefs, it was accepted by *Morena e Moholo* (Paramount Chief) Letsie I. The idea was first mooted by Sir Marshal Clark at a national *Pitso* in 1886,⁶³ and *Morena e Moholo* accepted it on behalf of his subjects. It became apparent later, at the subsequent national *Pitso* in 1887, that *Morena e Moholo* Letsie I was not in agreement with the other sons of Moshoeshoe about the proposal for a formal council. They contended that the council was aimed at destroying the institution of chieftainship.⁶⁴ Despite the clearly expressed opposition to the council, the Paramount Chief agreed to the formation of the council. The National Council was therefore duly formed in 1903. Although it was not necessarily formed to be an exclusive body for the aristocracy, the Council's membership was nevertheless predominantly aristocratic. Of its 100 members, *Morena e Moholo* appointed 94, who were largely chiefs and their counsellors. There were four members appointed by government on the advice of missionaries.⁶⁵ The resident commissioner and *Morena e Moholo* were members *ex officio*; the former being the president, while latter was styled "chief councillor". According to section 7 of its constitutive regulations, the Council did not have legislative powers, but was only a consultative body on "any laws of a domestic nature which may be proposed and its expression of opinion thereon be submitted to the High Commissioner".⁶⁶ It was therefore only advisory, and existed without any formal statute establishing it, except for the regulations issued by the High Commissioner.⁶⁷ It only received statutory recognition in 1910 through a proclamation.⁶⁸

The Council, which was originally intended to be representative of the nation, in reality conducted itself differently. According to Lord Hailey:

"The Council took a somewhat different view of its own position. It represented mainly the interests of the chiefs and it saw itself as the natural

⁶⁰ Moor Report (1954) at 73. See also Hailey (1953).

⁶¹ Moor Report (1954) at para 11.

⁶² See Mohapeloa JM "Indirect rule and progress toward self-rule and independence: the case of Lesotho", paper presented at the International Conference on Southern African History, 1977, Maseru.

⁶³ See Basutoland Annual Report (Cmnd 4838 June 1886).

⁶⁴ Chief Masopha, the brother of *Morena e Moholo*, was the fiercest critic of the Council. He is on record denouncing his brother at the National Pitso held in 1887.

⁶⁵ Morse C et al *Basutoland, Bechuanaland Protectorate and Swaziland: Report of an Economic Survey Mission* (London: Her Majesty's Stationary Office 1960).

⁶⁶ The first major task of the Council was to adopt the Code of the Laws of Lerotholi, 1903. See also Juma L "The laws of Lerotholi: role and status of codified rules of custom in the Kingdom of Lesotho" (2011) 23(1) *Pace Int'l Law Review* 92.

⁶⁷ Basutoland Council *Proposed Regulations for Constitution of Basutoland* PRO CO 417/375.

⁶⁸ Proclamation No 10 of 1910.

custodian of the traditions from which the chiefs derived their authority over the people.”⁶⁹

The Council alienated the chiefs from the general population. They struggled to balance their interests as chiefs with the interests of the colonial authorities. The chiefs could not strike this sensitive balance, and ended up offending both the administration and the commoners. As an article in a local tabloid demonstrated, the brewing discontent among the educated commoners reached great heights. The author opined that the “national council was a parliament merely of chiefs”,⁷⁰ and this then agitated some commoners’ opposition to the Council itself. Sir Allan Pim, who was commissioned by the colonial administration to assess the economic and financial position of the territory, observed that chiefs in the Council “strenuously oppose any measure considered as likely to affect the hereditary rights and prerogatives of chiefs”.⁷¹ This made the administration sympathetic to the commoners’ call for popular participation in the Council, as there was a strong feeling held by some commoners that the Council did not represent the nation.⁷²

Besides the lack of popular participation in the Council, there was also widespread dissatisfaction with the way the chiefs managed native courts and matters of justice in general.

The major reforms were introduced in the 1930s following Sir Alan Pim’s recommendations, which saw the gazettment of chiefs and the stripping of their judicial powers. These reforms climaxed with the enactment of twin proclamations in 1938.⁷³ Another wave of reforms, which coincided with the rein of Regent Paramount Chief Mats’ebo Griffith, were introduced in the 1940s. Major concessions to the power of the aristocracy in the semi-legislative body were made. The first inroad was the introduction of the principle of popular participation through the introduction of district councils, which acted as electoral colleges for participation in the National Council.⁷⁴ The second inroad was the establishment of the principle of an “elective legislative council” during this period.

Clearly, 1940–1960 was a critical period for the downward spiral in the power of the monarchy in general and its legislative power in particular. Regent Mats’ebo made many concessions to the colonial administration, which was by then in tacit alliance

⁶⁹ Hailey (1953) at 62.

⁷⁰ Mohlomi (*nom de plume*) *Naledi* July 1904 (quoted by Machobane LBBJ *Government and change in Lesotho, 1800-1966: A study of political institutions* (Basingstoke & London : Macmillan 1990) at 25).

⁷¹ Pim Report (1935).

⁷² See article by Seele F in *Naledi* in 1907, where he opined that “... this is indeed a Council of Chiefs. They are the ones who requested it and it was given to them, hence it is in order that only they should run it. If the Nation would like to participate in government, it should request for its own Council”. Translation is by Machobane (1990) at 25.

⁷³ Proclamations 61 and 62 of 1938.

