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# Marital Litigation in Early Colonial Lesotho 1870-1900

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## EDITOR'S NOTE

Pule Phoofolo is a senior lecturer of history at Walter Sisulu University, South Africa. His newly-acquired interest in gender and legal history has already resulted in the publication of his well received article on “Female Extramarital Relationships and their Regulation in Early Colonial Thembuland”, published as a lead article in volume 30, no. 1, 2005 of the *Journal of Family History*.

“What is this new death, invented by the whites, that takes our wives away from us while they are still young and vigorous? We don’t want it!”  
(BaSotho King’s counselor, on Divorce, 1841).

- 1 On 23 September 1874, Makubutu, a woman plaintiff, filed a property and child custody suit against her third successive male partner, Makolometse, at the newly introduced colonial court in Lesotho. She told the court that she had gone through three failed “marriages”. At first, she had married one Nyanga by Christian rites. Nyanga Later died, after fathering a son, Adrian, with her. Makubutu next contracted a customary marriage with one Somoro, who exchanged the customary cattle for her. She begot three children with him. Later, she deserted her marriage, her three children being “detained” by Somoro. She next lived with a married man, Makolometse, as “his mistress”, three daughters issued from this arrangement. Makolometse later chased her away, keeping his three daughters. She had come to court to claim her three daughters from Makolometse, arguing that, in SeSotho customary law, they should legally belong to her son by her first husband because he was the representative of her deceased husband to whom she was married by Christian rites<sup>1</sup>. She also claimed

property that she had acquired through her strategic marital arrangements and her industry which Makolometse had appropriated.

- 2 Makubutu's story is remarkable for this early period. Here we have a woman, whose mobility through serial marital arrangements is truly remarkable, challenging an exclusively male preserve—property, especially child custody—in an overly masculine arena—a court, and with a significant expectation of success. Had Makubutu's case been a single one, it would not tell us much about what this article intends to explore—how women manipulated legal and extralegal avenues to advance their marital and child custody interests in nineteenth century Lesotho. To do so, the article examines the experiences of other women who appeared before colonial magistrates as complainants and defendants in marital disputes. These women's testimonies provide fascinating insight into women's ability to employ various legal and extralegal strategies to advance their individual interests and undermine subordination<sup>2</sup>.

#### The Context

- 3 Lesotho lies in the south-east corner of the South African High Veld. Throughout the nineteenth century, this country was inhabited predominantly by Sotho-speaking people known as the BaSotho. This BaSotho nation state dated from the demographic, political and social turmoil of the period usually called the Difaqane. This process has perplexed historians, stirring an historiographical debate. The details of the controversy need not detain us here (Cobbing 1988: 487-519; Hamilton 1995; Richner 1988.). For our purposes it is enough to recognise that the process seems to have been a result of a conjuncture of forces. They included demographic pressure, climatic changes and the attempts of local leaders to control lucrative emerging trade opportunities (Guy 1980: 102-147, 1987: 18-37; Hall 1987: 1-17; Omer-Cooper 1969; Smith 1969: 171-189).
- 4 All these seem to have called for consolidating former separate small-scale Chiefdoms. It also encouraged centralisation of power for greater control over resources. The need to improve offensive or defensive capacity seems to have also featured prominently in this process. The result was that the former smaller clan-based political units of the region gave way to larger kingdoms. Locally based clans were incorporated into these more complex concentrations. The BaSotho state was one of these experiments at political centralisation<sup>3</sup>.
- 5 By a combination of fate, military prowess and grit, the BaSotho survived these disruptions territorially intact. They also inherited in their founding father, King Moshoeshoe, the leadership of a brilliant military strategist, a shrewd politician, an astute diplomat, a great statesman and an entrepreneurial national-builder. Under his leadership, the various Sotho-speaking communities that had survived the Difaqane were to fuse with non-Sotho refugees from these disturbances into a cohesive nation.
- 6 From the 1830s on, this budding state was to be threatened by Afrikaner farmers who started occupying the entire territory to the west of the Caledon River. These were descendants of boers who had trekked northwards from the Cape Colony in the 1830s. They had arrived on the outskirts of the mushrooming BaSotho state in their bid to escape from British influence in the Cape. A series of BaSotho-Boer wars—in the 1850s and 1860s—almost annihilated this budding state.
- 7 Wearied by war and with his people in dire straits as the boers redoubled their efforts to destroy his state, King Moshoeshoe succeeded after repeated requests over many

years in securing British protection. The Crown took over the BaSotho as British subjects and proclaimed their country a protectorate on 12 March 1868. Britain, however, had annexed Basutoland reluctantly, against the Colonial Office's aversion to further colonial expansion. Therefore, in 1871 Basutoland was placed under the Cape colonial administration.

- 8 Under the Cape administration, 1871-1881, the BaSotho made a remarkable comeback despite their truncated territory and their miserable plight (Eldredge 1993; Germond 1967: 462-471; Kimble 1978). Even so, tensions resulting from economic, political and social restructuring were already mounting by the end of the 1870s. They exploded in the BaSotho rebellion of 1880-1881 (Bradlow 1968: 119-217; Burman 1981; Mohapeloa 1971). So, the British Crown reluctantly re-annexed the country in 1884 when Cape colonial rule proved no longer tenable.

