

# THE CHANGING FAMILY STRUCTURE AND LEGAL LAG<sup>1</sup> IN LESOTHO: IMPLICATIONS FOR THE FUTURE

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## ABSTRACT

*Universally, the family is seen as the building block of the society. In Lesotho family law, proclamation 74 of 1871 succinctly spelled out those whom the society recognised as being married under the customary and Christian tradition. Over the years, the migration of able-bodied Lesotho men, especially in the very last quarter of the Twentieth Century, affected this marriage system and contributed in various ways to the prevalence of women single-parents and co-habitation. Today, over 50% of Lesotho households are headed by women; but women are still considered as minors. This paper examines the Laws of Lesotho on women's rights and the status of children qualified to inherit their parents' property. It observes that many children born out of wedlock who constitute about 30% of the children's population have no status of legitimacy and thus cannot inherit property. The paper recommends that new family laws enacted in response to the changing circumstances; laws that could match the permissive society, halt abuse of women and children and instill sanity into the family structure.*

## INTRODUCTION

Lesotho is a small mountainous country completely surrounded by the Republic of South Africa. It has a population of about 2.2 million people (Rojas 1995). It is approximately 30,300km.sq. with all land lying between 1,500m and 3,500m above sea level. Except within the last five years, because of the income accruing from Lesotho Highlands Development Authority (LHDA), Lesotho depended mainly on remittances from migrant workers in South Africa for its economic survival for the greater part of this century (Kishindo

1992). This is mainly because only 16% of Lesotho land is fertile for agriculture (UNDP 1979). Added to this is the declining soil fertility and decline in grain production because of the introduction of protectionist measures in Orange Free State and Transvaal, against Basotho grain and the importation of cheap Australian and American grains to replace it (Quinland 1983, Kishindo 1992). The erratic rainfall in Lesotho further reduced agricultural output and made crop production a risky activity (Swallow and Boris 1978:179).

Following the opening of diamond and gold mines in South Africa in 1867 and 1886 respectively, about 40% of Lesotho men aged 20-39 were drawn en masse to these mines and even also to white South African farms for labour (Kishindo, 1992).

This out-migration of able-bodied men en masse to South Africa for labour has had an indelible effect on the structure of the family, and indeed on the entire social system of Lesotho. In the pre-migrant agricultural Lesotho, as in other parts of Southern Africa, people married in their twenties, after long engagements (Schapera 1971:38). Following the migration to South Africa, men started marrying in their thirties and at times even later especially as wives were not needed in the mines. Such migrants needed time also to save enough money for bride-wealth (Schapera 1971:28).

Despite this, Lesotho is still an indigenous cultural society with entrenched marriage traditions. Taking a wife involves 'Bohali', payment in cattle as 'lobola' (bride-wealth or dowry). There is no prescribed specific number of cattle to be exchanged for a wife but conventionally people consider twenty as ideal, though no one nowadays will be happy to give out that number of cattle for a woman. The family law proclamation 74 of 1871 emphasized the importance of marriage among the Basotho. The proclamation recognized the customary as well as the Christian marriage.<sup>2</sup> Rule 3 of this proclamation stipulated that all marriages must be registered within 21 days of their coming into being, while rule 4 also stipulated that all dowry given for such marriages must also be registered in case of future dispute. **Bohali** exchange is therefore essential in Basotho marriages although marriage with no cattle exchange can still take

place if the girl's parents accept (Maqutu 1992:144-145) but this is very rare.

### **The Problem**

In the 'traditional' subsistence agricultural economy, people married in their twenties and prospered through grain production and animal husbandry. Within the last half of the Twentieth Century, the high rate of migration has had a great effect on the structure of the Basotho family system. For example, in 1986 the out-migration of about 40% of the adult male work force in Lesotho (Rojas 1995) altered Lesotho's economic and social relations. This gender-selective migration of only adult males was made possible by both the Aliens Control Act of 1963 which made it an offence for foreign Africans to enter South Africa without a travel document, and the Black Laws Amendment act of 1963 which made it difficult for foreign Africans to enter South Africa for work, except those recruited (Kishindo 1992:27, Sechaba Consultant 1991:3). Women were not recruited and so were not allowed into South Africa.