⁷⁴ Members of the District Councils were “elected” at the ward *pitsos*. While the District Councils effectively started functioning in 1945, they were given statutory force in 1948 through Proclamation No 48 of 1948. Election to the National Council through the Districts Councils reduced the Monarch’s control not only over the membership of the National Council, but even its agenda.

with the commoners.⁷⁵ In 1954, the report of the Administrative Reforms Committee⁷⁶ was released. One of its key recommendations was that

“...the size of the Council should be reduced, particularly if it is to carry out efficiently the additional functions which we recommend, and ... the Resident Commissioner and Paramount Chief should formally open the session and then retire.”⁷⁷

The National Council and the Sons of Moshoeshoe vehemently rejected the Moor Report *in toto*.⁷⁸

In short, it could be observed that the two decades that straddled the reign of Regent Mants'obo was the period of great constitutional reforms. It could even be safely argued that the seeds of a constitutional monarch typified by the Westminster design, which was later to be adopted in Lesotho, were sown during this period. The Westminster-like design that was first introduced by the 1959 Constitution was a natural consequence of the series of concessions in that decade by the monarch. While the aristocracy was very strong at the time of the establishment of the National Council in 1903, it soon lost ground with the emergence of popular participation and the principle of election to the council.

Ever since the establishment of the Advisory National Council in 1903, it had always been unicameral, and “the *Morena e Moholo* and his principal chiefs were automatically to be members”.⁷⁹ The monarch still had his appointees. This principle of aristocratic and monarchical representation in the Council persisted until the 1959 Constitution. According to the Constitutional Reform Committee ahead of the 1959 Constitution, “a single chamber is what Basuto are used to”.⁸⁰ This was so because unicameralism permeated the entire history of the Council since 1903. According to Machobane:

“The Committee had felt that the interaction of thought between chiefs and commoners in a single body is in consonance with the national traditions which long antedate the establishment of Basutoland Council.”⁸¹

The quest of the Committee to maintain unicameralism was further justified by the fact that one of the principles of the reform was to minimise the effects of dualism as far as possible in order to link “together into one system of government the authority of Her Majesty’s representatives and the authority of the Basuto Nation as embodied in the

⁷⁵ Weisfelder R “The Basotho monarchy, a spent force or a dynamic political factor?” A paper presented at the 14th Annual Meeting of the African Studies Association 3-6 November 1971, Denver. At 41, the author observes that “... the Basotho Kingship was both literally and figuratively emasculated for a most critical, twenty-year segment of its political evolution”.

⁷⁶ See Moor (1954).

⁷⁷ Moor (1954) at para 57.

⁷⁸ See “The Moor Report rejected” [1955] 1(4) *Mohlabani* 12.

⁷⁹ Machobane (1990) at 82.

⁸⁰ Machobane (1990) at 262.

⁸¹ Basutoland Council (1958). See also Basutoland Council. *Basutoland Report on Constitutional Discussions* (Cmdnd 636) (London: HMSO 1959).

Paramount Chief, the Chiefs and the people".⁸² The dualism in the organisation of government, which was aggravated rather than solved by the reforms of 1938–1955, had long been a matter of concern for the colonial administration. The problem of dualism is poignantly captured by Clough through the analogy of a plough drawn by two oxen, where "Basutoland is the plough and the oxen are the British authorities and the Basuto Nation who would work more effectively when pulling together".⁸³

Quite clearly, unicameralism was introduced not so much to advance the pre-colonial unison that existed between the aristocracy and commoners, but rather to kill dualism, not between chiefs and commoners, but between British representatives and the chiefs or natives. As between the chiefs and commoners the gap was already apparent. As Machobane contends, "over a period of over fifty years since the establishment of the National Council during which the political bond between the educated commoners and the Chief had worn very thin, the divergent interests of the two had sharpened".⁸⁴ Although there is some validity in Machobane's argument, there is equally merit in the assertion that in the pre-colonial era there was unison between chiefs and commoners.⁸⁵

Unicameral as the legislature was meant to be under the 1959 Constitution, the Council possessed the three elements of appointment, election, and *ex officio* aristocracy. The paramount chief was to appoint 18 members at his own pleasure, while 40 members were to be elected, and the 22 principal and ward chiefs were to be *ex officio* members.⁸⁶ Clearly, the Constitutional Reform Committee's intention of bringing the aristocracy and commoners together under one roof with Her Majesty's representatives was attained by this design. The power of the monarch clearly was unmatched in the Legislative Council because of the preponderance of aristocracy and his appointees.

3.2 Bicameralism and the structure of the post-independence Parliament

In the constitutional designs in Lesotho,⁸⁷ in the period immediately before independence, the country had a unicameral legislative council.⁸⁸ However, the nature of this legislative council, unicameral as it apparently seemed, had bicameral undertones.⁸⁹ In the run-up to independence, it became apparent that parliament would be bicameral adopting a format, according to the recommendation of the Constitutional

⁸² Clough O "Constitutional reform in Basutoland" (1959) XXVII *The Journal of the Society of Clerks at the Table in Commonwealth Parliaments* 68.

⁸³ Clough (1959) at 68.

⁸⁴ Machobane (1990) at 263.

⁸⁵ Eldredge E *Power in colonial Africa: conflict and discourse in Lesotho, 1870–1960* (Madison, Wisconsin : University of Wisconsin Press 2007).

⁸⁶ See s 27 of the 1959 Constitution.

⁸⁷ Before Lesotho adopted the transitional Constitution of 1965, the constitutional design that was used was under the 1959 Constitution.

⁸⁸ See Basutoland Council (1958). See also Palmer VV & Poulter SM *The legal system of Lesotho* (Virginia: The Michie Company 1972).

⁸⁹ The Council had both the aristocratic representation and the representation of the population at large.