#### SeSotho Marriages

- 9 Recent historical studies of the BaSotho have correctly stressed the critical role that women played in economic and social production and reproduction in the nineteenth century (Eldredge 1991: 707-31; Epprecht 2000; Kimble 1978, 1983). A wife was a critical asset in her husband's productive capacity. Additionally she produced and reproduced labour power through procreation of children. Equally important, she perpetuated her husband's lineage—leloko—through her procreative capacity.
- 10 So, women were valued for their fertility, and men acquired this all-important asset through marriage. Marriage transferred the fertility of the woman from her patrikin to her husband and his patrikin. The children she bore belonged to her husband's patrikin. To compensate her patrikin for the loss of this important asset, the bridegroom's patrikin exchanged for her the most valuable source of wealth, cattle, on marriage. These cattle were called bohali, and the exchange was referred to as ho nyala (to marry). The BaSotho proverb profoundly expresses the transaction: khomo ke mosali, mosali ke khomo (a woman and a cow are interchangeable).
- 11 Marriage was so central in BaSotho society that indeterminate forms of marriage were constructed to acquire the valuable resource—woman. For example, besides the “normal” marriage, the Seantlo wife (sorrowate marriage) was acquired as a substitute to a deceased wife who died young and without children. A sister to the deceased wife, the seantlo, begat children for her deceased sister, adding them to her sister's husband's lineage. Similarly, one of the younger brothers of a deceased husband could inherit the copulatory rights of his deceased brother (Levirate marriage), fathering children for him with his widow. Brides' parents also often accompanied their daughters to her marriage with a girl to be their daughter's maid. When this girl fell pregnant by any man, the children she bore belonged to her mistress, therefore to her mistress's husband's lineage. A barren wife could also persuade her husband to marry a mala or seriti—a girl to begat children for her. Additionally, if a young man died before he had married, his father could marry a lebitla—a girl married for the deceased son, and appoint a relative to begat children with her for his deceased son. A father without a son could even pretend that he had one, and marry a wife for his imagined son. Similarly, a father with only daughters could simply declare his eldest daughter to be a male. A wife would be married for her and handed over to a male relative of her female husband to begat children for her father.
- 12 Women's fertility was so valuable that it had to be controlled<sup>4</sup>. Men achieved this through regulating entry and exit routes to marriage and controlling the wife-

acquiring cattle, divorce and child custody. Authority to permit marriage and to effect it was vested in the hands of bride's and bridegroom's male household heads. They determined when marriage might occur, with whom, and negotiated the appropriate bohali. They also owned and controlled the wife-acquiring cattle. Although the young unmarried men contributed significantly towards the requisite labour for cattle production, cattle remained the property of the household head (Ellenberger & MacGregor 1912; Poulter 1970, 1976; Burman 1990: 48-75).

- 13 In a society that valued marriage so much, divorce was not included on the agenda of marital life. Bohali helped to secure the marriage, at least restricted the temptation to end it at the least taste of marital discomfort. It put prime value on the wife that ensured her humane treatment by her husband and her in-laws. Excessive and persistent ill-treatment of the wife by her husband, her abuse by her in-laws, and failure by a husband to provide for his wife and children after repeated appeals could force such a wife to desert her conjugal home and stay separated from her husband. Despite, formal divorce was avoided. A husband might also chase away his wife in a fit of rage, as if she committed multiple adulteries. She usually fled to her natal kin, stayed separated from her husband until the process of reconciliation had run its course; still yet formal divorce was not countenanced. When king Moshoeshoe announced that he was divorcing two of his junior wives who had converted to Christianity in the early 1840s, one of his senior counsellors harangued him with words that powerfully show that the BaSotho found divorce strange and viewed it gravely:

"No! It will not be so! We know of only one death that can separate wives from their husbands, it is the death that makes us descend to the grave [. . .]. But what is this new death, invented by the whites, that takes our wives away from us while they are still young and vigorous? We don't want it" (Thompson 1975: 93).

- 14 Similarly, Letsie, King Moshoeshoe's heir, evinced a similar unfamiliarity with divorce thirty years later after European missionaries had also forced him to divorce some of his wives who had converted to Christianity:

"My wives who have been converted are still my wives, although separated from me. I was asked to divorce them, but I refused to do so, but never opposed their leaving me on becoming Christians, but I have always considered them my wives, although I have not cohabited with them"<sup>5</sup>.

- 15 Of course, marriage has defied customs, traditions and even attempts to take it out of the hands of humans and place it among the sacraments defined by God. It is an incidental association between a man and a woman, joining two people and two personalities. Marital disharmony did occur. These were harmonized by the two contracting families. Only when husband and wife failed to reach a compromise was the chief asked to arbitrate. When even this failed, the couple divorced, usually through the wife deserting or the husband chasing her away. When the couple divorced, the children of the marriage remained with their father's patrilineage, or the bohali was reimbursed by their mother's patrikin. "The children of these wives belong to me", continued Letsie in the passage just cited, "because, whether my wives leave for Christianity or for any other cause, the children belong to me".
- 16 Children<sup>6</sup> were an absolutely important resource for their father's patrikin. They provided the requisite productive and domestic labour. They were the means of reproducing the community. Male children were valued for their capacity to perpetuate their father's lineage—their sons were born into, and belonged to, their lineage. They also added to their patrikin's land holding when they married and

received their own allotments. They stood to provide their parents with the only available security in the latter's old age. Female children, in their turn, were similarly appraised. Their potential lay in attracting cattle to their natal lineage when they married. Their brothers, including other male members of their lineage, used these cattle to marry wives, thus acquiring the all-important women's fertility, bear children, and perpetuate their lineage. So important were children that a preeminent historian of the BaSotho has boldly stated that "African men and women could count on social security in their old age only if they had land and children [. . .] Gaining control over biological reproduction in order to have children was a compelling reason for BaSotho men to control their wives" (Eldredge 1993: 194).

- 17 A widow also belonged to her deceased husband's patrikin. She was expected to remain in her deceased husband's house where she had a right to the usufruct of her husband's property for the benefit of her children. Although her husband's relatives were her and her children's guardians, she could not be legally coerced to consort with one of her husband's relatives. Only if she left her conjugal home did she forfeit her right to the usufruct of her husband's property and to the custody of her children.

