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LAW AND POPULATION GROWTH IN LESOTHO

II. FAMILY LAW ASPECTS

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31 January 1979 at 4 p.m.

(Senate Room)

## Explanatory Note

This paper is one of several prepared under the auspices of the Project "Law and Population in Lesotho" which are being presented at N.U.L. Social Science Faculty seminars during the early months of 1979.

The Project is examining the impact which a variety of legal provisions (whether statutory, customary or derived from the common law) are having upon the country's population size and specifically its rate of growth. Some laws may be found to encourage the birth of children (pro-natalist), while others may act as a discouragement (anti-natalist). Studies will be presented covering areas such as family law, child welfare, sex education, abortion, contraception, employment, taxation, land tenure, etc.

Since the focus of the research is on the internal legal position within Lesotho a narrow approach is necessarily being adopted in terms of the current general debate about appropriate population levels and whether or not the world is facing a 'population problem'. Many people argue that the solution to the problem of poverty lies not in reducing population growth but in a more equitable distribution of the world's resources. In this context it is natural for Lesotho to join other countries in the Third World in seeking both a 'new international economic order' and a fundamental shift in the balance of political and economic power in Southern Africa. However, these issues of an international dimension fall strictly outside the area of our study. The 'Introduction' paper merely seeks to establish vis-à-vis the resources available the existence of a population problem within Lesotho and the other papers explore the extent to which the law may be said to be a contributory factor in the current rate of growth.

A major objective of the Project is the production of a report to be submitted to Government and other interested bodies and individuals at a National Symposium which will probably be held towards the end of 1979. The attached paper is only a draft of part of the report and it is by no means to be treated as in its final form. For this reason your comments are welcomed - either at the seminar, or if you are unable to attend, through contact with the author at N.U.L. Since the paper is a draft you are requested not to quote from it without permission.

The Project is financed by the United Nations Fund for Population Activities (U.N.F.P.A.) and it has the approval of the Lesotho Government through the Central Planning and Development Office.

S. M. Poulter

Project Director

## 1. TRADITIONAL ATTITUDES AND CUSTOMS

There can be little doubt that the traditional beliefs and attitudes of the Basotho attached great importance to the birth of children. Before the arrival of Christian missionaries in Lesotho in 1833 religious beliefs centred around a recognition of the influence of the spirits of the departed. A person's ancestors were regarded as continuing to hold roughly the same positions as they held when they were alive and they were thought to exercise the same sort of control and protection over their families. Their descendants were under an obligation to care for them and pay them homage in order to retain this protection. Moreover, they were under a special duty to ensure that the family line was perpetuated so that the ancestors would never be neglected or forgotten in the future. Thus in a very real sense a man's main purpose on earth was perceived as that of forging a link between his ancestors and his own descendants. More specifically, in consequence of the patrilineal nature of Basotho society the central aim of marriage may be said to have been the addition of more members to the husband's lineage.

Aside from religious beliefs, the emphasis placed upon the procreation of children must also have been stimulated by political and economic considerations. During the middle portion of the 19th century the Basotho were engaged in much fighting and in a desperate struggle for survival. Men lost in battle had to be replaced. Children were a useful asset in other ways. Boys could herd cattle, sheep and goats; they could earn wages in the mines and other employments across the border in South Africa and provide for their parents in their old age; girls could perform household tasks and their marriages would bring in bohali (bride-wealth).

The high premium placed on the need for children is reflected in a variety of customary and legal procedures and principles designed to

/achieve

achieve this objective. Polygamy was not merely permitted but actively encouraged and to have married a number of wives was an indication of a man's wealth and prestige. This not only increased his chances of having many children (enough of whom would survive the high rate of infant mortality), but also usually guaranteed him a son who would be his heir. Since both succession to the chieftainship and private rights of inheritance devolve through the line of males the birth of a son was of enormous importance.

The practice of paying bohali upon marriage not only served, in most cases, to validate the marriage but also had the effect of affiliating any children of the marriage to the husband's lineage. This process of legitimising any offspring is reflected in the Sesotho maxims - - "nqoana o tsoaloe ke khomo" ('cattle beget children') and "nqoana ke oa khomo" ('the child belongs to the beast').

Where for one reason or another a marriage proved childless a number of devices were available to help resolve the problem. For instance, where the senior wife of a polygamist turned out to be barren the husband could take a further wife as a 'seed-raiser' (mala) who would form part of the barren wife's 'house'. If a son was born he would be the heir in the senior house and the seniority of the barren wife would be preserved.

