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The King of Lesotho and his Contemporary Constitutional Background

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Abstract: The Kingdom of Lesotho (the former Basutoland), independent since 1966, celebrates 200 years of its royal dynasty in 2022. Therefore, an analysis of its monarch's constitutional position, based on the current constitutional text of 1993 as amended numerous times afterwards (last - until now - in 2020), seems to be called for. The present analysis focuses on necessary general and genealogy elements as well as the monarch's competences in the legislative, executive and judicative branch of Lesotho, vis-à-vis the respective practical application.

A. General Introduction

Lesotho, the former Basutoland, which gained its independence from the United Kingdom in 1966¹, is declared a "(...)" democratic Kingdom"² by virtue of its current Constitution (1993³, as amended in 2020⁴; hereinafter abbreviated to "LC"): Chapter V of the same constitutional text is dedicated to the monarch's office, being consistent with relevant transitional provisions in view of the current dynastic law (1990 Office of King Order).⁵

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1 Based on the Lesotho Independence Act 1966. In regard to the contemporary, general legal system of Lesotho as following said Act cf. especially *Vernon V. Palmer / Sebastian M. Poulter*, *The Legal System of Lesotho*, Charlottesville 1972 (*passim*).

2 See Sec. 1 (1) LC.

3 Cf. Government Notice No. 211 of 1993 (of March 27th, 1993); officially accessible, although including only the Eighth Constitutional Amendment (2018), through <https://www.gov.ls/documents/lesotho-constitution/> (last accessed on 20 June 2022). The constitution maintained *grosso modo* the Westminster style *status* of the monarch after 1966. Cf. especially *J.H. Proctor*, *Building a Constitutional Monarchy in Lesotho / Formation d'une Monarchie constitutionnelle au Lesotho*, in: *Civilisations* Vol. 1, No. 1 (1969), pp. 64 et seq.

4 Cf. the Ninth Amendment to the Constitution Act (Act 7/2020). A very comprehensive insight to the consecutively revised constitutional text can be achieved especially through <https://constitutions.unwomen.org/en/countries/africa/lesotho> (last accessed on 20 June 2022).

5 Cf. Sec. 157 LC.

The monarch has the traditional role of the trustee of all lands of the Basuto nation;⁶ he is the head of state of Lesotho and should naturally exercise this office in a constitutional and law-abiding manner.⁷

Addendum I to the constitutional text provides the relevant constitutional oath⁸ of each new monarch, effectively underlining the abovementioned essentialia. Practically, however, the monarch's powers are substantially limited. In any case the fact that the current ruling dynasty will be able to celebrate exactly 200 years on the country's throne in 2022 may suffice as a starting point for the present analysis.

B. The Royal Dynasty of current Lesotho⁹

The dynasty's most notable progenitor was *Moshoeshoe I*, a well-known Basuto chief who came to central power 200 years ago, in 1822; he was universally recognized at the time, and naturally regarded as the only authority in Basutoland, although the creation of a British crown colony there after the 1860s (as well as that territory's later incorporation into the Cape Colony) put this status into perspective both for him and his successors. His son *Letsie I* followed as monarch between 1870 and 1891; he was succeeded by his son *Lerotholi*, who reigned 1891-1905; the latter was followed by two of his sons, first *Letsie II* (in office 1905-1913), then (1913-1939) the younger one, namely *Griffith Lerotholi*. 1939-1940 *Griffith Lerotholi*'s son *Seeiso* held the throne of the country; from 1941 to 1960, *Seeiso* was followed by his widow *Mantsebo* as a regent during the heir's minority of age. Said heir (*Seeiso*'s son by another marriage), namely *Moshoeshoe II* (1938-1996), was King of the country from Lesotho's independence until 1990, then again briefly from 1995 until his death in 1996; he was succeeded by the current monarch, his son *Letsie III*, both from 1990-1995 and from 1996 until the present day.

6 Cf. Sec. 108 LC.

7 Cf. Sec. 44 (1,2) LC.

8 See already Sec. 51 LC.

9 Cf. generally for the following information *B. M. Khaketla*, Lesotho 1970: An African Coup under the Microscope, Berkeley/Los Angeles 1972, pp. 338 et seq.; also *John E. Morby*, Dynastien der Welt, Zürich 1991, p. 325.