Massey (1980:4-26) argued that South Africa required a large supply of cheap labour to sustain its industrial growth. It accordingly went ahead to semi-proletarianize a large segment of the entire black population of southern african countries including Botswana, Swaziland and Lesotho, by enticing the men into wage labour. They neither paid them enough, nor allowed them to settle with their families in the urban areas or work camps (Massey 1980:25). The capitalists thus forced the workers to depend on their rural areas for contact with women and for part of their subsistence.

This made most migrant mine workers to develop a migrant culture and to be constantly on the move for family contact and supportive subsistence. Over the years, wages and the migrant culture have affected the Lesotho family-development pattern. Men who used to marry in the twenties could no longer afford to do so because of the low wages and, in Lesotho, low agricultural productivity. Courtship and friendship still continued, but most of the time, this ended up in elopement, mere co-habitation, single parenthood, adultery or birth of illegitimate children (Gill 1993:56). Within the last three decades

(1970-2000), this has been the trend. The family structure has therefore been altered immensely. The paper observes that with the birth of numerous Basotho children outside wedlock and with the nature of the existing family laws, there is bound to be an immense cultural disorganization especially in areas concerning the status of women (especially unmarried mothers and minors), and children qualified to inherit family property, as well as the legal status of illegitimate children, given that 50% of all households in Lesotho are headed by women (UNICEF 1998). Given the present degree of cultural disorganization, what cultural values, family norms and laws need to be put in place for social order to return to the community?

### **Theoretical Framework**

The paper takes its point of departure from Ogburn's cultural lag theory. Ogburn argues that material culture changes much faster than non-material culture (beliefs, values, norms, social organization). For example the main streets of Maseru are full of cars, but people still think of streets as places for trading, walking and playing. If people accept that cars are very useful to the society, but do not accept that the streets should be left free for the movement of cars, then a dangerous situation is created (Peil 1977:338). Wherever there is this lag there is pressure for adjustment. The main lag that concerns this paper is when one institution develops more rapidly than another, as is the case with family (marriage systems) and the legal system (Laws about marriage and inheritance). Ogburn (1967) argues that the family system is changing faster than the ideas and beliefs about what the normal family should be, but the laws of marriage and inheritance are very much lagging behind the changing family structure (Chinoy 1967:490). This is very dangerous because it creates a situation of disorder (normlessness) in which the subsequent generation no longer knows what to hold to. Laws should hasten to be abreast with changing traditions to avoid chaos in society. We shall, in this paper examine the changing family structure in Lesotho and make a case for the family law of Lesotho to be upgraded in all its components.

## The Changing Family Structure

One of the central arguments of this paper is that the migration pattern of able-bodied Basotho men in the last three decades has considerably altered the family structure in Basotho. A recent field survey carried out at Roma Valley by this writer on "The changing family system in Lesotho" (March 5-28, 1999) examined the effect of migration on the development of the Basotho family (Modo 1999). The 36 respondents in that survey answered the questions put to them very clearly. One important theme was the issue of late marriages among the Basotho.

There was a general consensus among the respondents that men marry late nowadays (30 years and above), unlike in the past when they married at 20. Men now find it difficult to pay *bohali*, i.e. cattle as *Lobola* (bridewealth). It takes a number of years to meet this requirement due to the decline in agricultural production and cattle breeding, coupled with the poor salary of mine workers. There is, however, no fixed number of cattle to be given as '*bohali*', but people see 20 as ideal. No one is, however, expected to supply all 20 for a woman. The bridegroom's family can bring 2 or 3 head of cattle and plead that the marriage be allowed to take place waiting for the rest to be brought in future. With this relaxed condition, it means there are other reasons for late marriages. 20% of the respondents said men do not need wives at the mines, and that those with South African girl friends or concubines are not in a hurry to marry. One elderly man jokingly added that any one who wants a wife without paying '*bohali*' can marry by abduction. Once the man and the abducted girl sleep together the girl is devalued, consequently her father's resistance is broken. Once the bridegroom's parents slaughter a sheep, called '*koae*' she is accepted as a daughter-in-law. Unless her father becomes stubborn and asks for her back, especially through the customary court, she is regarded as married and ***bohali*** can follow very slowly. From this Roma Valley Survey, it is obvious that the mine culture in South Africa has a major effect on the majority of Basotho men eligible for marriage. This is confirmed by Holland et al (1988:2) and Kishindo (1992:22) who have argued that 40% of the male labour in the 20-30 age group are away to South Africa at any given time. 77% (28) of the Roma Valley respondents said that

the influence of migration has been bad on the marriage institution: it has ruined many marriages, separated friends and led to hundreds of illegitimate children. The impact has been apparent in practices such as abandonment, 'Nyatsi', co-habitation and increasing number of street children.