Where a wife died before she had produced any children the husband might ask her family to give him her sister in marriage in her place. Such a marriage was known by the name of seantlo and it would seem that no further bohali was payable for the new wife because the first payment had not achieved its major purpose. Similarly where the husband died soon after the marriage before his wife had borne him any children his younger brother was permitted to step into his shoes and take over his rights in terms of the kenelo custom. This too was designed to render the payment of bohali productive and add children to the husband's lineage.

These devices were taken a stage further in the case of 'ghost marriages'. If a young man died before he had married, his father might nevertheless pay bohali for a wife for him and a relative would be appointed by the father to cohabit with the bride. In this way, it was hoped, a son and heir would be born who would maintain the line of succession and perpetuate the spirit of the deceased and glorify his name. Such marriages were known as 'lebitla', a marriage 'to the grave'. Closely related were 'lebota' marriages, i.e. those to an entirely fictitious person. Here the father had never had a son at all and, pretending that he had, he thereupon paid bohali for a wife of the imagined son. The purpose was exactly the same as with a marriage 'to the grave'.

To what extent have these attitudes and customs of a markedly pro-retalist tendency persisted to modern times? It is not particularly easy to assess how strong the traditional religious beliefs in the powers of the ancestors are today. With the presence of Christian missionaries in the country for nearly 150 years it is perhaps not surprising that the population is, according to the official census reports, over 80 per cent Christian. However, for a large number of people, this may merely reflect a veneer of Christian faith superimposed on traditional beliefs. In any event, unlike other spheres in which the Christian churches have been brought inexorably into conflict with traditional customs, the mere desire to have many children is supported by Christian teaching and hence buttresses traditional attitudes. Economically children are still perceived as great assets by most Basotho, especially in terms of an insurance for their old age. Most men will have spent more than half their working lives in the South African mines and will have returned without any form of pension and very often with some illness or disability.

/As Murray ...

As Murray graphically expresses this dependence -

"The rural household in Lesotho must have access to migrant earnings from the Republic, either directly through cash remittances or indirectly through bohali transfers and share-cropping contracts. The migrant, for his part, must invest in the socio-economic benefits and long term security of belonging to a rural household in Lesotho. The most reliable means of ensuring this security for the future is to establish legitimate dependants at home." (1)

Polygamy has clearly declined considerably during the course of this century both through the influence of the missionaries and their schools and through the impact of a rising population on the country's limited land resources. Traditionally a married man was entitled to be allocated three fields, one for himself and two for his wife and children, each field measuring very approximately two or three acres. If he had more than one wife he would receive two extra fields in respect of each additional wife. However, the occupation of arable land reached saturation point more than twenty-five years ago and the number of fields a family can hope to obtain has shrunk dramatically. In these circumstances there is no economic advantage in having additional wives since there is insufficient land for them to cultivate profitably. Nor is it any longer so important for all Basotho women to marry in order to fulfil themselves. The range of job opportunity for single women is far wider today than it ever was in the past.

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(1) "High Wealth, Migrant Labour and the Position of Women in Lesotho" [1977] Journal of African Law 79 at 90.

It is sometimes suggested that the practice of polygamy was by no means totally pro-natalist in its effects. Rather, when linked to the ban on sexual intercourse during the period of weaning, it helped to space children in a healthy way so that each mother had an interval of one or two years between pregnancies. This may well be true, but the main inhibiting factor was the taboo on intercourse not the practice of polygamy. The belief that intercourse can spoil the mother's milk and adversely affect her child is still widespread in Lesotho. (1 A) This explains the persistence of the customary claim for additional compensation in adultery actions where the adultery occurred during the period of suckling. (2)

Lesotho remains a patrilineal and largely male-dominated society. People still regard it as important to have a son who will be the heir and succeed to both their property and any hereditary office they may hold. However, 'ghost marriages' were prohibited by legislation around 1950 and kenelo, seantlo and mala marriages seem to have fallen into almost total disuse. It may therefore be suggested that while the desire for children remains a keen one among nearly all Basotho some of the customs which promoted fulfilment of the desire have now either decreased substantially in importance or totally disappeared.

/2. MARRIAGE LAWS

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(1 A) According to a survey carried out in 1976 this belief is held by 88% of women in the country: see Attitudes to Family Planning in Lesotho (Lesotho Distance Teaching Centre, Maseru, 1976), p. 14.

(2) See Poulter, Family Law and Litigation in Basotho Society, pp. 168-9.

