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DUAL MARRIAGES IN LESOTHO

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Introduction

The aims of this paper are to examine the dualism that lies at the heart of Lesotho's system of law and its court structure and then to explore one particular facet in greater detail, namely dual marriages. A dual marriage is one in which the spouses have 'married' one another twice, both under customary law and under the imported system of law.

An attempt will be made to answer the following questions. First, how do dual marriages actually occur and what is the explanation for them? Secondly, what is their significance in legal terms? Thirdly, what is the legal position if the second marriage fails to materialise?

Finally, some tentative suggestions are put forward about possible lines of reform.

1. Background of dualism

(a) Legal dualism

The underlying structure of the legal system differs very little today from the arrangement established in 1884 immediately after Basutoland was removed from the direct administration of the Parliament of the colony of the Cape of Good Hope and returned to a system of 'indirect rule' administered by the British government. Regulation 12 of Proclamation No.2B issued by the High Commissioner on 29 May 1884 provided on the one hand for the continued operation of the Cape Colonial Common Law which had been applied during the period of annexation to the Cape (1871-83) and, on the other, for the retention of the customary law then administered by the chiefs. These two legal systems still subsist side by side and ^{the} amended version of the 1884 provision indicates that generally the Lesotho courts have a wide discretion in deciding which system is to be applied to a particular case. It declares-

"In all...proceedings...the law to be administered shall as nearly as the circumstances of the country will permit be the law for the time being in force in the Colony of the Cape of Good Hope: Provided, however

that in all proceedings in any court to which all of the parties are Africans, and in all... proceedings whatsoever before any Basuto court, African law may be administered" (underlining added).

The common law of Lesotho is often referred to today as Roman-Dutch Law but if we are speaking of a system that continued to develop beyond 1800 it is clearly a misnomer. Roman-Dutch Law disappeared from Holland, its base, when the Napoleonic Code was introduced in 1811, and in Southern Africa where it was imported by Van Riebeeck it has been so strongly influenced by English law and moulded by the decisions of the courts that in many spheres it would be quite unrecognisable to the great Dutch institutional writers of the 17th and 18th centuries.¹ 'South African Law' would be a more accurate, though perhaps less palatable expression, always remembering that Lesotho does not count South African legislation as part of her law² and it is in this legislation that one finds the implementation of apartheid and authority for the gross violation of human rights.

Lesotho's own principal legislation is diverse and consists mainly of 'Proclamations' of the British High Commissioner and British 'Orders in Council' (1884-1959), 'Laws' enacted by the National Council (1960-65), 'Acts' of the Lesotho Parliament (1966-70), 'Orders' made by the Council/^{of} Ministers (1970-73) and 'Acts' passed by the Interim National Assembly (1973 to date). There is also a mass of subordinate legislation.

(b) Dualism in the court structure

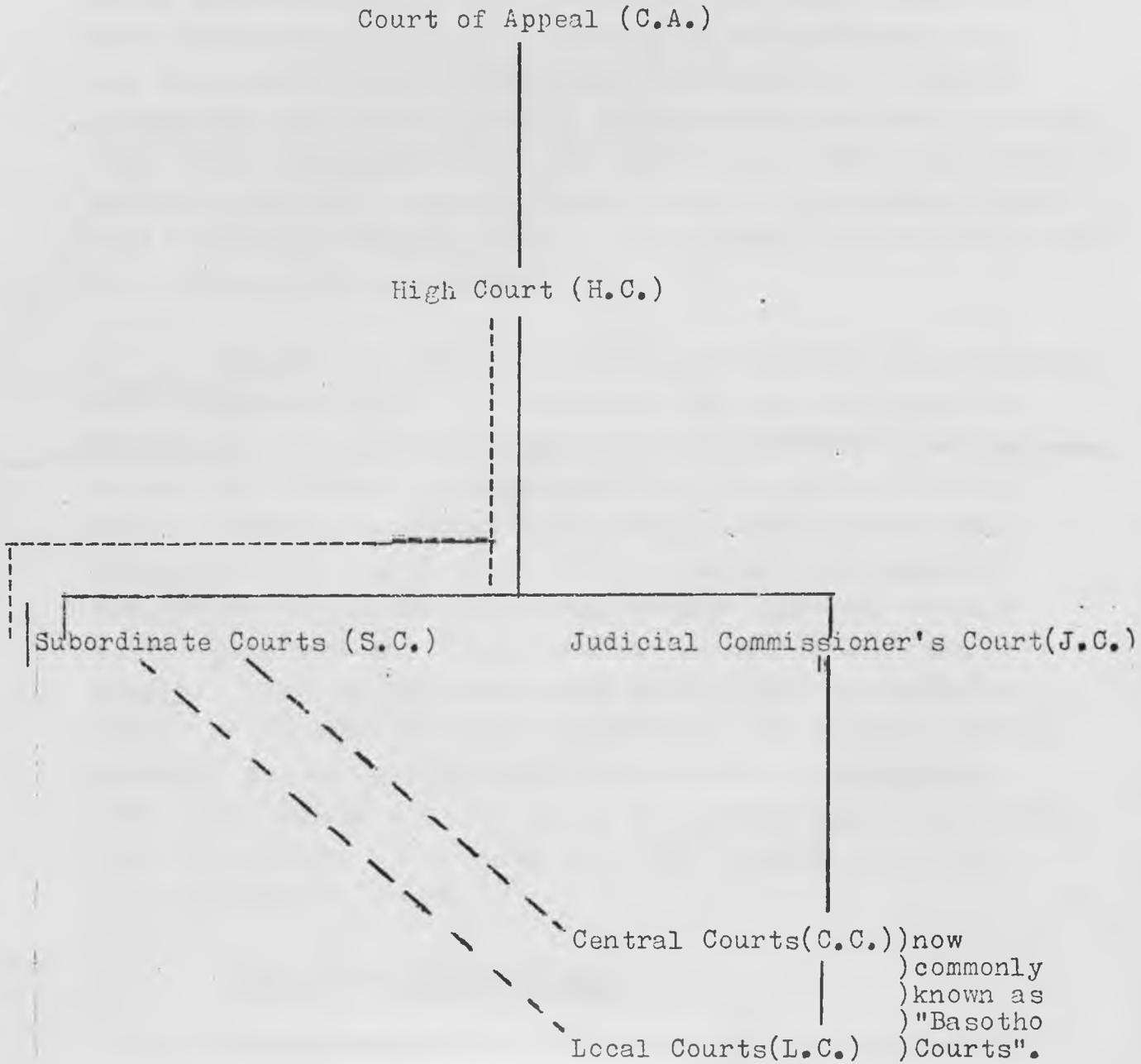
The system of legal dualism established in 1884 was accompanied, naturally enough, by a parallel court structure. The imported common law was to be applied by the Resident Commissioner (who was the chief administrative officer) together with his Assistant Commissioners (in their respective districts), while customary law was to be administered in the traditional courts of the chiefs.