Reform Commission, “which is essentially British”.⁹⁰ The Commission therefore recommended that there be a second chamber of parliament known as the Senate, which would primarily possess the “delaying powers”. The Senate was to be constituted of 22 principal and ward chiefs plus 11 members nominated by the paramount chief at his discretion, although he “should attempt to choose people who have had experience of public life, and especially those who are skilled in the vocation of economics, education and law”.⁹¹

When the country was bracing itself for independence, another constitutional reform commission was introduced in 1963.⁹² The report of the committee was that the country must introduce bicameralism, thereby departing from the *raison d'être* and design of the 1959 Constitution. The transitional Constitution of 1965 introduced the notion of a constitutional monarch whereby the powers of the aristocracy in general, and those of the monarch in particular, were emasculated.⁹³ Thus the Constitution established a bicameral model in which the second chamber, in tandem with broader constitutional design, was hugely weak. Just as the power of the *Motlotlehi* (King), in his capacity as the monarch, was styled under the 1965 constitution, and was already constitutionally circumscribed, the introduction of the second chamber further eclipsed his powers. Section 34 of the Constitution read :

“The Senate shall consist of the 22 Principal Chiefs and Ward Chiefs and 11 other Senators for the time being nominated in that behalf by *Motlotlehi*.”

At first sight it could be argued that the chamber was still very much aristocratic and thus a chamber of the monarch by and large. However, the turn of political events in the run-up to the adoption of the 1966 Constitution proved the contrary.⁹⁴ The case of *Molapo v Seeiso*⁹⁵ established the principle that the 11 members appointed by the *Motlotlehi* do not serve at his pleasure. The *Motlotlehi* had purported to terminate the appointment of senators who were part of the 11 senators nominated by him, when they voted contrary to his wishes during the Constitutional Motion Debate. Section 34 of the 1965 Constitution provided that “Senate shall consist of twenty-two Principal Chiefs and Ward Chiefs and eleven Senators for the time being nominated in that behalf by *Motlotlehi*”. It was argued by the applicants that “for the time being” meant for the duration of Parliament. Any other interpretation would mean that the *Motlotlehi* would be able at any time to dismiss the nominated senators, who might be cabinet ministers, if they were to displease him. He would thus be given considerable personal political power.

⁹⁰ See Basutoland Council (1958).

⁹¹ See Basutoland Council (1958) at 30.

⁹² Basutoland Council (1958).

⁹³ Mahao NL “The constitution and the crisis monarchy in Lesotho” (1997) 10(1) *Lesotho Law Journal* 165.

⁹⁴ The King was averse to the independence constitution which was creating a constitutional monarch. See Machobane (1990); Michael H & Stein ME “Legal aspects of the Lesotho constitutional crisis”(1970) 6 *East African Law Journal* 210.

⁹⁵ 1963-1966 HCTLR 150.

In fact, his personal powers were laid down in section 71(2) of the Constitution, and although section 71(2)(a) specified that he might act “in accordance with his own deliberate judgment” in appointing senators, it made no reference to revocation of their appointment. If it had been intended, it was argued, that the *Motlotlehi* should have such powers, they would have been specified. Applicants further argued that sections 38 and 39 of the Constitution dealt with disqualifications for the office of senator and member of the National Assembly, and it was noteworthy that both were treated in an identical fashion, and contrasted with principal and ward chiefs. No mention was made of revocation of their appointment by the *Motlotlehi*. It should be concluded that senators were intended to hold office for the duration of Parliament, namely five years, in the same way as members of the National Assembly.

The respondents contended that although the *Motlotlehi* was bound to act responsibly, and with the interests of Lesotho in mind, when exercising his functions, he was not debarred from politics. The words “for the time being” should be given their literal meaning, which was at the pleasure of the *Motlotlehi*. The same phrase was used to mean this in other sections of the Constitution. The nominated senators were there to represent and obey the *Motlotlehi*, and could be dismissed if they failed to do so. Both section 9 of the General Interpretation Proclamation and section 130(13) of the Constitution made it clear that a power to make an appointment or designation includes a power to revoke such appointment or designation unless a contrary intention is shown.

The High Court upheld the application on the basis that the words “for the time being” under section 34 do not mean at the pleasure of the *Motlotlehi*.⁹⁶

Perhaps the High Court used the wrong tools to interpret section 34 as a clause of the Constitution. The Court applied a literal interpretation instead of a purposive interpretation. Had the Court resorted to a purposive interpretation, it could have arrived at a different conclusion. The Court could have realised that the 11 senators serve a particular purpose in Parliament, different from that of the 22 principal chiefs and the National Assembly representatives. These 11 senators symbolised the relationship of the *Motlotlehi* with the Senate, and they are in a way his representatives. It is therefore unimaginable that they could continue to hold office except at his pleasure.

The judgement was however a further blow to the already diminishing role of the monarch under the mooted independence Constitution. Consequently, the discretion of the *Motlotlehi* to appoint senators was further diminished by the proposals for the independence Constitution. The White Paper to the independence Constitution stated:

“The provision for the nomination of the 11 persons to the Senate by *Motlotlehi* corresponding to section 34 of the present Constitution will be

⁹⁶ see also *Molapo v Seeiso* (1966) where Johnston C.J held : “The words ‘for the time being’ must mean for the duration of Parliament or until the happening of any of the contingencies specified in ss. 38 or 39, and not at pleasure. If the latter had been intended, it could have been expressed in s. 71 (2) or s. 39 (1).”

varied to make it clear that the nominations are for the duration of the Parliament and *are not revocable by Motlotlehi.*" ⁹⁷(Emphasis added.)