## 2. MARRIAGE LAWS

### (a) Forms of Marriage

Two distinct forms of marriage are recognised by the law of Lesotho. First, there is the Sesotho marriage under the customary law, which is potentially polygamous and which involves the payment of bohali. Secondly, there is the civil marriage derived from the imported common law, which is monogamous and which may take place either in church or in the office of a District Administrator. The Marriage Act, No. 10 of 1974, which regulates the solemnization of civil marriages specifically provides in Section 42 -

"This Act shall apply to all marriages solemnized in Lesotho save and except marriages contracted in accordance with Sesotho law and custom, and nothing herein contained shall be taken as in any manner affecting or casting doubts upon the validity of any such last-mentioned marriages contracted before or after the coming into operation of this Act."

However, while in law the two forms of marriage may be divided neatly into two different categories the long established practices of the Basotho have tended to mingle them together, resulting in considerable confusion. With the widespread acceptance of Christianity, growing numbers of Basotho have married in church. In 1977 the number of church marriages was around 5000, representing probably between 50 and 55 **per cent** of all marriages contracted in Lesotho that year. (3) However, nearly all Basotho continue to adhere to the custom of paying bohali on marriage and hence the couple are very often in reality parties to a 'dual marriage'. The question then arises as to which system of law is the appropriate one to regulate their matrimonial affairs e.g. the marital property regime, inheritance on death, the custody and guardianship of their children, the manner in which the marriage may be terminated etc.

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(3) For an explanation of how this percentage is arrived at, see Poulter, Legal Dualism in Lesotho, pp.



There are very few decided cases in which these problems have been squarely faced by the courts and the time would seem to be ripe for legislative action to clarify the situation. There would appear to be an obvious need for a comprehensive new law setting out the various forms of marriage and their consequences and dealing particularly with the phenomenon of 'dual marriages'. (4)

(b) Polygamy

Under Sesotho law a husband may have more than one wife and although, for reasons already explained, the practice of polygamy has declined so considerably that it has almost disappeared, important cases involving polygamy do occasionally reach the courts. They tend to reveal not only the contradictions which can arise when the two marriage systems are mingled together but also the strength of feeling in certain sections of the community that polygamy is still a central part of the culture of the Basotho even if modern conditions usually discourage its practice today.

In a number of cases, the most notable being Isosane v. Isosane (1971-73) L.L.R. 1, the High Court has accepted that a man may validly enter into a civil marriage with a second wife during the subsistence of a prior marriage with another woman contracted under Sesotho law. This situation is, of course, anomalous since the civil marriage is meant to be monogamous. In Ramafole v. Ramafole (H.C. Civ./Apn./ 133/1977, unreported) the third wife of a polygamist was denied the right to inherit her deceased husband's residential site despite her civil marriage being given full recognition by the court. The first two wives had been married according to Sesotho custom and the minor son of the first wife would inherit as the heir when he attained his majority. It appears that in

/such cases...

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(4) Ibid, pp.

such cases the High Court is prepared to view the husband's marriages through the eyes of Sesotho law, whereas perhaps his actions also need to be looked at from the standpoint of the common law.

In Mokhothu v. Manyaapele (C.A.Civ./1/1976, unreported) the reverse situation occurred since the husband had married his first wife in a civil ceremony. The couple separated and the husband thereupon married a second wife according to Sesotho custom. Only later did he actually obtain a divorce from his first wife. When the husband's relationship with his second wife began to deteriorate she sought an order from the High Court declaring her purported Sesotho marriage to be null and void. In his defence to the action the husband vehemently asserted the legality of what he had done on the basis of the recognition given to polygamy by Sesotho law. However, the second wife's claim was upheld on the grounds that public policy and the principles regulating civil marriages demanded that once a man had entered into a civil marriage he must abide by the precept of monogamy.

The upshot is that at present the question of validity hinges upon the order of the two marriages. Polygamy and a civil marriage are not mutually inconsistent provided the first marriage is a Sesotho one. Consideration surely needs to be given to putting the law on a more logical basis for the future.

Aside from the problems involved in the dual marriage system some thought might also be given to reforming the practice of polygamy purely in terms of the customary law. The manifest political, economic and social merits which polygamy possessed in the nineteenth century would seem to have largely disappeared today and instead the practice mainly reflects the inferior status of women in Basotho society.

/No doubt...

No doubt the abolition of polygamy might be too radical a step at the present time but restrictions of one sort or another might be introduced. For instance, polygamy could be limited to those cases where the first wife (the usual victim of the system) has freely consented to her husband taking another wife or where she is barren. Measures designed to raise the legal status of women would seem to be necessary if they are to play their full role in the development of the country.