The following historical, genealogical and office term information is also from *Dimitrios Parashu*, Genealogien afrikanischer Fürstenhäuser, Kap. II: Lesotho (unpublished). Cf. further, especially regarding *Moshoeshoe I*, the work of *Peter Sanders*, Moshoeshoe, Chief of the Soto, London 1975 (*passim*).

C. The Monarch in Light of the Contemporary Constitutional Text

I. Legislative competences

The monarch is expressively a part of the legislature,¹⁰ meaning in particular that his consent to acts passed by Parliament (Assent) is necessary.¹¹ Within the practical application of the present constitution, there has been no apparent case in which the monarch refused such consent.

Nominally, the King may - at any time - both end a Parliament's office term (Prorogation) and dissolve it,¹² that institution being elected in general for five years.¹³ The dissolution is of bigger practical importance and subject to pathology: The monarch has to follow a relevant proposal by the Prime Minister¹⁴ about such a move.¹⁵ The degree of power of the Prime Minister in this regard has been subject to grave legal disputes in the recent past, given relevant abuse in order to avoid parliamentary scrutiny.¹⁶

The topic of premature parliamentary dissolution is quite relevant within the context of the current constitution, having happened relatively frequently in practice, for example at the end of 2006, and in the more recent past - as a result of respective political crises - both in 2015 and 2017:¹⁷ All this was based on the protracted (since the end of the 1990s) political feud between the social-democratically-oriented *Pakalitha Mosisili* and the centrist-conservative *Tom Thabane*, who succeeded to each other as Prime Ministers for years - but election results after 2012 have been very balanced and led to the necessity of coalition governments, which have not been able to ensure general political stability.

10 Cf. Sec. 54 LC.

11 Cf. already Sec. 78 (1,4) as well as Sec. 80 (1,3,4) LC. Applies also to constitutional revisions, based on Sec. 85 (1,3) LC.

12 Cf. Sec. 83 (1) LC.

13 Cf. Sec. 83 (2,3) LC.

14 In this context, the latest constitutional revision aimed at weakening the relevant position of the Prime Minister and to provide a basis for a government *ad interim*; the practical impact will be shown over the following years. Cf. especially *Hoolo Nyane*, A Note on the Ninth Amendment to the Constitution of Lesotho, in: PER/PELJ 2021 (24) (May 2021), <http://dx.doi.org/10.17159/1727-3781/2021/v24i0a8624> (last accessed on 20 June 2022).

15 Cf. Sec. 83 (4) LC.

16 Cf. *Mofomobe and Another v Minister of Finance and Another; Phoofolo KC and Another v The RT Hon. Prime Minister and Others*, (C OF A (CIV) 15/2017 CONST./7/2017 C OF A (CIV) NO. 17/2017) [2017] LSCA 8 (12 May 2017), seen at <https://lesotholii.org/node/10843> (last accessed on 20 June 2022).

17 Cf., also for the following political elements, *Parashu*, note 9.

Exceptionally, a monarch can - after consulting with the Council of State¹⁸ - reject a dissolution proposal by the Prime Minister¹⁹ or dissolve the Parliament in the context e.g. of a vote of confidence against the head of government²⁰. After a dissolution new elections must be held within three months,²¹ with the exception of emergency cases.²² The abovementioned deadline has evidently been followed regularly in the recent past.

The history of Lesotho parliamentary elections in general has been very inconsistent since independence; the first such in 1970 was accompanied by a military coup, which briefly sent the monarch into exile.²³ The authoritarian Prime Minister *Leabua Jonathan*, who aimed to form a counterpart to the King, was only to be persuaded to initiate the next parliamentary elections in the mid-1980s; the constitution having been repealed anyway and thus stripping the monarch of any way of constitutional handling, led *Moshoeshoe II* to a number of several lasting abroad stays, with his wife *Mamohato*²⁴ acting as regent.²⁵ After 1993, the frequency of parliamentary elections was generally adjusted to the constitutional requirements.²⁶

Last but not least, the monarch may also nominate one-third of the members of Senate, again after consultation with the Council of State,²⁷ taking into account the general requirements of candidates' personal capacities.²⁸ It is further up to the monarch (consulted by the same Council) to convene a three-member Independent Electoral Commission.²⁹ He may order, in coordination with the Prime Minister, the conduct of a referendum³⁰ and is entitled to summon the legislative chambers in order for declaring a state of emergency³¹. Legislative projects regarding the national flag and any modification of the Lesotho official

18 The Council of State is an advisory organ which, among others, consists *ex officio* (see Sec. 95 LC) of the Prime Minister, the National Assembly's Speaker, the Attorney-General and the heads of Defence Force and Police as well as a Principal Chief who has been nominated by the College of Chiefs, Sec. 104 LC.