Empowering Women: Marriage, Missionaries and Colonialists

- 18 The foregoing, in outline, was the BaSotho marriage and family institution when European missionaries of the Paris Evangelical Missionary Society (PEMS) arrived in the country in the early 1830s. From the onset, they sought to transform it to a European and Christian form of marriage and the family. The PEMS missionaries drew substantially from the eighteenth century Enlightenment Movement<sup>7</sup>, especially its stages of civilization theory. According to it all human societies occupy a place on the developmental ladder. At the bottom are the savage nations (including Africans), with European nations occupying the pinnacle of the ladder.
- 19 Further, one of the Enlightenment's indices in determining the relative advancement of a society was the status of women in society. Societies where women were pampered playthings of their husbands were given higher status than societies, like the BaSotho, where women were productive members of society. In "savage" societies, one of the Enlightenment theorists argued, "the women of a family are usually treated as the servants or slaves of the men", and nothing could exceed the "dependence and subjection in which they are kept, or the toil and drudgery which they are obliged to undergo" (Millar 1806: 42-43). He continues to postulate that in these societies, wives "are bought and sold, like any other species of property and the conclusion of a bargain of this nature, together with the payment of the price, has therefore become the most usual form of solemnity in the celebration of their marriage" (*ibid.*: 49).
- 20 Imbued with this world view, PEMS missionaries sustained a vexatious crusade against the BaSotho marriage system, especially the bohali exchange, polygyny and child custody. They charged that Bohali was "the sale of women". It "reduced marriage to a mere commercial transaction"; made "love and unity impossible, conjugal fidelity a vain word, a thing unknown"; destroyed "a woman's purity"; will continue "to be radically vicious, immoral and productive of nothing but sin, misery, and moral ruin, both to man and wife and to their offspring". They vowed not to "compromise with this embodiment of evil, this traffic in souls, and this chain of bondage". On this view of BaSotho marriages, the missionaries necessarily abhorred polygyny. They bemoaned it as nothing more than "the purchase of a constantly increasing stud of wives as a farming speculation, which those who engage in it believe mistakenly to be the safest

and most profitable investment of their property". Thus, to the missionaries, BaSotho women were degraded downtrodden drudges, "brought up to have no choice, sold as a rule to the highest bidder, considered as the property of her male relatives by the father's side, transferred from her husband to another without her consent, may become the concubine of her husband's brother or of his eldest son when widowed". The missionaries' aim was to introduce what they called the "Christian ideal of marriage"—a "holy sacrament" defined by God, "a most intimate and holy union between man and wife", "the antitype of the tenderest relation"<sup>8</sup>.

- 21 Their first effort was to convert junior wives of polygynous men, after which they encouraged them to divorce their husbands. They succeeded in this with King Moshoeshoe, and his agreement of divorce became the standard affidavit on which "hundreds others were drawn up"<sup>9</sup> ? It reads as follows:

"Separation of sethepu (polygyny)

This day appeared before me, Casalis, minister of the church of Thaba-Bosiu, Moshesh, chief of the Basuto's and Nsseriso daughter of Ntimu and Monoa, an inferior wife of Moshesh, and declared before confirmers thus:

1<sup>st</sup> Their marriage by which they were formerly united in the manner of sethepu shall this day end.

2<sup>nd</sup> Nsseriso is released from the bond that of a husband, and Moshesh is released from the bond of Nsseriso, that of a wife.

3<sup>rd</sup> This day Nsseriso shall return to her relations, and there be at her own disposal or be free; and if she shall again marry it shall not be said she commits adultery; if she remains single, she shall be considered a free woman.

4<sup>th</sup> As to the children, they shall be brought up as their parents shall agree together.

THABA-BOSIU, 21 FEBRUARY, 1843

E. CASALIS

MOSHESH X

NSSERISO X

CONFIRMERS

Tsoloi X, Yathua Nan X."

- 22 As most polygynists were chiefs and influential men in the society, they vigorously opposed the missionaries and their teachings. Those chiefs that had converted<sup>10</sup> reneged amid growing opposition to missionary demands<sup>11</sup> (Gill 1993: 79-84; Perrot 1970: 24-25; Thompson 1975: 91-93). Unable to make much headway, and without legislative authority to enforce their rules<sup>12</sup>, the missionaries concentrated on the small, but growing, cohort of converts, locating them in "Christian villages"—enclaves of European culture, where converts had some degree of insulation from the pressure of their "pagan" brethren (Comaroff 1986: 1-22; Erlank 1999: 1-19, 2003: 69-84; Hammond-Tooke 1974: 20-41; Marks 1986; Meintjes 1990: 125-175; Reader 1966: 338-342; Wilson 1961: 351).
- 23 Colonialism breathed new life to the missionary crusade. On the eve of annexation, the governor of the Cape, Sir Philip Wodehouse, received a long memorandum from the French missionary, Emile Rolland, entitled "Notes on the Political and Social Position of the Basuto Tribe". Its purpose was to recommend policy for the impending colonial rule. The abolition of bohali and polygyny were among the radical recommendations contained in the memorandum. Rolland correctly perceived that marriage formed the fundamental basis of the BaSotho social system, and that restructuring it was the sine qua non for a radical change of BaSotho society. "Take cattle marriages away", he



urged, “and the whole fabric is broken in pieces”. Our chief blows should be struck at this system, for:

“If we wish to reconstitute the family on the Christian mode, to train up a righteous seed, to found an indigenous church, there must be no compromise with this embodiment of evil, this traffic in souls, this chain of bondage under which many, convinced of the truth of Christianity, still groan unable and often, alas! Unwilling to cast it off” (Rolland 1873).