(c) Minimum Age

For civil marriages entered into after 1st August 1974 the Marriage Act, no. 10 of 1974, now provides a basic minimum age of eighteen for boys and sixteen for girls. However, the Minister of Justice is empowered to grant written permission for a person to marry below the minimum age in any case where he considers this to be desirable. This permission may even be granted after the marriage has been contracted, in which case it operates retroactively to validate the marriage from the date of its solemnization.

Parental consent is required in the case of a minor, i.e. a person under the age of twenty-one who has not previously been married, though this may be dispensed with by a court if it finds that the parents' refusal of consent is both without adequate reason and contrary to the interests of the minor (section 26).

For Sesotho marriages there is no fixed minimum age for marriage. The decision as to when a child is ready for marriage is largely left in the hands of the parents since their consent is automatically required by section 34 (1) (b) of the Laws of Lesotho which lays down the essential elements of a customary marriage. In physical terms it would seem obvious that puberty must have been reached.

The 1966 Population Census suggests that the peak marriage age is between 30 and 34 for men and between 20 and 24 for women. However, whereas in the 15 to 19 age group there were only 470 married men (or 0.25 per cent of the male population aged fifteen or over), the number of married women in that group was 10,531 (or 3.5 per cent). No statistics were provided for marriages of persons under the age of fifteen though these are thought still to occur.

The question arises whether it would be desirable to fix the same minimum age for Sesotho marriages as presently applies to civil marriages, particularly in order to protect young girls from what may turn out to be unstable and unsatisfactory unions. Such a step might also tend to have some small impact on the number of children they might bear.

Although there are some writers who believe that the age at which a girl gets married has a direct relation to the number of children she could have, this cannot be proved conclusively and much must depend on a society's attitudes to pre-marital sexual intercourse. In India, where there are strong religious taboos, it is widely expected that the birth-rate will fall in consequence of raising the minimum age for marriage from 15 to 18 for girls and from 18 to 21 for boys, in terms of the Child Marriage Restraint (Amendment) Act 1978. In Lesotho, by contrast, there seem to be few effective cultural or religious constraints operating among young people today, and the illegitimate birth-rate, according to a survey made in 1978 by the Lesotho Distance Teaching Centre, appears to be somewhere in the region between ten and twenty per cent (see further, p. 21 below).

/It is true...

It is true that a person who has sexual intercourse with an unmarried girl (whether pregnancy results or not) commits the actionable legal wrong of Kemaris (seduction), requiring the payment of compensation at customary law. The usual scale of compensation is six head of cattle whose monetary equivalence the courts may well value at up to R300. In theory this substantial figure might be expected to restrict the incidence of premarital intercourse but the large number of claims for kemaris suggests otherwise. One explanation revolves around the fact that where the seducer is unmarried the compensation is payable not by him but by the head of his family (usually his father). Hence the sanction does not operate directly against the wrongdoer in such cases.

From this one may justifiably conclude that raising the minimum age for marriage could well have little impact on population growth.

On the assumption that fixing a uniform minimum age for both civil and Sesotho marriages would have at most a marginal effect on population growth in Lesotho, what are the pros and cons of such a proposal? One advantage already mentioned relates to the greater prospects of a successful marriage where the spouses are more mature. This maturity is necessary not only for a wise choice of partner but also for the efficient maintenance and competent running of a household. A second factor in favour of reform is that public opinion would appear to endorse such a proposal. In the survey carried out in a random sample of ten villages scattered throughout the country by the Lesotho Distance Teaching Centre during 1978, it was found that only two per cent of women and three per cent of men thought that it was ideal for girls to marry below the age of sixteen. Similarly only seven per cent of women and nine per cent of men considered marriages by boys under the age of twenty to be ideal.

(The main objection...

The main objection to the proposed reforms lies in the likely difficulties of implementation at the present time. First, unlike civil marriages, Sesotho marriages are not required by law to be registered and there is thus no official who is authorised or obliged to check the ages of the couple. Secondly, problems would arise in assessing their ages in any event since most Basotho do not possess birth certificates and the registration of birth was only made compulsory when the Registration of Births and Deaths Act, no. 22 of 1973, came into force in April 1975. Even now difficulties are being experienced in administering the Act and by no means is every birth being registered. Hence the main function in reforming the law at this stage would be an educational or propaganda one, designed to encourage a belief among parents that they should not consent to the marriages of their daughter below the age of sixteen or of their son below the age of eighteen. Under the proposed law it would still be very rare for a case to come before a court where it could be conclusively proved that one of the spouses was under age and that the marriage was consequently void. The legal presumption from a substantial period of cohabitation and payment of bohali would be that the marriage was valid.