#### a) Abandonment

Each of the Roma Valley Survey respondents claimed to know someone who has abandoned his wife in Lesotho and has taken a new wife in South Africa. It is estimated that about 10% of the migrants have done this. The abandoned wives (one in our sample) become single parents and are forced to fend for themselves and their children. Some of their children end up in the streets as runaways or are sent by their mothers to beg.

#### b) Entrenched 'Setsoalle' or 'Nyatsi'

Because cases of adultery involving married women whose husbands are away, in the South African mines, other men become afraid to marry. Some even decide to take other Sotho speaking women right there in South Africa. According to Gill (1993:57) there is a Basotho tradition that a nursing mother should be spared from sex for at least two years, to give her time to breastfeed and wean the baby. Her husband is allowed to have sex during this period with a specially chosen person, "usually the wife of a very close relative, the younger sister of the wife or the wife of an age-mate from the initiation lodge." Some Basotho men and women still believe firmly in this tradition, while the modern morally sound and christian-minded ones see it as adultery. Some mineworkers are said to engage in this tradition as a past time. They are fairly rich when compared to their farming and cattle rearing relatives, so they have things their way, committing adultery with many of their friends', or even co-workers' wives, putting their wife's sisters or other girls in the family way. Many marriages have been ruined, and many girls have become pregnant and abandoned in this way. Most of these girls end up as single parents. This writer was granted an interview by the Registry Staff at the Maseru High Court in November 1999. The High Court records

showed that, in 1999 alone, there were 56 divorce cases filed at the Court from the 10 Districts of Lesotho. Over three quarter of these cases concerned adultery. The registry staff observed that such cases normally ended in divorce, for it is very difficult for the Court not to grant such petitions.

### **Co-Habitation**

One should not think from the afore-said; that women are completely passive and powerless and therefore led by the nose. Maqutu (1992:61) and UNICEF (1998) observed that women in Lesotho are more educated than the men. While the majority of the boys go to the mines to look for work or to the mountains to herd cattle, girls for lack of work go to school. One respondent in the Roma Valley Survey said she does not want to end up in the house of a useless drunk, so she prefers to have a trial marriage in which no 'bohali' is involved. While 75% of the respondents in this Roma Valley Survey agree that Basotho women are more educated than the men, 35% believe that the break up of marriages in Lesotho is caused by educated women who insist on their rights. 66% also agree that the widespread practice of co-habitation in Lesotho is caused by women who want to see if they would eventually like the men they live with. One respondent said such women who co-habit are destroying the culture of their forefathers.

A recent survey by Mokoteli Moliehi (1999) showed that men and women actually take a deliberate decision to co-habit. In her sample, 8% of the men and 92% of the women claimed loneliness as the reason for co-habitation. 2% of the men and 83% of the women also claimed economic hardship as their reason for co-habitation. Furthermore 25% of the men and 75% of the women were of the opinion that peer group influence is mainly responsible for the upsurge in co-habitation. Many girls see their former schoolmates doing the same and they follow. Her data showed that the trial marriage is favoured by 62% of men and 38% of women. Contrary to the views of this researcher's respondents in the Roma Valley Survey, who think that educated women initiate trial marriage, Mokoteli's data showed that men (62%) rather than women (38%) go

for it. One major problem that is of concern to us is the fact that co-habitation most often leads to the birth of children who are considered by society as illegitimate.

### Street Children

Because of the widespread practice of extra-marital sex through 'Nyatsi', co-habitation, rape, economic hardship-induced sex (not commercial sex workers) and the conduct of 'nouveau riche' migrant workers, many illegitimate children are born every day in Lesotho. Many of the children are abandoned at infancy, some in the hospital and others on the street. Some of the children grow up and take to the street for lack of care or because of rampant child abuse.