In 1938 fundamental changes occurred.³ The Court of the Resident Commissioner was replaced by a newly constituted High Court which was granted the same jurisdiction as that possessed by the Supreme Court of South Africa. Secondly, a

systems of magistrates' (or subordinate) courts was introduced in place of the Assistant Commissioners' Courts in order to deal with the less important cases. The magisterial structure was based upon a few legally qualified magistrates supplemented to a large extent by administrative officers who were entitled to hold courts of different 'classes' according to their rank. Thirdly, the traditional chiefs' courts were replaced by statutory courts, originally known as 'Native Courts', now officially styled 'Central and Local Courts' and colloquially referred to simply as 'Basotho Courts.' Chiefs and headmen continue to hear 'cases', but strictly they are not holding 'courts' because they have lost the right to enforce their decisions. In the legal sphere they function rather as mediators and conciliators.

In 1944 a new post of Judicial Commissioner was created as an intermediate appeal court in matters of Sesotho Law, between the 'Native Courts' and the High Court. Lesotho acquired her own Court of Appeal in 1966 and abolished appeals to the Privy Council in London in 1970.⁴ As a result the structure of the judicial hierarchy looks like this-

Diagram showing the structure of the courts



_____ indicates channel of appeal

----- indicates channel of revisory jurisdiction

The Court of Appeal and High Court can administer both systems of law and have virtually untrammelled discretion in choosing which to apply in a given case. There is no statutory provision prohibiting the Subordinate Courts from determining a matter according to the customary law, but in practice these courts hear very few civil cases in comparison with their criminal jurisdiction and most of these seem to be determined under the common law. Where an action arises which the magistrate feels would be more conveniently dealt with in a Basotho Court he can order it to be transferred to a Local or Central Court.⁵

The Basotho Courts are only entitled to apply Sesotho Law⁶ (together with a few statutes) and may not apply the common law. If the case calls for the application of the common law it must be transferred to a Subordinate Court.⁷ Certain matters have been specifically excluded from the jurisdiction of the Basotho Courts, notably all cases in connection with civil marriages, except where and insofar as the case concerns the payment or return or disposal of bohali.⁸ Legal practitioners are barred from appearing on behalf of clients in civil cases before the Basotho Courts.⁹ However, the magistrates have wide powers of supervision over these Courts and may review and revise their decisions, e.g. by ordering a new hearing or the transfer of a case to a Subordinate Court.¹⁰

(c) Dual System of Marriages

The essence of the traditional Sesotho marriage involving agreement between the two families and the payment of bohali has survived the colonial era and the endeavours of the missionaries more or less intact, although some changes and modifications have obviously occurred since the time of Moshoeshe I. One notable development has been an attempt to define in legal terms exactly when a Sesotho marriage can be said to have taken place.¹¹ Section 34(1) of Part II of the Laws of Lerotholi, a statutory provision,¹² now declares-

"A marriage...shall be deemed to be completed when:

- (a) there is agreement between the parties to the marriage;
- (b) there is agreement between the parents of the parties or between those who stand in loco parentis to the parties as to the marriage and as to the amount of the bohali;
- (c) there is payment of part or all of the bohali....."