If a new comprehensive marriage law were to be enacted it would certainly seem desirable to provide for all forms of marriage to be registered. Marriage certificates furnish valuable evidence when a dispute subsequently comes to court and they are also useful for establishing marital status for Basotho migrant workers in South Africa.

(d) Nullity: Impotence and Sterility (5)

/At common law...

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(5) See generally Poulter, Family Law and Litigation in Basotho Society, p. 212; Mahlo, The South African Law of Husband and Wife, pp. 500-3.

(d) Nullity: Impotence and Sterility

At common law a marriage is voidable if one of the spouses is afflicted with impotence and hence unable to consummate the marriage and if this was unknown to the other spouse at the time of the marriage. Impotence also appears to provide a justification for repudiating a marriage under Sesotho law, at any rate where it was not disclosed to the other spouse at the time of the marriage.

On the other hand, Sesotho law does not seem to regard sterility in the same light since a husband whose wife turns out to be barren may take another wife. The right to practice polygamy obviates any pressure for the first marriage to be nullified or terminated.

At common law, however, it is far from clear whether sterility renders a marriage voidable. The South African courts, whose decisions are of persuasive authority in Lesotho, are divided on the question. In Venter v. Venter 1949 (4) S.A. 123 (W) it was held that sterility, unaccompanied by impotence, was not a ground for annulment, except possibly where it had been deliberately concealed from the other spouse. Ten years later in Van Niekerk v. Van Niekerk 1959 (4) S.A. 658 (GW) another court of similar standing decided that sterility did constitute a ground for annulment on the basis that the ability to procreate children was normally an essential element of marriage. In those cases, therefore, where the procreation of children was an express or implied object of the marriage the court held that a nullity decree could be obtained. It was not necessary for the plaintiff to prove fraudulent non-disclosure in order to succeed.

/Since the ...

Since the writings of the old Roman-Dutch writers (which form part of the basis of Lesotho's common law) are somewhat confused on the subject, it would appear open to a Lesotho Court to adopt either of these approaches. In the knowledge that most other legal systems do not recognise sterility as a ground for ~~annulment~~ the majority of modern academic writers clearly prefer Venter's case. This would coincide with population policy considerations in Lesotho provided that adequate facilities exist for the adoption of children (see below).

### 3. DIVORCE

#### (a) Procedures and grounds

Whereas customary divorces may be achieved either judicially in the Basotho Courts or by means of an informal arrangement between the two spouses and their respective families, dissolution of a civil marriage must take the form of a decree granted by the High Court.

Moreover, while the basic philosophy of Sesotho law is that divorce should be available in cases of marriage breakdown, the common law operates on the matrimonial offence principle and recognises only the two grounds of adultery and "malicious desertion". It would appear that since the procreation of children is a central aim of most marriages each spouse generally has a "right to procreate." Hence, unless there is a good reason why the spouses should not have children a refusal to have intercourse without contraceptives or some other method of birth control may amount to "malicious desertion" at common law.

/As Hahlo puts ...



As Mahlo puts it -

"A reasonable apprehension that child-bearing would endanger the life or health of the wife or that children born of the union would probably be mentally or physically defective would clearly be a good reason. What is not clear is whether poverty or the fact that the spouses have already more children than they can care for would be a good reason. Everything, it is suggested, must depend upon the circumstances. The fact that this planet of ours is becoming somewhat overcrowded may or may not be a valid consideration." (6)

(b) Incidence of divorce

It seems to be the view of a number of Basotho that customary divorce is so rare as to be almost unknown and that the very concept of divorce is an alien one imported from outside. However, both court records and the official census reports suggest that the number of Basotho divorcees now runs into thousands.

So far as divorces at common law are concerned, while the number appears to have increased quite sharply since 1965 (see Table 1 below), it still remains extremely small.

Even if the peak year of 1972 is taken, with proceedings instituted in 48 cases of which 36 led to decrees of divorce being granted, this must be compared with the figure of 3 649 civil marriages registered that year. This gives a ratio of roughly one divorce at common law for every hundred civil marriages and compares very favourably indeed with many other countries. For instance, in England and among the white population of South Africa the ratio is about 1 : 4. It should, however, be pointed out that the Lesotho figures are not really surprising when the traditional reluctance of the Basotho to divorce is borne in mind as well as the fact that the cost of a divorce in the High Court is unlikely to be less than R80 and may rise to as much as R250 in a contested case. Moreover the modern view is that a country's divorce rate is less important than the rate of marriage breakdown and that a low divorce rate may indicate the harshness of the law rather than the happiness and stability of individuals and families.

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(6) The South African Law of Husband and Wife, p. 398.