Temeki Lindiwe (1999) conducted a research on street children at Maseru Capital City; and found out that 70% of them come from single parent homes. Many of the street children were also conceived before their parents got married. She observed that there are more male children in the street (75%) than female children (25%) because most street girls get jobs as house help. There are also more matured girls than boys in the street and this further constitutes a threat to peaceful homes. Her respondents gave the reasons why they are on the street.

**Table 1: Street Children's Reasons for Being on the Streets**

	REASONS	NUMBER	%
i)	Sent out by the mother to look for money	5	8.3
ii)	Looking for food and money	15	25
iii)	Fled home because of stepfather's wickedness	6	10
iv)	Father always drunk and beating me	7	11.7
v)	Parents died	5	8.3
vi)	Mother overworking me	6	10
vii)	Parents divorced and I was starving	5	8.3
viii)	Stepfather sexually abusing me	10	16.2
ix)	Chased out for father said I am not his child	1	1.7
<b>TOTAL</b>		<b>60</b>	<b>100</b>

Source: Temeki Lindiwe (1999) "Street children in Lesotho the case of Maseru" Thesis submitted in partial fulfilment for the award of BA Social Anthropology/Sociology, National University of Lesotho May.



Street children have reasons for being in the street. 10 children fled the home because they were being sexually abused by stepfathers. One child was driven out because the father discovered that the child was not biologically his. The mother had probably engaged in 'Nyatsi'. Because, of the situation in which they find themselves, they engage in stealing, drug consumption, rape and drinking alcohol. To survive, some sell fruits and do some odd jobs such as washing cars, clearing surroundings of houses and transporting goods.

### Government's Response to the Juvenile Problem

The government of Lesotho is aware of the social problems caused by the upsurge in the birth of illegitimate children. It is, accordingly, doing everything within its power to contain the problem. Section 32, sub-section of the constitution provides that Lesotho shall adopt policies designed to ensure protection and assistance to all children and young persons, without any discrimination for reasons of parentage or other conditions. Reported cases of child abuse are taken seriously by the government. In Maseru District alone 108 cases of child abuse were reported between 1992 and 1997 (Lesotho CRC Report 1998). Government protects children from abuse, and at times punishes parents for cruelty against children. Government also runs, and encourages individuals and organizations, to set up homes for the different categories of helpless children. It also encourages that some children be taken into custody for reformation and correction.

**Table 2: Children in Custody between the Years 1990 – 1997**

	Under 15 Years Old				15-20 Years Old			
	Boys in Prison	Boys in JTC	Girls in Prison	Girls in Girls Unit	Boys in Prison	Boys in JTC	Girls in Prison	Girls in Girls Unit
1990	16	9	0	2	680	125	31	32
1991	10	8	0	3	656	96	37	32
1992	9	12	0	0	748	125	32	26
1993	21	11	6	4	888	162	75	34
1994	24	10	2	2	769	120	27	20
1995	16	5	1	0	858	87	39	27
1996	15	20	3	2	886	135	57	25
1997	19	15	2	-	734	88	47	-

Source: Lesotho Bureau of Statistics

Because there are no special prisons for teenagers, delinquent boys and girls below 18 are put in prisons with adult criminals. Even the Government's Juvenile Training Centre (JTC) is run under prison conditions by prison warders. Government is yet to set up its own institutions for the rehabilitation of youths in Lesotho. But Street children are now being helped by NGOs such as the Maseru Girls' Guide Rehabilitation Centre. Presently about 40 street children are in the Girl's Guide Centre. The World Food Project (WFP), the Government, and some philanthropic persons are helping to pay for the feeding and education of these street children, many of whom are victims of child abuse. A social worker at this Girl's Guide Rehabilitation Centre said that they also look for the parents of these children and counsel them. They have had to travel to Durban and Pretoria to see such parents. Their efforts are commendable, but they need real assistance because many of the children are traumatised and need serious attention.