Marriages solemnised by ministers of the Christian religion followed the arrival of the first missionaries from the Paris Evangelical Missionary Society (P.E.M.S.) in 1833 and of the Roman Catholic missionaries some thirty years later. When Basutoland became a British Colony in 1868 doubts must have arisen as to whether these marriages were valid and it was felt necessary to recognise their validity officially by means of government regulation.¹³ Provision for marriages to be celebrated by a secular marriage officer seems to have first been introduced in 1877.¹⁴

From 1911 until 1974 'civil marriages' (by which is meant all non-customary marriages, whether religious or secular) were regulated by the Marriage Proclamation of 1911. This Proclamation provided that all non-customary marriages should be solemnised by a marriage officer who would be either a District Officer or a minister of religion duly gazetted as such. Essential preliminaries were specified in the form of the publication of banns in church or the issue of a special licence. The main purpose of the Proclamation was to provide for the formalities, solemnisation and registration of civil marriages and virtually nothing was said about the legal consequences of a civil marriage. What was clearly stated, however, was that nothing in the Proclamation should be taken as in any manner casting doubts upon the validity of Sesotho marriages whether they were contracted before or after 1911.¹⁵

In 1974 the Proclamation was superseded by the Marriage Act of 1974 which tidied up the law but did not effect any really major changes. Every District Administrator

is now a Marriage Officer for his district ex-officio and ministers of religion may be designated marriage officers by the Ministry of Justice.

The impact of the missions and churches upon the number of people entering into civil marriages can be measured against the rapid growth in Basotho adherents to Christianity. The following figures are those given in the official census reports-

<u>Year</u>	<u>Number of Africans professing Christianity</u>	<u>Expressed as a percentage of the de facto African population</u>
1875	6,379	5
1904	50,526	14.5
1921	135,749	27
1936	254,511	45.5
1946	323,913	63
1956	452,925	71
1966	695,002	82

These are high figures indeed, and as might be anticipated by no means all professing Christians put their faith into practice in relation to all the important events in their lives. The average number of civil marriages contracted in the whole country each year during the decade 1961-70 was only just over 2,500. However, the numbers have been growing steadily and the average for the years 1971-75 had risen to around 4,300 per annum. By 1976 the figure was 5,409.¹⁶ In each case the vast majority were church weddings, probably only about five per cent being before a District Commissioner or District Administrator. If it is assumed that the total marriage rate among Basotho is eight per thousand of population per annum¹⁷ it seems clear that whereas during the 1960's only about one-third of all marriages between Basotho were contracted according to civil rites today the figure is nearer 55 per cent.¹⁸

Why do so many Basotho choose to marry in church?¹⁹ Obviously it is partly because of the religious beliefs of the spouses and their parents, but it appears also to be a fashionable thing to do. It seems that another factor may be the usefulness of a civil marriage certificate in satisfying the requirements of South African authorities and employers.

2. Church attitudes towards dual marriages.

Historically, what has the approach of the Christian missions been towards those Basotho who have wished both to adopt the wedding ceremony of their faith and retain their traditional practices? Have the missions permitted a couple to marry under Sesotho law first and then go through a ceremony of marriage in church afterwards? The major denominations represented in Lesotho have taken different stances.

The P.E.M.S., believing that the payment of bohali under Sesotho law signified the purchase of a wife, refused to countenance customary marriages.²⁰ Anyone paying or receiving bohali was liable to be expelled from church membership forthwith. The Roman Catholic and Anglican churches, on the other hand, were less rigid and took no objection to such dual marriages.²¹

In practice members of the Lesotho Evangelical Church frequently broke the rules and paid bohali surreptitiously.²² In the process they were often compelled to resort to devious disguises for their payments. Some drove the cattle after nightfall and acquired the nickname of 'Christians of the Twilight'.²³ Others paid in cash and the money was then meant to be used to offset the wedding expenses, including the bride's dress and the feast.²⁴ This payment they called moho (a gift)²⁵, a transparent cover for what was commonly bohali, at any rate in some degree, since not all the money was really spent on the wedding by the bride's family.²⁶ Other simple techniques of evasion were for parents not to become converts until they had married off all their daughters²⁷ or else, if already members, to lapse as soon as their daughters became eligible for marriage.