T A B L E 1

Incidence of divorce cases in the High Court, 1965-76

Year	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	TOTAL
Proceedings instituted	12	16	28	21	27	29	23	48	52	31	54	56	397
Decrees granted	7	12	16	13	17	22	14	36	30	13	31	25	236
Decrees refused	0	0	2	2	0	1	4	1	2	0	0	0	12
Cases withdrawn or not proceeded with or not yet completed	5	4	9	5	7	2	5	11	20	18	22	31	139
Outcome of case not known (file mislaid)	--	--	1	1	3	4	--	--	--	--	1	--	10

Source: Private researches in High Court records by Miss Sasha Songca and the author.

Note: The statistics only relate to divorces of Basotho and other Africans.  
Some of the figures still need further checking.

(c) Reforms

In recent years the matrimonial offence principle of the common law has come in for considerable criticism in many countries and a great deal of reforming legislation has been introduced. This has usually provided, in one way or another, for divorce on the basis of "irretrievable breakdown of marriage."

A similar call was made recently in Lesotho by Mofokeng J. in the case of Masupha v. Masupha (H.C. Civ./T/31/1977, unreported). In that case the plaintiff husband had sought a divorce from his wife, whom he had married by civil rites, on the grounds of her adultery and malicious desertion. As the hearing proceeded it became clear from the evidence led for the husband that he was unable to make out his case on either ground. The court therefore acceded to the wife's application for the dismissal of her husband's claim without even needing to hear any evidence on her behalf. Despite this it was obvious that the marriage in question had totally broken down some years before and the husband had even purported to marry a second wife by Sesotho custom (as to the invalidity of which, see Mokhothu v. Manyapelo cited earlier).

The learned judge seized the opportunity presented by Masupha's case to make certain remarks on the state of the law, as follows -

"This case demonstrates clearly what happens under the common law system of divorce where a party who wishes for a divorce has to prove one or other or all the recognised grounds of divorce. In a majority of such cases no such proofs really exist and the result is that a party and his witnesses 'gang up' and fabricate evidence; the court is told unadulterated lies, sometimes to the extent of trying to bastardise minor children...

/This, I am ...

This, I am afraid, is what has happened in the case before me. I am of the view that this would not have happened if the principle of the Sesotho legal system... had been adopted in the common law system. The principle is simply this: the courts are free in divorce matter to take account of . situations where the marriage relationship has totally broken down...

This principle has been mentioned in this case because it is quite obvious that the plaintiff, being an ardent adherent of Sesotho law and customs (he repeatedly said so in the course of giving his evidence) thought, wrongly in my view, that the same principle would apply to his case. However, that is not yet the legal position under the common law, but is applied almost daily in divorce matters under Sesotho law. Perhaps the day is not too far off when this realistic principle of the Sesotho legal system pertaining to divorce matters will be of general application in all divorce matters before all the courts in this Kingdom."

In view of this it is pertinent to refer to the following statement made by the English Law Commission in its report on divorce law in England where the concept of irretrievable breakdown was enacted in 1969 -

"... a good divorce law should seek to achieve the following objectives:

(i) To buttress, rather than undermine, the stability of marriage; and

(ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation." (7)

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(7) The Field of Choice, para. 15.

If civil marriages are to be harmonious, stable, respected and conducive to the proper upbringing of children divorce must be made neither too easy nor too hard. Sensible reforms in the grounds for divorce need to be accompanied by suitable provisions for the possibility of reconciliation. Sesotho law already has a useful mechanism in the form of the ngala custom which enables a wife to return to her parents' home as a sanction for her ill-treatment by her husband. Thereafter the husband is expected to go to his parents-in-law and seek her return, undertaking to mend his ways in future. All parties are under a duty to seek a re reconciliation and the spouses' parents play a vital role in this. A similar provision should find its way into any new system of divorce from civil marriages that may be introduced. Facilities for the conciliation of outstanding differences in relation to the children of the marriage and any matrimonial assets also need to be made available. Since minor children are at risk as much as anyone in divorce cases adequate safeguards for their welfare should also be introduced. It could, for instance, be provided that no decree of divorce may be granted until such time as the court is satisfied that suitable provision can and will be made for the welfare of minor or dependent children.

Consideration might also perhaps be given to extending divorce jurisdiction to the subordinate (magistrate's) courts. These courts did formerly possess jurisdiction to dissolve civil marriages and they were only deprived of it by an oversight on the part of the legislative draftsman in 1960. (8) These courts possess important advantages from the point of view of Basotho litigants since they are cheaper, speedier and more convenient of access than the High Court which only sits in Maseru.

/There must ...