This change of section 34 of the 1965 Constitution was clearly a sequel to the High Court decision in *Molapo v Seeiso*.⁹⁸ Indeed, there was a slight variation in the wording of section 41 of the 1966 Constitution, which still retained the discretionary powers of the king to appoint the members of the Senate but omitted the phrase "for the time being".⁹⁹

Thus, the evolution of the second chamber in Lesotho reflects a chamber which was originally aristocratic in order to maintain the predominance of the "Sons of Moshoeshoe"(aristocracy), who have been, individually and collectively, part of the constitutional designs in Lesotho since the formation of the Lesotho nation-state in the early 19th century.¹⁰⁰ However, at some point expertise became a factor; hence the introduction of the appointed members of the chamber. There are two differences, however, with respect to the 1966 design. The first one is that under the old design, the appointment of 11 members was in the sole discretion of the King.¹⁰¹ This discretionary power of the monarch has been stripped away by the new design under the 1993 Constitution. In terms of the 1993 constitutional design, the King no longer has any discretionary powers; his powers are all exercised subject to the advice of other authorities.¹⁰² The main authorities that are now interlocutors in the exercise of the erstwhile discretionary monarchical powers are the Prime Minister and the Council of State.¹⁰³

Another difference is that while the old design required that 11 members be appointed on the basis of expertise, such requirement has been removed under the 1993 design. The net effect has been that the government of the day is the one that determines the appointments.¹⁰⁴ Almost invariably, the appointed members end up being appointed as ministers and deputy ministers. While this practice somehow resonates with the principle of democracy, that the democratically elected government must dominate, it defeats the theoretical underpinnings of the Senate as the non-majoritarian chamber.¹⁰⁵ In that way, the Senate becomes an extension or appendage of the National Assembly.

⁹⁷ White Paper for the 1966 Constitution, 1966 (Annex C, Appendix II No 12).

⁹⁸ *Molapo v Seeiso* (1966).

⁹⁹ Section 41 of the 1966 Constitution provided: "The Senate shall consist of the twenty-two Principal Chiefs and Ward Chiefs and eleven other Senators appointed in that behalf by the King."

¹⁰⁰ Machobane (1990).

¹⁰¹ Section 41 of the 1966 Constitution provided : "The Senate shall consist of the twenty-two Principal Chiefs and Ward Chiefs and eleven other Senators appointed in that behalf by the King."

¹⁰² Mahao (1997).

¹⁰³ 'Nyane (2016) at 174.

¹⁰⁴ Makoa F "Strengthening parliamentary democracy in SADC" *Lesotho Country Report* (SAIIA 2004).

¹⁰⁵ Campion (1953).

4 THE POWERS AND LIMITATIONS OF THE SENATE UNDER THE 1993 CONSTITUTION

As a general principle, the Second Chamber is part of the Parliament of Lesotho;¹⁰⁶ and, as such, an important structure in the legislative process. Section 78(3) of the Constitution provides that when a bill has been passed by the National Assembly it shall be sent to the Senate, and “(a) when it has been passed by the Senate and agreement has been reached between the two Houses on any amendments made to it by the Senate; or (b) when it is required to be presented under section 80 of this Constitution, it shall be presented to the King for assent”. The section clearly establishes the Senate as an integral part of the bill route. However, the section is drafted in such a way that the National Assembly must “agree” to the changes proposed by the Senate, otherwise a bill may be passed under section 80, the disapproval of the Senate notwithstanding.

On top of the power to pass ordinary legislation, the Senate has the power to pass constitutional amendments.¹⁰⁷ In terms of section 85(3) of the Constitution, a bill that amends certain sections of the Constitution requires that it “is supported at the final voting in each House of Parliament by the votes of no less than two-thirds of all the members of that House”. In terms of this section, there is no legislative restriction on the Senate; it is treated symmetrically with the National Assembly for purposes of protecting certain provisions of the Constitution.¹⁰⁸ In the protection of these sections, the Constitution states expressly that the limitations to which the Senate is subject do not apply in the enactment of ordinary legislation.¹⁰⁹ Therefore, the Senate can veto a constitutional amendment if the amendment does not get the votes of two-thirds of the members in the House.¹¹⁰

These powers notwithstanding, the Senate is subject to legislative restrictions in relation to both non-monetary and monetary bills.¹¹¹ The non-monetary restriction is found under section 80(3). The section provides as follows :

¹⁰⁶ Section 70(1) provides that “[s]ubject to the provisions of this Constitution, the legislative power of Lesotho is vested in Parliament”.

¹⁰⁷ Section 85.

¹⁰⁸ Those ss are found in s 80(3)(b). They are : s 37 (citizenship); s 38 (citizenship); ss 54 to 60 (parliament); ss 66, 66A, 66B, 66C, 66D, 67, 68, 69(1) and 69(6) (Independent Electoral Commission); s 70 (power to make laws); s 74 (quorum in the houses); s 75(1) (voting in parliament); ss 78(1), (2), (3) and (4) (mode of exercise of legislative power); ss 80(1), (2) and (3) (limitations of the powers of senate); s 82(1) (sessions of parliament); s 83 (prorogation and dissolution of parliament); s 84 (general elections); ss 134 to 142 inclusive (public institutions like the ombudsman, Public Service Commission, Attorney General); ss 150 and 151 (pensions); and ss 154 and 155 (interpretation of the Constitution). This section exists alongside the other more foundational sections mentioned in s 80(3)(b) of the Constitution that are protected by a referendum. A bill to amend the sections mentioned in s 80(3)(b) may not be submitted to a referendum if it is supported by two-thirds of the two houses of parliament.

¹⁰⁹ Section 85(4) of the Constitution categorically provides that “[n]othing in section 80 of this Constitution affects the operation of subsection (3)”.

¹¹⁰ However, if both Houses do not agree by a special majority on the amendment of provisions envisaged under s 80(3)(b), such amendments may be submitted to a referendum. If the referendum approves them, the amendments may be enacted notwithstanding non-approval by the Senate.