- 24 So, he recommended abolishing bohali in marriage contracts and giving Christian marriages greater legal status over customary marriages. To discourage polygyny, he recommended recognizing only the principal wife over subsequent spouses. He urged a new system of child custody that would place children of secondary wives under the guardianship of their mothers’ rather than their father’s relatives. The purported intention was to discourage young women from marrying already espoused men, and to encourage women already married in polygyny to reconsider their status. Compulsory marriages were to be abolished and widows were to be permitted to remarry whomsoever they chose. Polygamy would also be discouraged through increasing the hut tax of polygynists while remitting that of monogamists (Rolland 1868).
- 25 If Rolland’s recommendations were radical, those promulgated by the colonial government went to the extreme. Marriage was to cease being a family institution but shifted to the responsibility of the contracting parties. Young women would have to decide their choices for spouses. To reduce the dictates of parents, colonial legislation set the age of majority at fifteen and eighteen years old for young women and young men respectively. It validated Christian and civil marriages without the bohali exchange.
- 26 To guarantee the enforceability of these regulations and to control marriages, colonial law required that all marriages be registered before a magistrate, where the contracting parties would declare their consent. Registration of marriages would also legalise customary marriages, without which they had no legal standing. Where one party in a customary marriage converted to the Christian religion and solemnized the marriage, they had to register it to legalise it. Husbands who refused to register their marriages lost custody rights of their minor children—up to 18 and 15 years of age for boys and girls respectively—to their wives. Widows, also, were given custody rights to their children, and could remarry<sup>13</sup>.
- 27 The colonial government avoided legislating against bohali exchanges and polygyny, finding them “too deeply founded to be easily abolished”. Instead, the government hoped that “as by the influence of the Government and the missionaries the people are raised in the scale of civilization, so will these customs disappear”<sup>14</sup>. Thwarted, missionaries introduced and enforced their own laws, purportedly for their converts, although they did affect non-converts. The most irksome rules included the regulation that gave child custody rights to widows to the exclusion of any of the husband’s relatives who were “heathens”, and that forbid converts to give bohali for Christian daughters of “heathen” fathers and “heathen” fathers of Christian daughters to ask for bohali when they married. This forced girls’ parents to either forego the bohali or to marry them to “heathens” in which case the girl was excommunicated. Additionally, daughters whose fathers were “heathens” were to marry according to Christian rites, while junior wives of polygynists, if converted to Christianity, were to be free to leave their husbands together with their children and to marry at their discretion. Christian



women were urged to protest at the “disgraceful and degrading” bohali custom, and the missionaries would concentrate of educating girls to reject bohali marriages<sup>15</sup>.

- 28 So, a set of radical laws now existed, giving women unprecedented ability to challenge patriarchal demands on them. Courts of law were opened in each of the four administrative districts into which the colonial government divided the country. From then, we discern women entering courtrooms, initiating lawsuits or responding to those initiated by their husbands, in-laws, even their sons. Most of these cases related to marital discords and their consequences.

#### Marital Discords

- 29 Nineteenth century BaSotho marriages—Christian and customary—seemingly were devoid of connubial bliss like those of other conjugal couples across space and time<sup>16</sup>. If late nineteenth century Xhosa marriages were spiced with wifely extramarital sexual intrigues, but avoided ending in divorce (Phoofolo 2005: 3-47), BaSotho’s were plagued by rampant wifely desertion<sup>17</sup>. So widespread was this social drama that even children were named after their mothers’ repeated desertions. For example, Mokhelosane married Kharebe in 1848. She bore him two daughters appropriately named Thotoana (always carrying a luggage) and Tselane (for ever on the road) because their mother repeatedly fled from her conjugal home. Eventually, she settled down in an informal union with another man. So traumatized by her parents’ tumultuous marriage was Thotoana, that she vowed lifelong spinsterhood. Instead, she preferred to “get a baby from a white man”<sup>18</sup>.

- 30 There were many and sundry reasons for ending a marriage. Those that women commonly cited included impatience with arranged marriages, husbands’ failure to support the wife, barrenness, and spousal violence and abuse. The list could be extended, for only in storybooks do all marriages represent a happy beginning and a happy ending. Additionally, in Lesotho, as everywhere else and at all times, marital conflicts were the consequences of a myriad prosaic situations.

- 31 Thus, the very prevailing method of entering a marriage—parental dictates—often soon opened the exit gates. In a period when marriage was presumably without romantic love, it is surprising how wives who had been forced by their parents to marry the current husband when they could have followed the dictates of their hearts to marry the man of their choice left forced marriages at the slightest sign of marital discomfort. Ramosala, Modise’s wife, asserted that:

“Ever since my girlhood I refused to have Modise. He courted me and I refused. He went to Mofuoa and asked his permission. Mofuoa went and fetched me against my will. He told Mofuoa that I was willing. I always told him I wouldn’t have him. I have never loved him or had anything to do with him. I went by force, and remained a month or two. I came away because I didn’t love him. Afterwards, Modiko, a man whom I loved with a love strong as death came and fetched me. I had only one child by Modiko and I now live with his brother. Modise gave me strong medicine to make me love him and I have a weak head ever since. I was very sick after I took the medicine and I feel the effects of it to this day. He has also been very unkind to me and beat me”<sup>19</sup>.

- 32 Mamohalane also deserted her husband Jankoko and subsequently started an alternative relationship with her maternal cousin. This is how she justified her actions:

“My father forced me to marry Jankoko—He beat me—Jankoko beat me and wounded me and I will never return to him. I never loved him. My cousin with whom I am living at present courted me before I was married and I loved him even then. I have

gone to him now because I love him. My father beat me to make consent to marry Jankoko. I have left him for good”<sup>20</sup>.

- 33 Women also deserted husbands who failed to provide for them—men’s primary responsibility. These include Masooane, who “left” her husband, Nosi, because “he is lazy and does not provide me with clothing”<sup>21</sup> and Tsilela, who deserted her husband, Matsau, because she lived with him “like a widow woman” in that he did not “provide any food for me and his children”. She complained as follows:

“My husband does not assist me. He gives me no clothing, no food. And when the child is sick he does not help me. When I gave birth to my third child he gave me no assistance and I had to seek a place for my confinement”<sup>22</sup>.

- 34 Wives were especially aggrieved when their husbands diverted the family resources to their relatives. Among these was Sethuntsa, Ramakause’s wife, who complained that her husband never bought her clothes and handed over his money to his mother—“I got nothing from him”, she vexed, and “after planting, weeding and harvesting my husband’s land, the grain was taken to his mother’s and not to my hut, the grain was used by her not by me; some of the grain was sold but I was told nothing about this”<sup>23</sup>. Wives became even more embittered when their husbands alienated material support to their lovers. Moiloa, a notorious tightwad, sustained multiple extramarital affairs, but his wife, Elsie, tolerated it. When, one day, she saw him giving one of his lovers a shilling, “which he had refused me”, she left him “for good”<sup>24</sup>. An identical situation involved Ntlakana, who complained that her husband “always pleaded poverty, but the girl he is courting gets plenty of presents which he buys for her”<sup>25</sup>.