19 Cf. Sec. 83 (4a) LC.

20 Cf. Sec. 83 (4b,c) LC.

21 Cf. Sec. 84 (1) LC.

22 Cf. Sec. 84 (2) LC.

23 Cf. especially *Khaketa*, note 9 (*passim*).

24 Cf. *Khaketa*, note 9, p. 338.

25 Cf. *ibid.*; also *Parashu*, note 9. For the system of political parties in a wider, even general South African context cf. especially *Khabele Matlosa*, Multi-Partyism Versus Democracy in Southern Africa: "Whither Lesotho", VRÜ (3) 1992, pp. 327 et seq.

26 Cf. *Parashu*, note 9.

27 Cf. Sec. 55 LC.

28 Cf. Sec. 58 LC, as well as - *status negativus* - Sec. 59 LC.

29 Cf. Sec. 66 LC.

30 Cf. Sec. 84B (1) LC.

31 Cf. Sec. 23 (8) LC.

languages³² require the qualified majority of two-thirds of the National Assembly, before royal assent can be given.³³

II. Executive competences

The executive power of Lesotho is (nominally) vested in its respective monarch - of course he exercises this power through his ministers³⁴ and, in this respect, has at most the right to be brought up to date at any time with the latest political developments.³⁵ All responsibility rests with the cabinet.³⁶

The neuralgic topic of appointing the head of government is subject to a special system: The Prime Minister is regularly appointed by the monarch after consultations with the Council of State,³⁷ the relevant candidate being bound both to parliamentary membership as well as leading a political party, but above all potentially enjoying the parliamentary confidence.³⁸ This has led to the fact that only relevantly qualified persons have been appointed Prime Ministers by the monarch.

The dismissal of the head of government also takes place in coordination with the Council of State.³⁹ The necessary parliamentary membership, as depicted right above, also applies to minister-appointees to the cabinet.⁴⁰ The latter *in toto* has generally the role of advising the King in nominal (as outlined above) exercise of the executive power.⁴¹ A constitutional veto right with regard to the list of potential ministers is not evident for the monarch, and has also not been relevant practically.

III. Administrative and judicial competences

In the administrative context and always in coordination with the Prime Minister, the King appoints the Ombudsman⁴² and the Auditor-General⁴³ as well as the head of the Armed (Defence) Forces⁴⁴ and of the Police⁴⁵. In addition - in coordination with the Judicial

32 These being Sesotho and English, see Sec. 3 (1) LC.

33 Cf. Sec. 3 (3) LC.

34 Cf. Sec. 86 LC.

35 Cf. Sec. 92 LC.

36 Cf. Sec. 91 (1) LC.

37 Cf. Sec. 87 (1) LC.

38 Cf. Sec. 87 (2) LC.

39 Cf. Sec. 87 (5) LC.

40 Cf. Sec. 87 (4) LC.

41 Cf. Sec. 88 (2) LC.

42 Cf. Sec. 134 (1) LC.

43 Cf. Sec. 142 (1) LC.

44 Cf. Sec. 145 (4) LC.

45 Cf. Sec. 147 (3) LC.

Service Commission, for the necessary checks and balances as well as preservation of independence - the monarch appoints the members of the Public Service Commission,⁴⁶ which is particularly active in disciplinary matters.

In the judicial context, the monarch is also entitled, again in consultation with the head of government, to appoint the *ex officio* members of the Judicial Service Commission,⁴⁷ namely the Chief Justice⁴⁸ and the Attorney General⁴⁹ of Lesotho, as well as the members of the Human Rights Commission⁵⁰.

In practice, the right of appointment proves to be extremely dependent on the will of the respective Prime Minister; the monarch has, for instance, no constitutional veto right in this regard.

Finally, it should be mentioned here that the King of Lesotho has the right to pardon,⁵¹ as customary for heads of state.

IV. Pecuniary issues, succession and regency

The King receives a civil list from the resources of the country's Consolidated Fund,⁵² as approved by the Parliament and not being subject to reduction during his office term;⁵³ the same applies to regents.⁵⁴ The office (as well as emeritus monarchs after an abdication) enjoys an extended tax immunity,⁵⁵ the latter also applying to possible expropriations⁵⁶ and judicial proceedings in general⁵⁷.