¹¹¹ Section 80 of the Constitution.

“When a bill, other than a bill that is certified by the Speaker as an Appropriation bill, is passed by the National Assembly and, having been sent to the Senate at least thirty days before the end of the session, is not passed by the Senate within thirty days after it is so sent or is passed by the Senate with amendments to which the National Assembly does not agree within thirty days after the bill was sent to the Senate, the bill, with such amendments, if any, as may have been agreed to by both Houses, shall, unless the National Assembly otherwise resolves, be presented to the King for assent.” (Emphasis supplied.)

The section in effect provides that the National Assembly can still pass a bill of which the Senate does not approve provided two main conditions have been met. Those conditions are: a) it must have been sent to the Senate at least 30 days before the end of the session, and b) it was not passed by the Senate after it was so sent or it was passed with amendments with which the National Assembly does not agree.

In Lesotho, the nature of the limitation became a subject of litigation for the first time in *Development for Peace Education and another v Speaker of the National Assembly and others*.¹¹² *In casu*, the Minister of Law, Human Rights and Constitutional Affairs tabled the Human Rights Commission Bill 2015 in the National Assembly. The Bill was then sent to the Portfolio Committee on Law and Public Safety for stakeholder consultation.¹¹³ The Bill was then passed by the National Assembly and accordingly sent to the Senate. While the Senate was still considering the Bill and having consultations with the stakeholders, including the applicants and the Ministry responsible, the Clerk of the National Assembly invoked, for the first time, section 80(3) and recalled the Bill before it could be passed by the Senate. His reason for so doing was that the time for the Bill to be with the Senate had expired in terms of section 80(3) of the Constitution of Lesotho. The Bill was accordingly returned by the Clerk of the Senate, and was certified by the Speaker and presented to the King for assent.

The central question was whether the Clerk of the National Assembly was correct that after the expiry of 30 days, he could recall to the National Assembly a bill which had not yet been passed by the Senate. The Constitutional Court unanimously agreed that the Senate has only 30 days to consider a bill, after which the National Assembly can recall it if it has not been passed. In other words, the Senate has only 30 days of dilatory period.

Similarly, the Senate has even tighter restrictions in relation to money bills. In relation to money bills, the Senate has just one day to pass the bill.¹¹⁴

¹¹² Constitutional Case No. 5 of 2016 (unreported).

¹¹³ The applicants indicated their intention to make representations to the concerned Committee. Such opportunity was not granted to them. As a result, there was no public participation at all by the Committee. The reason provided by the Committee in its report was that it would have been duplication to have such consultations as the responsible Ministry had already had “wide” consultations.

¹¹⁴ Section 80(1) provides : “When a bill that is passed by the National Assembly and that is certified by the Speaker of the National Assembly under subsection (2) as an Appropriation bill is sent to the Senate it shall forthwith be introduced in the Senate and shall be passed by the Senate without delay; and if it is not passed by the Senate by the end of the day after the day on which it was sent to the Senate or if it is passed by the Senate with amendments to which the National Assembly does not by then agree, the bill,

5 LESSON FROM THE UNITED KINGDOM ABOUT THE RESTRICTIONS ON THE SECOND CHAMBER

Sections 80(1) and (3) of the Constitution of Lesotho owe their historical origins directly to section 2(1) of the United Kingdom Parliament Act of 1911 as amended in 1949.¹¹⁵ The Lesotho sections are the mirror-image of the United Kingdom section except that the delaying period for the House of Lords is two sessions as opposed to one. However, it is important to note that the Lesotho formulation has been abridged to the extent that it has lost clarity. The phrase 'having been sent to the Senate at least thirty days before the end of the session' in section 80(3) becomes almost ambiguous.¹¹⁶

The enactment of this restrictions on the House of Lords in Britain has a history.¹¹⁷ It followed the rejection by the conservative dominated House of Lords of the budget passed by the Liberals dominated House of Commons in 1909. Parliament retaliated by removing the veto power of the House of Lords. The 1911 Act removed completely the powers of the House of Lords to veto money bills.¹¹⁸ For a non-monetary bill the House of Lords was given the suspensory power of three successive sessions, after which it could be presented for Royal assent even if the House of Lords still rejected it.¹¹⁹ The powers of the House of Lords were further emasculated by the 1949 amendment which reduced the delaying power from three sessions to two. Section 2(1) thereof provides :

"If any Public Bill, (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in two successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the second time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill..."

with such amendments, if any, as may have been agreed to by both Houses, shall, unless the National Assembly otherwise resolves, be presented to the King for assent."

¹¹⁵ Ekins R "Acts of parliament and the Parliament Acts" (2007) 123 *Law Quarterly Review* 91. For an analysis of the Act together with the Parliament Act of 1949, see the decision of the House of Lords in *R (Jackson) v. Attorney-General* [2006] 1 AC 262. For analysis of the case see Elliott M "United Kingdom bicameralism, sovereignty, and the unwritten constitution" (2007) 5 *International Journal of Constitutional Law* 370. See also Forsyth C "The definition of parliament after *Jackson*: can the life of parliament be extended under the Parliament Acts 1911 and 1949?" (2011) 9(1) *International Journal of Constitutional Law* 132.

¹¹⁶ In terms of the British design, the section is fairly clear that the House of Lords has the dilatory power of two sessions and if a non-monetary bill, 'having been sent up to the House of Lords at least one month before the end of the session', is not approved by the House of Lords in each of those sessions such bill may still be presented for Royal assent.

¹¹⁷ Ekins (2007); Bogdanor V *The new British constitution* (Oregon: Hart Publishing 2009)

¹¹⁸ Section 1(1) of Parliament Act 1911.