*Government also encourages both adoption and the foster care of children by responsible members of the community.*

**Table 3: Completed and Incomplete Applications for Foster Care between 1992 and 1997 by Africans and Europeans within Lesotho**

Race	Year	Completed Cases	Incompleted Cases	Total
<b>Africans</b>	1997	7	0	7
	1996	7	0	7
	1995	4	3	7
	1994	2	7	9
	1993	4	1	5
	1992	3	-	3
<b>Europeans</b>	1997	-	-	-
	1996	-	-	-
	1995	-	2	2
	1994	2	-	2
	1993	2	1	3
	1992	-	-	0
		<b>31</b>	<b>14</b>	<b>45</b>

Source: Lesotho CRC Report 1988 p.30

In the case of foster care, table 3 shows that great care is taken to ensure that applications contain all supporting documents including birth certificates which truly identify the child. Where such documents are not provided the application remains incomplete. This is so, because the government is very careful to avoid indirectly promoting the abuse of its children by unknowingly violating the International Convention for the suppression of the traffic of women and children of 1912. Though Lesotho is not yet a party to this convention, the fundamental human rights of its citizens must be protected. Government encourages child adoption and foster care as a way of ensuring that the less fortunate children are still given a future.

### **The Changing Family and Legal Lag**

It is now clear from the discussions so far, that the view of people about marriage and family life is changing. The family structure is changing in Lesotho, but the legal institution is not keeping pace with these changes. It would appear that the existing laws are not flexible enough to cater for changing circumstances. The laws lag behind family practices. For example, Basotho women who are considered as minors do not have the right to property.<sup>3</sup> Yet UNICEF (1998) observed that over 50% of households in Lesotho are headed or managed by women. Since landed property rights are denied women, it becomes difficult for families headed by women to make both ends meet. Little wonder then that 34% of all poor households in Lesotho are headed by women (UNICEF 1998).

### **Rethinking Family Laws**

There are several other social problems that have resulted from the inadequacies in the Lesotho family system. Such ills include, rampant deaths resulting from delay in attending prenatal clinics by teenagers hiding their pregnancy,<sup>4</sup> abandonment of little babies, increase in number of street children, etc. Since it is not easy to halt the process of family change, this paper advocates that family laws especially the customary ones be upgraded. An example of this would be to make men fully responsible for their children born in and out of wedlock, or to make both married couples equal in property

ownership. Again, issues such as the following will have to be addressed: should there really be community of property in customary or civil marriage? Should the wife's property become the husband's at marriage? Should the married daughters of a deceased be allocated to a brother and not given property of their own? Let us re-examine a few of these issues.

### Community of Property

In a family, a married woman accumulates property for the household which is headed by the husband. If she leaves her husband, irrespective of who is at fault, she has to leave the property behind. At times, the woman is forced by the husband to go and she walks out empty handed. There is an urgent need for clear laws on this issue, since the customary system, with its checks and balances, no longer works; this is especially the case in urban Maseru where most modern couples live. *The Deserted Wives and Children Proclamation of 1959* does not appear to have addressed the issue, but since it is a statutory law, judges should be asked to be aware of this problem. This one act has impoverished many women who are heads of homes (UNICEF 1998).

### Allocation of Unmarried Daughters

Parents have the duty to ensure that the future of their offspring is secured. The girls are allocated among their brothers for this purpose. Allocation implies that the **bohali** that is given to the family when such a daughter marries should be used to marry a wife for the son to whom she has been allocated. If the girl marries after the death of their father, the **bohali** then goes to the son to whom she was allocated. The guardianship and responsibility for the lady, especially, when her marriage fails, lies with the brother with whom she is allocated. This principle was accepted in the case of *K. Mosaase V. J.N. Mosaase* 1978 (LLR 18). In that case Mapetala CJ held that where a member of the family was appointed father and guardian of the deceased's children there ought to be clear evidence. Also Contran CJ remarked in *Makhooane v Makhooane* (supra) 1979 (2) LLR 606 that daughters can be allocated.