- 35 The same occurred when husbands took quarters with their lovers or subsequent wives. The first wife tolerated the arrangement until it affected her due share of her husband’s support. A poignant example is that of Setori. She continued to live with her husband for five months after he had “taken in” a second wife. She “remained” even after his sister had repeatedly informed her of her husband’s wish that she could return to her home “that I was no longer his wife that he had another woman he looked upon as being his wife before me”. Even so, when her husband “took one of my blankets” her overbearing patience ended: “I went home”<sup>26</sup>.

- 36 Even a war or a natural disaster that precipitated a food shortage failed to exonerate husbands from their wives’ expectations to “put bread on the table”. In these times, many marriages came under severe strain. The last third of the nineteenth century was an especially exceptional period. Recurring droughts, devastation of crops by the locusts, animal and human epidemics ricocheted off one another in relentless succession. Internal skirmishes and colonial wars worsened their effects, precipitating dire food crises<sup>27</sup>.

- 37 During wars, husbands recruited into the army, or migrated. Without their husband’s support, many wives returned to their natal homes, or left to live with relatives. This was Mokoko’s explanation for deserting her husband, Motsoko: “In the war, I had to struggle hard to get food to keep my children and myself alive.” Likewise, recurring famines impacted onerously on family solidarity, exposing many families to overbearing strain. If the crisis was localised, many husbands sent their wives away to their maiden homes if these were not themselves affected. Maintaining their absent wives in such circumstances was burdensome for husbands—many contented with leaving the responsibility for the care of their wives to the latter’s kin. Other husbands left their families to search for food or the means to secure it or merely to survive.

Some in this category took the opportunity to abscond with their female lovers. “He went away with another woman”, Seshemane lamented, “during the famine he threw me away and neglected me”<sup>28</sup>.

- 38 A woman’s barrenness could also sour her marital relationship and lead to her deserting her marriage. Listen to Anna’s melancholic tale:

“I was barren and did not bear any children to him. I was laughed at by his concubines and treated with great disrespect by both plaintiff and his concubines. He neglected me also, and I then made up my mind to leave him, which I did, and have remained from him ever since”<sup>29</sup>.

- 39 The most commonly cited reason for women to desert their husbands was spousal violence and abuse. Despite Davidson’s observation that spousal abuse is a universal and recurring phenomenon throughout history (Davidson 1977: 4), this social drama has only recently attracted historians’ attention<sup>30</sup>. It is almost totally unresearched in African historiography<sup>31</sup>. Yet, virtually all women who deserted their husbands in the period covered by this study recounted woeful tales of persistent battering and abuse by their husbands. One woman even stated that she had survived her persistent physical abuse by her husband because she assumed that “it was the way all men behaved to their wives”<sup>32</sup>.

- 40 Ramasilo’s testimony provides a typical scenario. Her husband struck her “over the back and shoulders and under [her] left breast”, for delaying at the water spring. She had later run away, slept on the mountain, arriving at her home on the third day of her flight. She “positively refuse[d]” to return to her husband<sup>33</sup>. Similarly, Ramakosele was forced to recall his daughter from her abusive husband because of “constant ill-treatment and beatings”. He claimed that “there was not end to their disputes”. Court officials had to interrupt him as he poured out a long litany of beatings and ill-treatment inflicted on his daughter<sup>34</sup>.

- 41 Victorina painted a notoriously bleak picture of her life with her husband. She recounted how, after the first year of their happy marriage, the marriage had quickly turned sour. Her husband had beaten her for asking “why he did not sleep at home”. On another occasion when he persisted in sleeping out, she told him that she knew of his philandering with a neighboring woman. Upon this, he assaulted her “by tying a rein around [her] neck” and trying to “choke [her], saying that he wished she ‘would die’”. Later, she remonstrated with her husband’s alleged lover, when her husband threatened her with death, warning that if “she did not want to die, [she] was to leave his house”. When she had not left the next day, he “struck [her] twice on the head and then dragged [her] to the house” and she took about three months to recuperate. He took away all his property from her hut and abandoned her for three months. Eventually, one night he shut and fastened the door of her hut and “beat me cruelly”. When his parents intervened and rescued her, he followed her and “hit me on back of head with a stick rendering me senseless”<sup>35</sup>.

- 42 Men “thrashed” their wives with every conceivable weapon. Knobbed sticks and horse reins were husbands’ weapons of choice, but they routinely used fists. Those who used horse reins tied them around their wives’ necks and strangled them. The most notoriously abusive husband was David Motsieloa. After two years of a blissful marriage to Madelena, he started assaulting her daily, beating her with a knobkerrie across the face and on her body<sup>36</sup>. The last time he molested her before she deserted him, he “had

beaten her so badly that she has been in ill health since—she was nearly dead from concussions of the brain”<sup>37</sup>.