¹¹⁹ Section 2(1) of Parliament Act 1911.

The interpretation of this section in the United Kingdom is fairly settled. The main purpose of the Parliament Act of 1911, according to Ballinger, was “to limit the power of the House of Lords to impede the programme of a government with a majority in the House of Commons”.¹²⁰ This overarching purpose is attained through two main innovations, namely, by asserting the primacy of the House of Commons on financial matters and by replacing the absolute veto power of the House of Lords with suspensory veto power of two years.¹²¹ According to Bradley and Ewing,

“Under the Parliaments Acts 1911-49, Bills may in certain circumstances receive royal assent after having been approved only by the Commons. There are two situations in which this may happen: (a) if the Lords fail within one month to pass a Bill which having been passed by the commons, is sent up at least one month before the end of the session and is endorsed by the speaker as a Money Bill; or (b) if the Lords refuse in two successive sessions, whether of the same parliament or not, to pass a public Bill ...which has been passed by Commons in those two sessions...”¹²²

This view is widely shared by constitutional authorities on British parliamentary practice.¹²³ Under the Parliaments Acts of 1911 and 1949, on which section 80 of the Constitution of Lesotho is based, certain public bills may be presented for Royal assent without the consent of the Lords.¹²⁴ However, the House of Commons rarely uses this power.¹²⁵ According to Bogdanor,¹²⁶ only three non-monetary Bills were passed using this procedure under the Parliament Act of 1911¹²⁷, and only four under the 1949 amendment of the Parliament Act.¹²⁸

¹²⁰ Ballinger C “Hedging and ditching: the Parliament Act 1911” (2011) 30(1) *Parliamentary History* 19 at 19.

¹²¹ Ballinger (2011) at 19.

¹²² Bradley AW & Ewing KD *Constitutional and administrative Law* 12th ed (London: Pearson Education 1997) at 213.

¹²³ Russell M (2013); Tsebelis & Money (1997).

¹²⁴ According to Limon D *et al* (eds) *Erskine May's treatise on the law, privileges, proceedings and usage of parliament* 22nd ed (London: Charles Knight & Co (1997) at 569 “...a Bill which is passed by the House of Commons in two successive sessions...and which, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, shall on its rejection for the second time by the House of Lords, unless the House of Commons direct to the contrary, be presented to Her Majesty and become an Act of parliament...”

¹²⁵ Even the House of Lords hardly uses its suspensory powers to frustrate a government programme because of the well-established “Salisbury convention”. According to Bogdanor (2009) at 121, “this convention, named after Lord Salisbury, means that the Lords should ensure that the Commons have had a mandate for its legislation. Where there was such a mandate, then, by implication, the Lords should not use its powers”.

¹²⁶ Bogdanor (2009) at 120.

¹²⁷ The Government of Ireland Bill 1914; The Welsh Church Bill 1914; The Parliament Bill 1949.

¹²⁸ The War Crime Bill 1949; The European Parliamentary Elections Bill 1999; The Sexual Offences (Amendment) Bill 2000; The Hunting Bill 2000.

6 CONCLUSION

The forgoing analysis indicates that the development of bicameralism in Lesotho is an artefact of the broader development of institutions of government throughout the various historical epochs of the country. When the constitutions were made in the period 1950 to the 1960s, the country had, more or less, the same models of parliament. Parliament started off as unicameral but with bicameral characteristics, where both the aristocracy and the subjects were represented.¹²⁹ However, the aristocracy and the subjects co-existed in a manner that showed that in future it would naturally break into bicameralism taking on the British style. Indeed, the 1965 Constitution that came immediately before independence and which ended up as the blueprint for the independence Constitution, provided for a bicameral parliament – the lower and the upper chambers, the latter styled senate and being largely aristocratic. Initially, the appointed members in the Senate would be expected to represent the monarch, but it later became apparent that the appointed senators are not representatives of the monarch and cannot be expected to serve at his pleasure – thereby ending any discretion that the monarch had at independence to appoint certain senators.¹³⁰

Today it can virtually be argued that despite the Senate in Lesotho being still largely constituted of the aristocracy, the King has no power at all in the Senate, as even the power that he wielded to appoint the other 11 senators has shifted to the new institution – the Council of State, which some observers deride as being effectively dominated by the Prime Minister.¹³¹

As it is currently, the Senate has degenerated into a sheer appendage of the National Assembly so much that its importance in the parliamentary design is increasingly being called into question.¹³² As has been demonstrated above, the country still needs the second chamber in order to guard against the dangers of majoritarianism and to represent other interests that may not be adequately represented through representative democracy. However, the article recommends that a stronger, rather than a weaker, Senate can attain this objective. The Senate should be constituted in such a way that it becomes a house of sobriety amidst the political tensions fanned by the National Assembly. Thus, a review of this chamber is recommended. The key principles that should guide the review should be : 1) the theoretical underpinning of bicameralism should be retained, and the purpose of the Senate should theoretically be to protect the parliamentary design against the dangers of democracy; 2) the structure should be reviewed with the intention to accommodate both the aristocracy and the other sectors of society which representative democracy has not represented, such as, women, the youth and the disabled; and 3) the legislative process should also be reviewed in order to strengthen the role of the Senate therein.¹³³ In particular, section

¹²⁹ Machobane (1990).

¹³⁰ *Molapo v Seeiso* (1966).

¹³¹ Makoa (2004).

¹³² Makoa (2004).