Eventually the Church realized that its attitude had led to even greater evils than those which it had sought to eradicate. Christians were learning to behave hypocritically and were practising constant deceptions on their own clergy. The bohali custom had turned out to mean far more to the Basotho than the P.E.M.S. missionaries had imagined and they were steadily losing converts to the other churches.²⁸

Therefore around 1954 the rule banning bohali payments was lifted and the Church of Lesotho officially countenanced what everyone knew had been going on behind the scenes for upward of a hundred years. 29

3. Three types of dual marriages described

A dual marriage usually occurs in one of three ways. The first situation is where the couple marry initially according to Sesotho custom and then, perhaps three, five, ten or even twenty years later they go through a wedding ceremony in church. This process is usually referred to colloquially as 'tiiso ea lenyalo' (confirmation of marriage). One reason, obviously, for proceeding with the religious service is to express publicly their adherence to church doctrine, no doubt mindful of the maxim 'better late than never.' Probably they will not be recent converts and for some time their church may have been subtly exerting pressure on them to do the right thing, albeit rather belatedly. Another possible reason is that the wife believes that by entering into a civil marriage she will strengthen her legal rights. The most important objective from her point of view is probably to obtain her husband's commitment to monogamy. Indirectly her children may benefit too and conceivably if she has heard of the common law system of community of property she hopes that it will somehow work to her advantage. It is unlikely that her husband shares these latter intentions, though he probably accepts the ban on polygamy in most cases.

The number of dual marriages of this first type can be gauged with a reasonable degree of accuracy by checking the marriage registers. As a civil marriage the church wedding has to be registered by law and opposite the names of the couple will appear the words 'previously married according to Sesotho custom' rather than 'bachelor' and 'spinster' or 'divorcee' or 'widow'. The figures for the last few years are as follows 30_

<u>Year</u>	<u>Total number of civil marriages registered</u> 31	<u>Number of couples describing themselves as previously married according to Sesotho custom</u>	<u>Percentage</u>
1966	2,516	460	18.3
1967	2,400	564	23.5
1968	2,739	542	19.8
1969	3,015	686	22.8
1970	2,704	600	22.2
1971	3,317	912	27.5
1972	3,649	882	24.2
1973	4,576	891	19.5
1974	4,996	1,221	24.4
1975	4,961	1,166	23.5
1976	5,409	1,023	18.9

The second type of dual marriage reflects a greater degree of cohesion in the timing of the two sets of ceremonies and procedures. The usual pattern is that the couple and their respective parents automatically agree upon a church wedding, both because of their religious affiliations and because it is appropriate to their social position, but they also wish to show that they retain their respect for Sesotho customs. For this reason the negotiations for the marriage are conducted through the traditional channels and family representatives settle how much bohali should be paid. Sometimes the whole bohali is paid over in money immediately before the church wedding takes place, but it is just as likely that only part will be paid at this stage, leaving the balance to be extinguished at some later date. In some instances nothing may actually be paid before the church ceremony, but the amount due will nevertheless have been finally agreed upon. After the wedding service is over there will be the usual festivities and these will be regarded by most of the participants as the climax of the whole occasion.

In this second type, it is difficult (and certainly very artificial) to seek to separate the two marriages and determine which of them came first in time. Technically, however, it is possible to do so because the completion of a Sesotho marriage

depends upon at least part of the bohali having been paid.³² If it is assumed, as seems very probable, that nearly all those who marry civilly also pay bohali, then this must be the most common type of dual marriage. However, it should be borne in mind that today a number of young Basotho (especially the men) would prefer not to pay bohali on marriage and wish to have a thoroughly modern wedding. Usually they are finally prevailed upon to follow the practice of paying bohali by family pressures and if this is done by the payment of a single lump sum of money around the time of the church ceremony they may well try to repudiate the idea that they are parties to a Sesotho marriage at all. Though they may seek to deny the existence of the Sesotho marriage, side by side with the civil marriage, all its ingredients are present and their families will naturally see what has happened in terms of a dual marriage. It is therefore submitted that there is still such a marriage even in this type of situation and furthermore, as will be argued later, that it is quite misleading to portray the payment of bohali in such a case as a purely commercial appendage to a civil marriage.

In the third type of dual marriage the process is almost the reverse of the first. A modern couple, determined not to follow the traditional custom of paying bohali and to keep their parents and relatives out of the affair altogether, go through a civil marriage before a District Administrator. They might do this in order to avoid the necessity of obtaining their parents' consent where they knew this would be withheld. They themselves or their parents might be of different faiths and hence unable to agree on which church ceremony to have. The couple may have eloped and the man may only have been willing to pay the customary compensation for abduction and unwilling to negotiate further about bohali.

After this first stage is completed the families of the husband and the wife will eventually come to hear of the wedding and may well be rather shocked at what has been done behind their backs. The girl's family, in particular, will often then put pressure on the husband and his family to 'regularise' the position in traditional terms by paying bohali. After sometime the husband and his family may relent in order to maintain good relations with the wife's family. Bohali is then

negotiated and paid. Again, it is submitted a dual marriage has occurred because all the necessary ingredients of a Sesotho marriage are finally present. However, this type is much rarer than the other two and only occurs where the girl is prepared to outmanoeuvre her parents by marrying in a District Administrator's office. Generally the girl's parents will have sufficient influence over her to ensure that they are involved in the negotiations from an early stage and are able to insist on the payment of bohali as the price of their consent to a church wedding.