The topics of succession to a throne as well as a regency have always been an extremely sensitive regulatory matter in constitutional monarchies. This is not different in the LC. The College of (Principal) Chiefs is always authorised to designate an heir to the throne.⁵⁸ In practice, however, this did not lead to the potential nomination of members of other well-known families in Basutoland after 1822, the *Moshoeshoe I* dynasty retaining still firmly its position. In the (merely theoretical, since not having occurred practically so

46 Cf. Sec. 136 (1) LC.

47 Cf. Sec. 132 LC.

48 Cf. Sec. 120 (1) LC - also the further members of the High Court, based on Sec. 120 (2) LC, in consultation with the Judicial Service Commission (for which the monarch has, as noted, also a limited creation competence).

49 Cf. Sec. 140 (1) LC.

50 Cf. Sec. 133B (2) LC.

51 Cf. Sec. 101 LC.

52 Cf. Sec. 110 LC.

53 Cf. Sec. 48 (1) LC.

54 Cf. Sec. 48 (2) LC.

55 Cf. Sec. 49 (1,2) LC.

56 Cf. Sec. 49 (3) LC.

57 Cf. Sec. 50 LC.

58 Cf. Sec. 45 (1) LC.

far) case of a relevant non-agreement within the College, the High Court has the ultimate deciding authority.⁵⁹

The College of Chiefs, as an administrator of traditional tribal law, also decides on a regency, if necessary (e.g. if the heir to the throne has not yet reached the age of 21).⁶⁰

Both interestingly and empirically, given the traditional purely masculine composition of the College, up to now such regencies have left the wives of deceased or expatriate monarchs fulfilling the important role of the *ad interim* head of state, as seen⁶¹ with Queen *Mantsebo* 1941-1960 for her stepson *Moshoeshoe II*, or also⁶² most notably in the early 1970s Queen *Mamohato* for her husband in exile (again *Moshoeshoe II*).

V. Abdication and office vacancies

In any case, a monarch has always the right to abdicate,⁶³ however, this cannot have any influence on a regular succession to the throne.⁶⁴ Only the Prime Minister may legally acknowledge a monarch's office vacancy in the event of an inability (in the Prime Minister's eyes) to carry out the monarch's official business - the establishment of such vacancy pending on a following decision of the state's two legislative chambers *in ultimo*.⁶⁵ These provisions have not seen a practical application so far. In a case being close, *Moshoeshoe II* was temporarily deposed in 1990 by a spontaneous military revolt which sought to entrust the throne to Crown Prince *Letsie*.⁶⁶

D. Summary

The overview of the monarch's powers vis-à-vis the constitutional and political realities of Lesotho reveals an office which, although evidently present in an extensive way within all state powers, is widely to be perceived as ceremonial. This seems logical considering current constitutional monarchies in other parts of the world, and also given the general premise of Sec. 1 (1) LC. In addition, relevant influences of the Basutoland legal tradition have found their place in the constitutional reality without producing conceivable grey areas (see merely the constitutionally limited powers of the College of Chiefs as a traditional influence).

In view of especially increased political calamities though, particularly over the course of the last decade (not considering the undemocratic situation of 1970, as outlined above), it

59 Cf. Sec. 46 (3) LC.

60 Cf. Sec. 46 (1) LC.

61 Above, B.

62 Above, C.I.

63 Cf. Sec. 52 LC.

64 Cf. *ibid.*

65 Cf. Sec. 53 LC.

66 Cf. *Parashu*, note 9.

seems not helpful to Lesotho that in fact its constitution grants the monarch only the role of a front-line spectator, the true pole of power being still in hands of the respective heads of government: Even if the most recent constitutional revision changed this selectively, such change is considered as - at least - non efficient, even non-sufficient.⁶⁷ Checks and balances could call for the monarch to be an even more decisive referee between the political powers, without changing the basic Westminster system, by both further reducing the Prime Minister's influence - and further enhance the Parliament's position by any possible means.

It remains to be seen whether Lesotho will face an even more comprehensive constitutional revision in future, possibly also regarding the monarch's position.

67 Cf. especially *Hoolo Nyane*, Lesotho can't afford incremental changes to its constitution: it needs a complete overhaul, theconversation.com, June 22 2020, seen at <https://theconversation.com/lesotho-can-t-afford-incremental-changes-to-its-constitution-it-needs-a-complete-overhaul-140747> (last accessed on 20 June 2022).