¹³³ In its composition the House should be representative of expertise and other sections of society which the National Assembly has demonstrated incapable of representing over time. Aroney at 205 identifies

80 of the Constitution, which deals with the restrictions on the powers of the Senate, must be amended. The section could be crafted in such a way that it distinguishes the types of bills that may be vetoed by the Senate and those in respect of which it may only play a dilatory or revisionary role.¹³⁴

BIBLIOGRAPHY

Books

- Ashton H The Basuto 2 ed (London: Oxford University Press 1952).
- Bogdanor V Monarchy and the constitution (Oxford: Oxford University Press 1995).
- Bogdanor V Power to the people: a guide to constitutional reform (London:Victor Gollancz 1997).
- Bogdanor V The new British constitution (Oregon: Hart Publishing 2009).
- Bradley AW & Ewing KD Constitutional and administrative Law 12th ed (London: Pearson Education 1997).
- Eldredge E Power in colonial Africa: conflict and discourse in Lesotho, 1870-1960 (Madison, Wisconsin : University of Wisconsin Press 2007).
- Elton GR The parliament of England 1559-1581 (Cambridge: Cambridge University Press 1986).
- <https://doi.org/10.1017/CBO9780511560521>
- Gill SJ A short history of Lesotho from the late Stone Age until the 1993 elections (Mori, Lesotho: Morija Museum & Archives 1993).
- Jennings I Cabinet government 3 ed (Cambridge: Cambridge University Press 1969).
- Lijphart A Democracies. patterns of majoritarian and consensus government in twenty-one countries (London: Yale University Press 1984).
- <https://doi.org/10.2307/j.ctt1ww3w2t>
- Lijphart A Patterns of democracy. Government forms and performance in thirty-six countries (New Haven: Yale University Press 1999).
- Limon D et al (eds) Erskine May's treatise on the law, privileges, proceedings and usage of parliament 22nd ed (London: Charles Knight & Co 1997).
- Loewenberg G & Patterson SC Comparing legislatures (Boston: Little Brown 1979)

four justifications for the second chamber, namely: a) democratic representation, (b) public deliberation, c) legislative output, and (d) scrutiny of the executive.

¹³⁴ Mulgan (1996) at 191; Coakley J "The strange revival of bicameralism" (2014) 20(4) *The Journal of Legislative Studies* 542.

Machobane LBBJ Government and change in Lesotho, 1800-1966: a study of political institutions (Basingstoke & London : Macmillan 1990).

<https://doi.org/10.1007/978-1-349-20906-4>

McIlwain CH Constitutionalism and the changing world (Cambridge: Cambridge University Press 1939).

Palmer VV & Poulter SM The legal system of Lesotho (Virginia: The Michie Company 1972).

Russell M The contemporary House of Lords. Westminster bicameralism revived (Oxford (Oxford: University Press 2013).

<https://doi.org/10.1093/acprof:oso/9780199671564.001.0001>

Shell D The House of Lords (London: Harvester Wheatsheaf 1992).

Swenden W Federalism and second chambers. Regional representation in parliamentary federations: the Australian senate and German Bundesrat compared (Brussels: P.I.E.-Peter Lang 2004).

Tsebelis G & Money J Bicameralism (Cambridge: Cambridge University Press 1997).

<https://doi.org/10.1017/CBO9780511609350>

Chapters in Books

Patterson S C and Mughan A "Senates and the theory of bicameralism" in Patterson SC & Mughan A (eds) *Senates: bicameralism in the contemporary world*, (Ohio: Ohio State University Press 1999).

Journal Articles

Aroney N "Four reasons for an upper house: representative democracy, public deliberation, legislative outputs and executive accountability" (2008) 29 *Adelaide Law Review* 205.

Ballinger C "Hedging and ditching: the Parliament Act 1911" (2011) 30(1) *Parliamentary History* 19.

<https://doi.org/10.1111/j.1750-0206.2010.00239.x>

Campion GCB "Second chambers in theory and practice" (1953) *Parliamentary Affairs* 17.

Clough O "Constitutional reform in Basutoland" (1959) XXVII *The Journal of the Society of Clerks at the Table in Commonwealth Parliaments* 68.

Coakley J (2014) 20(4) "The strange revival of bicameralism" (2014) 20(4) *The Journal of Legislative Studies* 542.

<https://doi.org/10.1080/13572334.2014.926168>

De Minon MH "The passing of bicameralism" (1975) 23 *American Journal of Comparative Law* 236.

<https://doi.org/10.2307/839106>

Dickinson HT "The eighteenth-century debate on the sovereignty of parliament" (1976) 26 Transactions of the Royal Historical Society 189.

<https://doi.org/10.2307/3679078>

Ekins R "Acts of parliament and the Parliament Acts" (2007) 123 Law Quarterly Review 91.

Elliott M "United Kingdom bicameralism, sovereignty, and the unwritten constitution" (2007) 5 International Journal of Constitutional Law 370.

<https://doi.org/10.1093/icon/mom008>

Forsyth C "The definition of parliament after Jackson: can the life of parliament be extended under the Parliament Acts 1911 and 1949?" 2011 9(1) International Journal of Constitutional Law 132

<https://doi.org/10.1093/icon/mor019>

Gocking R "Colonial rule and the 'legal factor' in Ghana and Lesotho" (1997) 67(1) Africa 61.

<https://doi.org/10.2307/1161270>

Juma L "The laws of Lerotholi: role and status of codified rules of custom in the Kingdom of Lesotho" (2011) 23(1) Pace Int'l Law Review 92.

Laver M "The role and future of the upper house in Ireland" (2002) 8(3) Journal of Legislative Studies 49.

<https://doi.org/10.1080/714003929>

Llanos M & Nolte D "Bicameralism in the Americas: around the extremes of symmetry and incongruence" (2003) 9(3) The Journal of Legislative Studies 54.