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(8) The mistake did not come to light until 1964 - See Theko v. Theko (1963-66) H.C.T.L.R. 105.

There must surely be many spouses in Lesotho whose marriages have broken down and who are entitled to a divorce but who are effectively barred from obtaining one by the expense and inconvenience of High Court proceedings. No doubt at present they are entering new unions unrecognised by the law and creating further problems for the future.

#### 4. LEGITIMACY, MAINTENANCE and ADOPTION of CHILDREN

##### (a) Legitimacy

Basically a child is legitimate in Sesotho law if it was born at a time when its mother was married, regardless of whether her husband was in fact the child's father. For this purpose it appears that the mother's marriage will only be regarded as complete if at least ten head of cattle (or their equivalent) have been paid by way of bohali. Only then will the child be recognised as unequivocally belonging to the lineage of the husband. Children conceived after the husband's death are also regarded as members of his lineage on the grounds that their mother was married to her husband's family and not to him alone.

The common law rule, on the other hand, is that a child is legitimate if its parents were married to each other at the time of its conception or birth or at any time between these dates. Thus whereas Sesotho law emphasises the marriage of the mother as the crucial determinant, the common law is concerned with paternity as well. Where there is doubt as to the paternity of a child the common law employs a rebuttable presumption that the child is the legitimate offspring of the husband - "pater est quem nuptiae demonstrant." Children of some void marriages may also be treated as legitimate at common law where application is made to the courts for the union to be declared a "putative" marriage.

/The two legal...

The two legal systems also differ on the question of legitimation. At common law an illegitimate child is automatically legitimated by the subsequent marriage of its parents, whereas Sesotho law appears to require in addition to the marriage an agreement between the parents of the spouses on the future status of the child, coupled with full family publicity of such agreement. Furthermore, Sesotho law is prepared to treat a child as legitimated by the subsequent marriage of its mother to a man other than its father provided these formalities are complied with.

No official figures are available in Lesotho with respect to the rates of legitimate and illegitimate births. Some indication of the present situation may, however, be obtained from the survey carried out by the Lesotho Distance Teaching Centre in 1978. It concluded from a survey of 268 births within the last five years in eight villages selected at random from the census enumeration areas, that the illegitimate birth-rate was somewhere between ten and twenty per cent. It appeared that around forty per cent of these illegitimate children were subsequently legitimated by marriage.

An obvious means by which more detailed and accurate information on the illegitimate birth rate could be obtained is through a stricter enforcement of the detailed provisions of the Registration of Births and Deaths Regulations 1974. These Regulations provide for the inclusion, among the particulars to be registered on the birth of a child, of all the names (including surnames) of the father and mother (ss. 5 and 6 and 1st schedule). However, a cursory inspection of the current births register reveals that the mother's surname is almost always different from that of the father. This either indicates an illegitimate birth rate of around 90% or (far more likely) a misunderstanding on the part of those responsible for the reporting and registration of births of what the legal requirements actually are. Both the mother's surname

/and her maiden...

and her maiden name are required to be entered on Form C (Notification of Birth). There would seem to be a clear need for the administration of these Regulations to be strengthened.

(b) Maintenance

Both at common law and under customary law the obligation to maintain and support children extends through relatives of various degrees in order to try to ensure that the child is given a proper start in life. At common law the primary responsibility falls upon the child's parents, regardless of whether the child is legitimate or illegitimate. Both parents are bound to contribute according to their resources and circumstances and they must share the obligation in proportion to their means. Where the parents (or after their deaths their estates) cannot provide the necessary maintenance the duty of support devolves upon the grandparents. Alternatively it may pass to the child's older brothers and sisters.

Under Sesotho law an important distinction is drawn between legitimate and illegitimate children. Legitimate children are the responsibility of the husband's family while illegitimate children fall to be maintained by their mother's family. The only obligation the father of an illegitimate child bears is in connection with the payment of compensation to the head of the mother's family for seduction.

In both instances the duty of support is spread through the members of the extended family so that where a closer relative has died or is unable to support the child a remoter relative (e.g. an uncle or a cousin) takes over the obligation. The chieftainship is meant to exercise a general supervision over the maintenance of orphans.

/So far as...



So far as the enforcement of child support is concerned some useful machinery has been provided by the Deserted Wives and Children Proclamation, No. 60 of 1959 (as amended in 1971 and 1977). In terms of this legislation the subordinate (Magistrate's) courts are empowered to make maintenance orders involving periodical payments for children below the age of fifteen where the child is shown to be without adequate means of support. Moreover it is made a criminal offence, punishable by a fine of up to R200 or one year's imprisonment (or both) for any person who is legally liable to maintain a child to fail to provide it with adequate food, clothing, lodging and medical aid when able to do so. The usual practice is for the courts to suspend any sentence of imprisonment on condition that a maintenance order is complied with and regular monthly payments made to the court clerk.