The legal significance of a dual marriage

What, then, is the juridical nature of these dual marriages?

The first possibility is that Lesotho follows the South African approach in terms of which the civil marriage always predominates, overriding and absorbing any prior customary marriage.³³ Duncan has taken this view³⁴ but it is totally unacceptable. The reason for the South African stance is that customary marriages are given very limited recognition in that country anyway, being designed mere 'customary unions'. In Lesotho both types of marriage are equally valid and there is no justification, in the absence of statutory authority, for holding that a civil marriage literally cancels out a customary marriage.

A second possibility is that the marriage which takes place first is the only valid marriage, the second ceremony amounting to no more than a blessing or confirmation of the status created by the first ceremony. There is judicial support for such an approach in two East African cases, Rattansey v. Rattansey³⁵ and Ayoob v. Ayoob.³⁶ In both, the spouses had first contracted a civil marriage and then gone through an Islamic ceremony of marriage. In both cases the courts held that the second Islamic 'marriage' was completely devoid of legal effect because the parties were already man and wife.³⁷ The religious ceremony did not convert their relationship into one under Islamic law.

If the underlying principle of these East African authorities were to be adopted in Lesotho then the first type

of dual marriage and most examples of the second type (indeed in practice the large majority of all dual marriages) would amount, in law, to nothing more than a customary marriage. The religious ceremony would merely have served to consecrate the existing marriage, not to supersede it or change its nature. What significance would this have? In the first place, it would mean that the Basotho Courts possessed jurisdiction over the marriage.³⁸ Secondly, the husband would not be barred from taking a second wife under customary law. Thirdly, on death the parties would not qualify to have their estates administered under the inheritance proclamations because they would not have been married 'under European law'. All these conclusions are so surprising that there must be the strongest doubts whether this can be the correct approach in Lesotho. The last consequence would mean that, through an oversight, the decisions of both the High Court and the Court of Appeal in Hoochlo v. Hoochlo³⁹ were wrong. The deceased's wedding in an Anglican church had been preceded by a customary marriage in which bohali was transferred. The Court of Appeal declared that the deceased was 'unquestionably' married under 'European law' and this would seem to have been an accurate statement of the legal position.

The third possibility is the opposite of the one just discussed, namely that the second ceremony is the vital one because it has converted the nature of the marriage from one type to another. Thus in the first type of dual marriage in Lesotho (and most of the second type) the civil marriage would supersede and replace the customary marriage, not because of its intrinsic superiority (as under the first approach) but because it came later in time and had different consequences. This process of 'conversion' was recognised by the English courts in a number of cases prior to the enactment of the Matrimonial Proceedings (Polygamous Marriages) Act in 1972 in an endeavour to circumvent the decision in Hyde v. Hyde⁴⁰ under which they were compelled to deny matrimonial relief to parties to polygamous marriages. They were therefore prepared to hold that a marriage which was potentially polygamous in its inception had become monogamous if the spouses had entered into a second monogamous marriage.⁴¹ This approach was clearly the product of very special circumstances⁴² and was specifically rejected by

Spry J.A. in Ayoob's case ⁴³ when considering the position in Kenya. It would mean in Lesotho that dual marriages of the third type would have been converted from monogamous unions to polygamous unions—a most unlikely result.

The fourth possibility - and one preferred by the present writer - is that the true essence of a dual marriage in Lesotho is to be found both in its name and in the realities of the situation. The parties have clearly manifested an intention to marry under both systems and therefore both marriages must be regarded as subsisting side by side. Instead of adopting a negative attitude in terms of which one of the marriages is treated as overridden, subsumed or of no significance, a positive approach is needed which will give life and meaning to the fruitful merging of the two cultures. It can also provide a breakthrough in the manner in which bohali is regarded and in answering the controversial question whether or not the husband can take a second wife.

Following the South African approach there has hitherto been a tendency in the Lesotho courts to regard bohali in a dual marriage as an ancillary contract attached to the civil marriage as a mere appendage. The reality of the situation, of course, is that the obligation to pay bohali in such marriages derives from the customary marriage which subsists side by side with the civil marriage.

So far as the husband's legal capacity to marry a second wife polygamously is concerned, the clear answer is that he cannot do so. However, the important point is that this is not because of any inherent superiority of monogamous marriage over polygamy or of the imported law over the customary law. It can be seen as springing instead from the strength of the rules of each system and it is this which resolves the conflict between them. The imported law absolutely forbids polygamy once a civil marriage has been entered into. Sesotho law allows polygamy but it does not positively require it. It can therefore be argued that the weaker permissive rule has to give way in face of the mandatory prohibition.