- 43 Some of these assaults could deteriorate into pitched battles, especially if the wife fought back, as many did. Setori’s case is an instance in point. When he tried to hit his wife with a belt buckle, she “seized hold of it” and they wrestled. Even after he grabbed her throat, choking her, she “refused to give up the belt” until onlookers separated them<sup>38</sup>. Ramakause’s wife went farther, targeting gendered parts of the man’s body women believed to hurt most. When her husband stuck her, she rushed at him and “attempted to catch hold of [his] private parts”. She missed, but continued wrestling with her husband while simultaneously swearing at him. When he tried to hit her the second time with a piece of wood, he missed and struck the child she was carrying on her back<sup>39</sup>.
- 44 Unsurprisingly, adultery<sup>40</sup> of the husband featured rarely among the reasons non-Christian women cited for deserting their marriages. One reason is that both sexes were implicated in this social drama; so none could accuse the other successfully for indulging in it. “Basotho morality is very low”, observed Mabile (1905) probably exaggeratedly, “adultery is general. Every man has his mistress and every woman her lover”. Another observer confirmed this impression, thirty years later: “Marital fidelity does not appear to have ever been a prominent Basuto characteristic”<sup>41</sup>. The other, perhaps more important reason why non-Christian wives hardly cited adultery as a ground for divorce is that among the BaSotho, as in all patriarchal societies, a sexual double standard overlooked husbands’ infidelity while enforcing strict fidelity on wives<sup>42</sup>. “The wife had no redress for single acts of adultery by her husband”, notes an informed author of the early history of the BaSotho (Ashton 1952: 86). Additionally, wifely adultery was constructed to implicate the offending man, and not the woman. It was understood as the theft—requiring compensation—of one man’s property by another man. It was constructed as a transaction between two males. The result was that the construction of adultery obscured women’s agency and marginalized their responsibility in it. It was the erring man who was prosecuted, not the philandering wife. Women were depicted as weak, vulnerable to seduction, and incapable of true consent.
- 45 Certainly, some husbands—few in the records—did react jealously to their wives’ philandering, precipitating their wives’ flight. For example, Setoi found it difficult to forgive his wife after catching her enacting sex with her lover. Because they “had no more peace”, she deserted, alleging that “living with [him] was as bad as living in hell”<sup>43</sup>. Likewise, when Sello saw his wife talking to another man, he “pinched her because [he] was jealous of her”<sup>44</sup>. Other husbands who court their wives and their lovers in the act acted in the heat of passion and beat their wives. For example, in 1872 one of the king’s own wife was caught *flagrante delicto* with her lover after “two years illicitly tampering with her”. The offending man was “punished with a severe beating” and the woman was “also beaten by her indignant husband”<sup>45</sup>.
- 46 Generally, however, one is struck by the lofty benignity of philandering wives’ husbands. In the example just cited, the wife was soon comfortably “ensconced” with her husband. Molomo’s is another case in point. When his wife became pregnant by her lover, Boloto, he “severely reproved” both and they “promised repentance”. As a result, he “abstained from further action”<sup>46</sup>.

- 47 Christianised women, however, routinely deserted their philandering husbands, and subsequently divorced them on the grounds of adultery. European missionaries helped to swell the numbers of “adulterous” husbands when they introduced a second definition of an adulterous husband among their converts—a man who first married by Christian rites, but contracted a subsequent marriage customarily. Many non Christian bridegrooms were lured into Christian marriages by their Christian fiancés whose parents—often only the mother—were Christians. Soon, they reneged from their Christian affiliation. Additionally, many husbands who had genuinely converted to the Christian faith, and married by its rites, left the church en masse when they found that their Christian wives had acquired a new sense of autonomy that threatened their masculine hegemony within the gendered marital relations<sup>47</sup>. These two categories of men simply married subsequent wives customarily. Others exploited the unwitting convenience offered by marrying daughters of Christian parents—they could marry their first wives cheaper in church where bohali was not required, “saying to [themselves] that the cattle [they] should have been obliged to pay to [the girls’ parents], had they been heathens, should be kept to enable [them] to marry second [wives]”<sup>48</sup>.
- 48 So pervasive was the likelihood of a man married by Christian rites remarrying customarily that Christian maidens forced their would-be-bridegrooms to vow monogamy during courtship and held them steadfastly to their promise. “When he courted me”, recounted one such wife, “I told him I would never consent unless he would promise me never to become a polygamist. He promised me solemnly that he would not. I used to ask him everyday when he came home late if he was courting anyone else. Instead, he beat me and I left him”<sup>49</sup>.
- 49 Many of these conflicts were over routine, run-of-the mill, activities inside the home. Underlying them, however, were men’s concerns with reinforcing male dominance within the home, to bolster the sexual balance of power, to reclaim their exclusive right to, and to maintain their control of, women. The reasons cited by husbands for beating their wives and for chasing them away include women’s actions and attitudes that men regarded as challenging their patriarchal powers and prerogatives—women’s “disobedience” and their “insolent” or “rebellious” attitudes. Two testimonies contain all these concerns:
- “The reason I left my husband is that he beat me for having delayed at the fountain. He struck me three times [. . .]. The next time he beat me he had shut me out, and when I wanted to get in he told me to go away home or wherever I liked. His father came and remonstrated with him but he said he did not care for me any more, I might go my ways. This was because I had gone with his mother to Swanepoel contrary to his wish. I left him and went home but they fetched me back and I returned to him. The next time there was no fire in the house and I did not go to the gardens—he was angry with me for not going to the gardens. In the evening when we were in the house, he said ‘now I am going to thrash you’ [. . .]. He then beat me”<sup>50</sup> (emphasis added).
- 50 Likewise, when Mohapi beat his wife the first time, they were contesting the rightful authority to discipline their child. His wife struck the child and he objected to her doing so. She said “I had no right to interfere and to show her that I had the right, I thrashed her”. The second occasion was when he came home late and his wife confronted him about the fact. He “got angry and administered chastisement with my open hand”. A third time was upon his finding his wife absent at home. He “beat her

with a stick” when she returned. A fourth occasion was when he “wanted to have connection (sex) with [her] and she would not let me, so I beat her”<sup>51</sup>.