*"If the spinster after the father's death is maintained (as she usually is) by the heir, but not necessarily so if an allocation has been made, for in that event the benefits and liabilities should be enjoyed and discharged as the case may be, by the person to whom the unmarried daughter has been allocated" (Maqutu 1992:64).*

Unfortunately most of the girls so allocated are ignored by the brothers they are allocated to. These sisters some of who are unmarried and have children are left to fend for themselves and their children. This custom had intended that girls and unmarried women be protected. We know that the situation of women has been changing over the years, and there are also some changing moral codes, which some women subscribe to. Many women still live under conditions where the need for guardianship, maintenance and protection is still paramount (Maqutu 1992:64). To arrest a situation where such women become totally ignored, laws must be updated and enforced to make heirs live up to their responsibility, failing which a certain portion of their father's property should be given to such women for their upkeep.

### **All Illegitimate Children Belong to their Mothers' Family**

Should men get girls pregnant, at times through rape, and be allowed to go scot free and not take care of the girl and her baby? In this patrilineal society, what should be the role of the biological father of the so-called illegitimate child? Evans J in the case of *Thaba Nkoko and v Matšepiso Mkoko* 1967-70 LLR 328 had put the question of liability for maintenance beyond doubt by holding that this "bore no relationship to modern standards and way of life." At page 331 Evans J. concluded:

*"The legislature has however enacted to protect children, legitimate or illegitimate, left destitute and in need of sustenance ... and what ever may be the custom of the country, statutory law prevails ... There is little doubt that statutory law has made innovations in custom and the common law, generally beneficial to the community in order to bring it in line with modern conditions and*

*concepts ... If the court is satisfied that proof has been established that he is the father and the children are without adequate means of support, an order of maintenance follows".*

This ruling should be understood. The duty to maintain an indigent illegitimate child is now mandatory for there is now a statutory precedence. *The Deserted Wives and Children Proclamation of 1959* has made it a statutory duty. Under common law this duty of protection exists for all minors, but as a statutory duty it applies until the child is 18 years. The custom of abandoning illegitimate children to their mothers family is still common, and constitutes a serious set back to the mothers. The law must be made known to all so that those irresponsible migrants and rich people, some of whom are in South Africa, should come and cater for their offspring.<sup>5</sup> Awareness of this law will certainly help reduce the number of children in the streets of Maseru.

However, *The Deserted Wives and Children Proclamation of 1959* requiring the natural father to provide the child with maintenance, if he or she is in need of such maintenance, still does not affect the legal position of the child. The natural father is still not regarded in law as the child's relative (Maqutu 1992:151). Because of this, the mother's family generally adopts the child as their own. A law should be put in place to make the biological father recognise his status as a father. It is only after the father cannot be traced that the mothers family should take responsibility.

## CONCLUSION AND RECOMMENDATIONS

From the fore-going, we have seen that because of the migration of Lesotho men of marriageable age within the last three decades, the marriage system has changed considerably. Men now marry very late. Increasingly, there are cases of female single parents because most girls get pregnant as a result of 'Nyatsi', co-habitation, and or because husbands desert their wives. While still upholding the importance of customary beliefs about marriage and procreation, there should be clear laws to protect all people. Also the number of 'bohali' cattle for 'lobola' could be reduced to only 3 heads as was

the case in the past (Maqutu 1992:116). This will reduce the incidence of co-habitation and the number of illegitimate children. Government should immediately activate, and enforce all statutory laws that deal with the protection of the child from all forms of abuse. These should be implemented to ensure the future development of Lesotho among the community of nations.

## ENDNOTES

- 1) Legal lag. When cultural practices are changing and there are no new laws in place to take care of the cultural changes, we say there is a legal lag.
- 2) For Proclamation 74 of 1871; which deals with the registration of marriages, within 21 days, and registration of dowry given in marriage; see *Report of Commission on the Laws and Customs of the Basuto* 1873 page 6.
- 3) In Lesotho, women are regarded as minors irrespective of their age and status.
- 4) Semakaleng, H and Makhabiso R (2000) of the National Health Training College Maseru submitted a paper to the Lesotho Technological Policy Studies Network on Factors influencing delay in prenatal clinic attendance by pregnant teenagers in Lesotho. They argue that while hiding their pregnancies some of the teenagers (40%) die in 'back street' abortions.
- 5) On several occasions, the social worker at the Girls' Guides home went to South Africa to see the biological fathers of the street children admitted at the home.

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