This last interpretation of dual marriages should, it is submitted, be the one to gain acceptance by the courts because it fulfils the intentions and expectations of the parties and

because it is able to give the fullest recognition to the essential features of each type of marriage—bohali in the Sesotho marriage and monogamy in the civil marriage. The status of marriage is obviously created by the first ceremony, but it is modified by the second ceremony. Both marriages continue to subsist side by side and both affect the legal relationship of the parties.

5. The position where a dual marriage fails to materialise

A civil marriage is completed when the marriage officer declares the couple to be man and wife.⁴⁴ A customary marriage, on the other hand, is 'deemed' to be completed when there is agreement between the parties to the marriage coupled with parental agreement both as to the marriage and as to the amount of the bohali, and when part, at least, of the bohali has actually been paid.

Difficult questions arise in determining what the legal position is where one of the expected marriages does not materialise and in assessing what impact this has upon the other marriage. For instance, if the couple and their parents agree upon a dual marriage (with a church wedding following a Sesotho marriage) and the planned church ceremony does not take place, does this invalidate a prior customary marriage between the couple which is already complete in its own terms? It is submitted that the answer ought to be in the negative and that if one marriage has been completed it should stand. Both types of marriage are equally valid in Lesotho⁴⁶ and if the question were posed with the two marriages arranged in the reverse order no-one would argue that the civil ceremony should be invalidated by the failure of the subsequent customary marriage. The common law does not allow a civil marriage to be made conditional in such a manner⁴⁷ and there is no reason to think that Sesotho law would do so either in these circumstances.

In the light of this two recent cases merit investigation.

In Mabitle v. Mochema⁴⁸ the parties had agreed to marry first according to Sesotho custom and later in church. In the period between the two ceremonies, while the wife was still at her parents' home, she became pregnant by another man. The husband thereupon refused to proceed with the church ceremony and hi

father claimed back the bohali he had already paid. Jacobs C.J. held that there was no binding or completed customary marriage because of the unfulfilled intention to marry in church and he therefore allowed the claim.

It is submitted that this decision was erroneous. The customary marriage was complete in its own terms⁴⁹ and the only means of escape for the spouses should have lain in a divorce. Here the proper person to reclaim the bohali would have been the husband, not his father.⁵⁰

A similar situation arose in Ramaisa v. Helesoa.⁵¹ A dual marriage had been agreed upon ^{by} the couple and their parents. After the bohali had been paid but before the church ceremony and while the bride was still living at her parents' home she decided to elope with another man. Subsequently these two were married in the office of a District Administrator. The question arose whether the girl was already validly married as a result of the prior customary marriage and hence whether the ceremony performed by the District Administrator was of any legal effect.

Cotran C.J.'s finding was that the customary marriage had not actually been completed and therefore the District Administrator had validly married the bride and the man she had eloped with. The learned judge's reasoning differed, however, from that of Jacobs C.J. in the earlier case and ran as follows. Section 34 of Part II of the Laws of Lerotholi is not a comprehensive statement of the whole of Sesotho marriage law and when the section states that a customary marriage is "deemed" to have been completed in certain circumstances this is not conclusive. The mere fact that these criteria have been fulfilled is only prima facie evidence of a completed marriage and will only become conclusive when the parties have lived with one another as husband and wife, however briefly. Where, as in this case, the couple have not lived together as husband and wife there is prima facie no completed marriage unless a contrary intention is proved. Moreover, the agreement of the couple and their parents must not be viewed in the abstract but in the context of their intentions (presumably, in this case, concerning the church marriage which was to follow). Therefore, Cotran C.J. decided, the customary marriage could not be regarded as having been completed.

This process of reasoning, it is submitted, is not entirely free from difficulty though the outcome of the case may well have been a satisfactory one since the girl, after considerable vacillation (even after the civil wedding) as to which of the two men she really wanted to marry, seemed finally to have thrown in her lot with the one she married before the District Administrator.

In the first place, the court's assertion that decisive importance should be attached to whether the couple have lived together as husband and wife for the completion of a customary marriage is contrary to well established authority.⁵²

Secondly, while Cotran C.J. was perfectly correct to point out that section 34 is not a comprehensive statement of Sesotho marriage law⁵³ and that the section was originally drafted with the specific purpose of settling questions of seniority in the realm of succession to the chieftainship,⁵⁴ there would seem to be no authority whatever for declaring a Sesotho marriage invalid simply because an expected church wedding fails to materialise. No other legal system would appear to treat a marriage as void upon the failure of a condition of this nature and certainly the common law would not do so in the reverse situation. On the other hand, it might have been possible for the court to have reached the same conclusion more convincingly along a slightly different line of argument. It might have held that the customary marriage was incomplete because, on all the evidence, the parties had so far only agreed to become engaged to one another and had taken the view that the expression of their agreement to the customary marriage itself was to be postponed to coincide with the church wedding. As already explained, in this type of dual marriage the usual festivities take place after the church wedding is over and these are regarded by most of the participants as the climax of the whole occasion. In this way the requirement in section 3 of "agreement between the parties to the marriage" could have been interpreted flexibly and sensibly to accomplish the very objective which the court was seeking.