- 51 Before deserting faltering marriages, wives challenged the imposition of the ideology and institutional edifices that constructed them as social and legal minors and that subordinated them and justified their abuse. They did so by employing several strategies: they talked back; refused to submit to restrictions on their physical mobility; engaged in revenge extramarital affairs; demanded that their husbands fulfill their part of the patriarchal marriage bargain; and subverted these patriarchal ideologies to their benefit. Others reproached or attacked their female rivals. Still others fought back abusive husbands. We have no evidence suggesting that desperately unhappy wives went as far as murdering their husbands, as their counterparts elsewhere in the same period did<sup>52</sup>. Even so, some may have chosen this extreme through subtle and handy means, including poisoning, as their counterparts elsewhere did<sup>53</sup>. Since some poisons can produce symptoms similar to well-known diseases, wife’s poisoning of her husband could easily escape detention.
- 52 Reconciling an estranged wife and persuading or forcing her to return was an arduous and often protracted affair. Many disgruntled wives got firm and vigorous support from their natal kin. For example, when Elea started cohabiting with his brother’s wife and neglecting his own wife and children, his brother-in-law came to take her and the children away. His reason, he claimed, was that he found his sister, Florina, “in a very destitute position. She and her children were nearly starving and had to beg for food”. He also feared that as “Elea was relapsing to heathenism”, he “would not bring the children according to Christian religion”<sup>54</sup>. Molotsane also refused adamantly to let his daughter return to her abusive husband and in-laws. “I was very much aggrieved and I thought it was now my duty to stand up for my daughter [. . .]”, he vexed, “now I say I will have nothing to do with them [. . .] Matoloane thinks he will have the whip hand of me because his marriage took place in the church—and they shield their evil doings under cover of religion [. . .]”<sup>55</sup>.
- 53 In non-Christian marriages, negotiations with a wife’s natal kin for her return could cost the husband additional cattle especially if his wife had deserted because of ill-treatment by himself or her in-laws. Some wives brazenly and steadfastly refused to return to their husbands even when their natal kin persuaded or compelled them to return. For example, Sello attempted three times to fetch his estranged wife from her brother’s home, but she refused despite her brother “advising her to go back to me saying she was still my wife”<sup>56</sup>. Likewise, Makhobotlane tried seven times to persuade his wife, Maria, to return, but she “persistently refused”<sup>57</sup>.
- 54 Wives’ relatives exerted pressure on their run-away-daughters cautiously to avoid more traumatic consequences. For example, Mamohalane’s parents forced her to marry a husband she did not like. She refused him conjugal rights. As a result, he beat her ruthlessly. She fled to her parents, who forced her to return. She stayed with him for a day and ran away again, this time “to a young man” at a place where her husband and natal kin could not reach her<sup>58</sup>. Similarly, Majoro’s wife protested her husband’s physical abuse with her feet, returning home several times and each time being forced by her family to return to her husband. Eventually, she steadfastly refused to return, vowing that “she would rather be killed”. Her father repulsed a beast brought by her husband to induce her to return because he feared that she might commit suicide<sup>59</sup>.



- 55 Men whose Christian wives had deserted faced even more complicated obstacles when negotiating their wives' return. While non-Christian husbands could threaten their in-laws with litigation for reimbursement of bohali, many of these had not exchanged bohali for their wives—therefore their in-laws had nothing to lose from procrastinating to intervene in reconciling them with their run-away-wives. Their only remaining resort was to call upon their missionary mentors to intervene. Missionaries, however, could only use moral persuasion to reconcile the parties.
- 56 Additionally, to avoid returning to marriages they no longer cherished, some Christianised wives played truant with their deserted husbands—they resorted to customary negotiation methods, usually bureaucratic and protracted. Mpolai did this to her husband, Senekan. She and her husband quarreled over a candle. He “thrashed” her, after which she fled to her parents. When he husband tried to get her back, she refused, saying that she first had to get her brother's, permission. Her brother, Makhetloane, however, refused to speak to Senekan, preferring to negotiate with his father. When Senekan's father met Makhetloane, the latter told him that he wished to see Senekan. Senekan obliged, but Makhetloane told him that “he had nothing to do with me but he wanted to see my father”<sup>60</sup>.
- 57 Senekan's fellow parishioner, Ramakause, was entertained to a similar bureaucratic nightmare. From his detailed testimony, we can glimpse at the predicament of a deserted husband trying desperately to recover his estranged Christian wife:

“After our marriage, we lived together happily for about two years when we quarreled about some mealies. In consequence of this quarrel my wife left me. I went to Kokoana (wife's brother) to fetch her. After talking over the matter I gave Kokoana a beast and my wife returned to me. Soon we quarreled again. She left me but returned after the war. Soon after her return, she had a child. After the birth of the child she slept with me one night, next morning she left me taking all our children, four in all, with her. She did not say why she left me. I spoke to Mr. Maeder (missionary) about the matter—Mr. Maeder gave me a letter to the Rev. Dieterlen about the matter—he gave me a letter to Mr. Nettleton (assistant commissioner)—he called me and my wife and spoke to us about the matter privately and asked my wife to return to me. She refused, he advised me to try for about 3 months and persuade my wife to return—I did my best to do so but did not succeed. I then went to Mr. Maeder again who gave me a letter to the R. M. at Mafeteng who said he could not do anything and gave me a letter to Mr. Orpen (Chief commissioner) in Maseru. I did so who sent me with the letter to Mr. Moffat. Mr. Moffat (assistant commissioner) told me to return to Mr. Maeder and inform him that he would within three months write to him on the subject. During the three months I frequently came and begged my wife to return to me. At the end of the time Mr. Maeder advised me to come again to Mr. Nettleton giving me a letter to him. I delivered the letter and he said that he would give me a letter to Maseru. I asked to be allowed to talk with my wife but he said it was better for me to go to Maseru. Mr. Maeder at last agreed that I should talk with my wife whether she intended to come back to me or not. I did so and she returned to me. We lived together for about a year when we quarreled again about some kaffir corn (millet). We fought and after the fight she took her blankets and went away with her children. I again reported the matter to Mr. Maeder who gave me a letter to Mr. Surmon. I delivered it to him and he asked me if I had been to the parents of my wife about the matter. I said no. I afterwards went to them. Kokoana said that he saw that I and my wife did not like each other and that it was only the law that bound us to each other. I agreed with him. He said that my mother-in-law was not present. I then went home. I returned and spoke to my wife who refused to return



to me. It is about two years since she last lived with me. I am perfectly willing to take my wife back again to live with if she will return to me”<sup>61</sup>.