(c) Adoption

Adoption is recognised under Sesotho law principally as a method by which a man without male issue may acquire an heir and the child adopted is almost invariably a close relative such as a nephew. (9) Adoption can thus solve the problem posed by a barren wife without the husband needing to resort to polygamy.

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(9) For a recent illustration, see Lebona v. Minister of Interior, H.C. Civ./Apr./371/1977 (unreported).

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5. INHERITANCE

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Because of the dualistic nature of the Lesotho legal system it is virtually impossible to present an accurate statement of this complex and controversial branch of the law in a short compass. Rules derived from the customary law, statutory enactments and the common law subsist side by side and the implications of their interaction have by no means yet been definitively worked out. (10)

Despite this, various significant aspects can be highlighted and possible lines of reform suggested.

The fundamental principle of Sesotho law, which may safely be assumed to apply to the vast majority of the population, is that inheritance runs through the male line. This means that a man is succeeded by his eldest legitimate son (or in a polygamous household by the eldest son of his senior wife, her status being determined by priority of marriage). If a married man has no natural sons (and has not adopted an heir), the inheritance may go instead to his brothers or their sons. His own daughters are bypassed and have no right to inherit.

The heir's pre-eminent position is buttressed by the rule that his father may not, either during his lifetime or by means of written instructions designed to take effect on death, allocate property to other persons in such a way as to deprive the heir of more than half of the estate. Yet when the heir does come into the inheritance it appears that he may often breach the wider family obligations imposed on him by Sesotho law by failing to support and properly maintain his father's widow and by neglecting to share the estate with his junior brothers.

/In view of ...

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(10) See generally Poulter, Legal Dualism in Lesotho, pp.

In view of this, the following questions would seem to merit consideration. Is it right that the deceased's brothers should have a superior claim to that of his own daughters? If daughters had a right to inherit would this gradually lessen the present determination of people to go on having children until they have a son? Should the heir continue to have a fixed right to the greater part of the estate, thus considerably restricting the deceased's freedom to make proper provision for other members of his family, particularly his widow? Clearly if the heir's rights were to be cut down his liabilities would have to be correspondingly reduced and his responsibility for his father's debts would have to be limited to the extent of the assets in the estate. But assuming this could be satisfactorily achieved, is there any reason why, after proper provision for the widow by means of a fixed proportion, the deceased's estate should not be shared among all his children, regardless of sex, either in equal shares or in other fixed proportions?

Satisfactory legal protection for widows and daughters is desirable in terms of a general population policy because it tends to enhance the status of women in society and their full involvement in development is vital for the country's future. It appears that in Lesotho their position would be better safeguarded through the application of the common law and statutory rules governing community of property, intestacy and the execution of wills. At common law a widow who has been married according to civil rites possesses a right to half the joint estate on the death of her husband. In the absence of a will she also has a supplementary entitlement under the Intestate Succession Proclamation, No. 2 of 1953, to a share in the other half of the joint estate, as do her daughters. On the other hand, if the deceased makes a valid will he can bequeath his half of the joint estate to his widow and children in whatever proportions he wishes and without any form of restriction (See the Law of Inheritance Act, no. 26 of 1973).

(However...

However, the general impression in Lesotho appears to be that these common law and statutory rules only apply where the deceased had "abandoned tribal custom" and adopted a "European mode of life". These words come from section 3 (b) of the Administration of Estates Proclamation, no. 19 of 1935, and are thought to be applicable either directly (in the case of intestacy) or by analogy (in the case of wills) to the situations described above. (11) Whether this is technically correct or not it seems clear that the time is ripe for the archaic, paternalistic, vague and unduly restrictive provisions of section 3 of this Proclamation to be repealed.

Whatever basic solution is adopted consideration might also be given to the introduction of a 'family provision' scheme whereby any person who had been dependent on the deceased and who had unjustly been left without adequate provision on his death could apply to the court for suitable support from his estate. The determination of what an appropriate amount of support would be in each case could be left to the discretion of the court.

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(11) See Poulter, Legal Dualism in Lesotho, pp. ;  
Khatala v. Khatala (1963-66) H.C.T.L.R. 97; Ramafole v. Ramafole,  
H.C. Civ./ App./ 133/1977 (unreported); Thoka v. Hoohlo, H.C. Civ./  
T/ 29/1977 (unreported).



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