Possible future lines of reform

Dualism in Lesotho is a product of the colonial era. In other African countries which already had a number of different customary laws (and sometimes Islamic law as well) prior to colonisation, the introduction of the common law did not turn a unitary legal system into a plural one, for pluralism was there first. However, in many African countries there has been a desire since independence for a move towards 'integration' or 'unification' of their legal systems. The advantages which are expected to accrue from such reforms include the avoidance of elitism, increased unity as a nation, equality of all before the law and a simplified administration of justice. In practice, however, the implementation of such reforms has proved extremely difficult.

Three aspects of reform may be singled out for brief discussion in relation to Lesotho.

(a) First, the Lesotho court structure could be further integrated by converting the Basotho Courts into magistrates' courts and eliminating the Judicial Commissioner's Court.

Then, below the level of the High Court, there would be only one set of courts which possessed the power to hear cases under both the common law and the customary law. Their jurisdiction would merely be limited by denying them the authority to hear the most important cases, which would be reserved for the High Court. The speed at which such a reform can take place (and it has been official government policy for some years now)⁵⁵ depends upon the availability of trained manpower. The Law Department at N.U.L. is about to begin helping seriously in this area by introducing a two-year internal diploma programme.

(b) Secondly, unless the two systems of legal rules are themselves to be merged or integrated (see (c) below) legislation needs to be passed specifying clearly when one system rather than the other is to be applied to a given type of case. At present too much discretion is left with the courts and there are virtually no established guidelines. Often the rules of the two systems conflict with one another and there is a need for greater certainty.

(c) Thirdly, as an alternative to (b), an attempt could be made (e.g. in family law where most of the conflicts between the systems arise) to integrate the systems as far as possible. The most significant development in this direction in Anglophone Africa has been the enactment in Tanzania of the Law of Marriage Act 1971.⁵⁶ Integration has been achieved there by means of a number of different techniques. In some matters a rule of customary law has been preserved at the expense of its counterpart in the common law, e.g. in the retention of polygamy as an alternative to monogamy, in the abolition of the offence of bigamy and in the preservation of bridewealth. Elsewhere the imported rule has been selected as appropriate and the customary rule has been sacrificed, e.g. with regard to the formalities of marriage and compulsory registration, in the abolition of the husband's right to inflict chastisement on his wife and in the adoption of the principle that in disputes over children the welfare of the child is the paramount consideration. Sometimes a new rule has been created to supersede both systems, either by a synthesis of the best aspects of each of them (e.g. in the necessity for attempts at reconciliation prior to divorce) or by a complete innovation from outside (e.g. with the introduction of irreparable breakdown of marriage as the sole ground for divorce).

Where any new enactment involves a dramatic departure from the customary law the vital question is whether those who follow a traditional pattern of life will accept and implement the statutory reforms. If they fail to do so the dual system will still persist, albeit unrecognised by the law of the land. Probably this is even more dangerous than the present legal dualism since the law in the books then becomes detached from reality, fails to fulfil normal expectations and creates a totally misleading picture of the life of the nation. It is therefore necessary for considerable thought to be given to the likely reactions of the bulk of the population of Lesotho before any attempt is hazarded at integration in the field of family law.

Footnotes

1. See generally Schreiner, The Contribution of English Law To South African Law and the Rule of Law in South Africa (Stevens, 1967); Mahlo and Kahn, The South African Legal System and its Background (Juta, 1968), pp.575-96.
2. There is one minor exception to this; a few pre-1884 Cape statutes are still in force in Lesotho dealing with e.g. inheritance, wills, evidence etc.
3. Some of them followed from the criticisms made by Sir Alan Pim; see Pim, Financial and Economic Position of Basutoland (London, 1935)
4. See the Court of Appeal and High Court Order, No.17 of 1970, s.7(1)(a).
5. Proc. 5 of 1964, s.8 (2).
6. Central and Local Courts Proclamation, No.62 of 1938, s.9.
7. Basuto Courts (Practice and Procedure) Rules, rule 31.
8. Proc.62 of 1938, s.8 (1)(b).
9. Proc.62 of 1938, s.21.
10. Proc. 62 of 1938, s.26.
11. For a discussion as to how this came about see Poulter, Family Law and Litigation in Basotho Society (Oxford, 1976), pp.101-3.
12. Part II of the Laws of Lerotholi comprises 'rules' issued by the Paramount Chiefs under Proc.61 of 1938 and in consequence it ranks as 'subordinate legislation.' See generally on the subject, Poulter, "The Place of the Laws of Lerotholi in the Legal System of Lesotho" (1972) African Affairs 144; reprinted (1973-4) Lesotho Notes and Records 33.
13. See regulation 16 issued by Sir Philip Wodehouse dated 2 May 1868 and repeated in the 1871 and 1877 regulations of Sir Henry Barkly.
14. See marriage regulation 2 issued by Sir Henry Barkly dated 29 March 1877.
15. Proc.7 of 1911, s.7.
16. Private researches in the office of the Registrar-General, Maseru. The full figures are given below.
17. This figure seems to be the rough average for those countries (mainly European) for which accurate statistics are available - see U.N. Demographic Yearbook 1970, pp. 730-5. No such statistics are kept in Lesotho; only civil marriages are required to be registered. The same figure is used by Hastings, A., Christian Marriage in Africa (S.P.C.K., 1973), p.134.