<https://doi.org/10.1080/1357233042000246864>

Macartney WJA "The parliaments of Botswana, Lesotho and Swaziland" (1969) The Parliamentarian 2.

Macartney WJA "African Westminster? The parliament of Lesotho" (1970) Parliamentary Affairs 121.

<https://doi.org/10.1093/oxfordjournals.pa.a051517>

Mahao NL "Chieftaincy and the search for relevant constitutional and institutional models" (1993) 9(1) Lesotho Law Journal 149.

Mahao NL "The constitution and the crisis monarchy in Lesotho" (1997) 10(1) Lesotho Law Journal 165.

Malherbe EFJ., "The South African national council of provinces: trojan horse or white elephant", (1998) Journal of South African Law 77.

Mfketi N "Bicameralism in South Africa" (2012) 35(4) Canadian Parliamentary Review 17.

Michael H & Stein ME "Legal aspects of the Lesotho constitutional crisis" (1970) 6 East African Law Journal 210.

Miller J, Hammond TH & Kile C "Bicameralism and the core: an experimental test" (1996) 21 Legislative Studies Quarterly 83.

<https://doi.org/10.2307/440160>

Mulgan R "The Australian senate as a 'house of review'" (1996) 31 Australian Journal of Political Science 191.

<https://doi.org/10.1080/10361149651184>

'Nyane H "Formation of a government in Lesotho in case of a hung parliament" (2016) 20 Law, Democracy and Development 174.

<https://doi.org/10.4314/ldd.v20i1.9>

Passaglia P "Unicameralism, bicameralism, multicameralism: evolution and trends in Europe" (2018) 10 Perspectives on Federalism E-1.

<https://doi.org/10.2478/pof-2018-0014>

Riker WH "The justification of bicameralism" (1992) 13(1) International Political Science Review 101.

<https://doi.org/10.1177/019251219201300107>

Russell C "Thomas Cromwell's doctrine of parliamentary sovereignty" 1997(7) Transactions of the Royal Historical Society 235.

<https://doi.org/10.2307/3679278>

Russell M "Upper house reform in the United Kingdom and Australia" (2001) 36(1) Australian Journal of Political Science 27.

<https://doi.org/10.1080/10361140020032179>

Russell M "What are second chambers for?" (2001) 54 Parliamentary Affairs 442.

<https://doi.org/10.1093/parlij/54.3.442>

Shell D "The history of bicameralism" (2001) 7(1) The Journal of Legislative Studies 5.

<https://doi.org/10.1080/714003862>

Wallman S "Lesotho's pitso: traditional meetings in a modern setting" (1968) 2(2) Canadian Journal of African Studies 167.

<https://doi.org/10.2307/484115>

Legislation

Basutoland Constitution, 1959.

Basutoland Constitution, 1965.

Constitution of Lesotho, 1966.

Constitution of Lesotho, 1993.

Parliament Act 1911 (UK).

Parliaments Act 1949 (UK).

Proclamation No 10 of 1910.

Proclamation No 48 of 1948.

The Native Administration Proclamation 61 of 1938.

The Native Courts Proclamation 62 of 1938.

Case Law

Development for Peace Education and another v Speaker of the National Assembly and others Constitutional Case No. 5 of 2016 (unreported).

Molapo and others v Constantinus Bereng Seeiso, Mokotoko and others 1963-1966 HCTLR.

R (Jackson) v. Attorney-General [2006] 1 AC 262.

Reports

Basutoland Council *Proceedings of The Basutoland National Council* (1903-11) (Maseru, 1911).

Basutoland Council *Report on Constitutional Reform and Chieftainship Affairs* (Maseru: Government Printer 1958).

Basutoland Council *Proposed Regulations for Constitution of Basutoland* PRO CO 417/375.

Basutoland Council *Basutoland Report on Constitutional Discussions* (Cmd 636) (London : HMSO 1959).

Hailey L *Native Administration in the British African Territories Part V. The High Commission Territories : Basutoland, The Bechuanaland Protectorate, and Swaziland* (London: HMSO 1953).

Makoa F “Strengthening parliamentary democracy in SADC” *Lesotho Country Report* (SAIIA,2004).

Morse C et al *Basutoland, Bechuanaland Protectorate and Swaziland: Report of an Economic Survey Mission* (London: HMSO 1960).

Pim A *Basutoland: The Financial and Economic Position of Basutoland* (Pim Report) (Cmd 4907) (London :HMSO 1935).

Moor Sir H *Basutoland: Report of the Administrative Reforms Committee (Moor Report)* (April-July 1954).

White Paper for the 1966 Constitution, 1966 (Annex C, Appendix II No 12)

Internet Sources

Giuseppe Ieraci “‘King in Parliament’. Note for a Conceptual Scheme of the Government-Parliament Relationship in Parliamentary Democracies” (1999) available at <https://ecpr.eu/filestore/paperproposal/db8c279d-e3d8-42ad-b5d6-024af8653917.pdf> (accessed 10 April 2019).

Romaniello M "Bicameralism: a concept in search of a theory" (2016) available at <http://www.amministrazioneincammino.luiss.it/app/uploads/2016/09/Romaniello.pdf> (accessed 11 May 2019).

Theses

Horgan GW "Bicameralism: factors in the evolution of second chambers in four federations" (unpublished MA thesis, Queen's University, Kingston, Ontario, 2000).

Unpublished Papers

Weisfelder R "The Basotho monarchy, a spent force or a dynamic political factor?" A paper presented at the 14th Annual Meeting of the African Studies Association 3-6 November 1971, Denver.

"The Moor Report rejected" [1955] 1(4) *Mohlabani* 12 (Morija Archives)