18. The estimate can only be very approximate. On the one hand, the total rate of eight per thousand may be too low because of the larger proportion of young people in Lesotho than in European countries. On the other hand, the percentage given for civil marriages in Lesotho may be smaller than it should be because of failure by marriage officers to fulfil their statutory duty of registration (which is frequently alleged).
19. The percentage of couples marrying in church in Lesotho is probably no lower than those marrying in church in England.
20. See Casalis, E., The Basutos (London, 1861), pp.182-6; Ellenberger, V., A Century of Mission Work in Basutoland (Moriya, 1938); Smith, E.W., The Nabilles of Basutoland (London, 1939), pp.124,188;341-2; Germond, R.C., Chronicles of Basutoland (Moriya, 1967), p.472.
21. See Ellenberger, V., p.240; 1944 National Council Proceedings p.194; Reuter, A., Native Marriages in South Africa (Munster Westfalen, 1963), p.238. The Catholic viewpoint was first expressed publicly at a famous pitso at Matsieng on 21 June 1888.
22. Sheddick, V., The Southern Sotho (London, 1953), p.37; Reuter, p.247; information provided by the Revd. Ncholu of Morija, a Mosotho priest of the Lesotho Evangelical Church.
23. Ashton, H., The Basuto (O.U.P., 2nd ed., 1967), p.71.
24. Ashton, ibid.; Sheddick, p.37.
25. See e.g. Ntsinyi v. Rammoko J.C. 268/1954.
26. Sheddick states (at p.37) that the mpho was not recoverable on divorce.
27. Paroz, "Le Mariage au Lessouto" (1946) Journal des Missions Evangeliques 17-21.
28. Ellenberger, D.F. and Macgregor, J.C., History of the Basuto, Ancient and Modern (London, 1912), pp.274-5 (note by Macgregor).
29. The process of recognition was a gradual one and was not formally adopted in the published regulations of the Church until 1969.
30. Private researches in the office of the Registrar-General, Maseru.
31. Included in these figures are a very small number (perhaps only ten each year) of marriages between non-Basotho.
32. See above, page 6.

33. See Matchika v. Mguni 1946 N.A.C.. (N. & T.) 78.
34. Sotho Laws and Customs (O.U.P., 1960), p.20. See also his decision as Judicial Commissioner on the jurisdiction of the Basotho Courts over dual marriages in Tlale v. Tlale J.C. 163/1950. Duncan's view was adopted, perhaps not surprisingly, by Jacobs C.J. in Zola v. Zola H.C.Civ./Appn./31/1970.
35. 1960/E.A. 81.
36. 1968/E.A. 72.
37. See also the statement of Hodson L.J. in the English case of Thynne v. Thynne 1955/P.272 at 304 that a second ceremony following on a valid marriage has no legal effect, and a similar ruling in the South African case of Ex parte Gordon and Gordon 1921 W.L.D.43.
38. See Central and Local Courts Proclamation, s.8(1)(b), referred to above, p.5.
39. C.A. Civ./A/4/1969.
40. (1866) L.R.I P & D.130.
41. See Chochuku v. Chochuku 1960/All E.R.253 as interpreted in Cheni v. Cheni 1962/3 All E.R.873 at 878 and in Ali v Ali 1966/1 All E.R. 664 at 669.
42. See Poulter, "Hyde v Hyde: A Reappraisal" (1976) 25 I.C.L.C. 475 at 500-1.
43. 1968/ E.A. 72.
44. Marriage Act, s.31.
45. Laws of Lerotholi, Part II, s.34 (1).
46. Marriage Act, s.42; Ramaisa v. Hlelesoa H.C.Civ./Apn./335/1976.
47. Hahlo, The South African Law of Husband and Wife, p.28.
48. H.C.Civ./A/15/1972.
49. See per Jacobs C.J. in Sejanamane v. Ntlama H.C.Civ./A/17/1972.
50. See Family Law and Litigation, p.213.
51. H.C. Civ./Apn./35/1976.
52. Qhobela v. Qhobela H.C.24/1943 and the other cases referred to in Family Law and Litigation, pp.122-3.
53. See Family Law and Litigation, pp.76-7
54. Ibid., pp.101-5.

55. See Second Five-Year Development Plan, p.224.
56. For an analysis, see Read, " A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania" [1972] J.A.L. 19. Interestingly many of the provisions were modelled on reforms proposed for Kenya, but so far not implemented there.



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