- 58 Some of these “self-divorced” wives remarried customarily. Others, like Makubutu, were ensconced in various types of informal unions<sup>62</sup>. Those who engaged in casual sex became single mothers. Still others fled to the mushrooming South African towns, beginning the process of women migration that was seen as a serious social problem throughout the first half of the twentieth century (Bonner 1990: 221-250; Kimble 1983; Maloka 2004). When their husbands, sometimes their husband’s descendants, eventually caught up with these women when a divorce system became available, many of these women had stayed away from their husbands for years. For example, Josephina Nketsitseng separated from her husband for twenty-three years before seeking a formal divorce<sup>63</sup> while Thaddea and Leta lived apart for over thirty years. When this couple finally decided to end their marriage formally, they were aged and sick. Unable to travel to the court, they agreed to write a joint affidavit to the magistrate’s court, asking the court to “void” their marriage<sup>64</sup>.

#### Marital Litigation

- 59 So, the scope for marital discord was great. These conflicts were dramatized in the newly established magisterial courts, which is why we have come to know about them. By putting Christian marriages at par with customary marriages, colonial law cleared the war for many Christianised women who had deserted when their husbands married subsequent wives customarily to sue for divorce and to successfully claim child custody. This is because men who were bound to a Christian marriage could not remarry customarily without exposing themselves to bigamy, desertion or adultery. Their Christian wives could rely on three substantial grounds for a successful divorce: that by marrying the second wife customarily, the husband, not the wife, had deserted the marriage, had committed bigamy, and adultery.
- 60 However, a grave omission in the regulations was the absence of an instrument to validate Christian marriages that were contracted before annexation. These marriages formed the bulk of marital litigation in the first decade of colonial rule. Missionaries had celebrated these marriages on the authority of an informal verbal agreement they had reached with King Moshoeshe. Only fifteen years later, in 1887, was this serious legal lapse exposed. In that year, a prominent PEMS convert, Chief Tsiu, decided to marry by Catholic rites. PEMS missionaries protested, saying that he had married by PEMS church rites to a woman he had deserted, and who he had not formally divorced. The colonial government sought legal advice that confirmed that the first marriage had no legal status. Hastily, a proclamation was promulgated, retroactively legalizing PEMS church marriages celebrated before 1868<sup>65</sup>.
- 61 Despite, Christian women who had deserted their husbands long before annexation filed successful divorce and custody suits at colonial magistrates’ courts<sup>66</sup>. Three such cases were heard before the ink on the new regulations had dried. In all of them, the couples had married by Christian rites long before the new regulations were enacted and the husbands had subsequently contracted second marriages customarily. The wives successfully filed for divorce on the grounds of adultery, were permitted to remarry and received custody of the children<sup>67</sup>. Nketsitseng’s testimony is more complete and is a typical example. She had married Lemuel by Christian rites in 1859. Later, Lemuel “took up” with Borane’s wife, leaving Josephina in her hut. Then, Borane died, thus clearing Lemuel of the charge of living in adultery. Next, he married Borane’s

widow customarily. He then allegedly “drove [Josephina] away from [her] hut and put his new wife in it, without providing any other accommodation for [Nketsitseng]”. She was forced to “take refuge” at the missionary headquarters of Morija, where she lived with her mother. She “tried to induce Lemuel to come and live with her at Morija, but he refused to do so”. Thirteen years later, the missionaries succeeded in “freeing” Josephina, along with Marietta and Ursula, from their Christian marriages, through the new construction of adultery that defined a subsequent marriage by custom to be adulterous<sup>68</sup>.

- 62 These cases opened the door for a plethora of others to come. Thus, of the 150 cases of Christian divorces examined for this study, the highest (68 per cent) cited adultery/desertion under this new definition as grounds for dissolution of marriage, followed by 40 per cent that cited the husbands’ subsequent marriage or other subsequent forms of informal unions as a ground for nullifying the marriage. Desertion alone and adultery alone also featured prominently among the grounds cited for divorce, accounting for 36 and 32 per cent respectively of the grounds cited. Women also predominated as plaintiffs, indicating that women perceived that their petitions seeking divorce and child custody had reasonable prospects for success. Indeed, the odds were good that women would succeed in obtaining divorces and child custodies. The judgments actually worked in their favour.
- 63 Colonial magistrates were willing to lend a ready ear to these women’s pleas. They granted them favourable divorces and child custodies almost with a vengeance, even in cases that merited a more sympathetic attitude towards husbands. Elea presented such a case, albeit contentious, in 1888. From the couple’s testimonies, they clearly lived out an especially miserable marriage. Leaving aside the many disparaging allegations against her that she denied in court, Elea’s wife, Florina, emerges as an embodiment of all that few would wish to have in a spouse. On her husband’s testimony, which she did not contradict, she began an extramarital affair soon after her marriage. It led to her bearing her first child before the marriage was consummated. Her husband described her as an especially quarrelsome spouse, always accusing him falsely of multiple infidelities, some of which he admitted. She also allegedly neglected her wifely and household duties. This was confirmed by her own brother, who, as we have seen, testified that on a visit to her home, he found her and her children “starving and begging for food”.
- 64 Elea was not an ideal spouse either. He admitted to at least two infidelities with other husbands’ wives and denied three others including that he had impregnated a girl before he married Florina. Seemingly, he also was especially cruel. On his own evidence, he once tied up a man who had been fighting in his village and kept him fettered until he died from “suicide”. Additionally, he persistently threatened his wife with ditching her for another woman.
- 65 All court witnesses, including the presiding magistrate, agreed that this was a notoriously unhappy marriage, blaming both parties for it. In his judgment, however, the magistrate focused on Elea’s “adultery” in marrying a second wife. He vexed that even if Elea’s admitted two infidelities “might have been excused”, his greatest crime was to marry a second wife while still bound to a Christian marriage. His detailed judgment reveals his overbearing preoccupation with the Eleas’s “inexcusable” crime in undermining a Christian marriage:

"The marriage in the church is recognized by government. Government does not ask whether cattle have passed or not passed. The fact of marriage in the church is sufficient. It is not a light thing to dissolve a marriage. Such a marriage as this is recognized by government. The regulations state plainly that Christian marriages are binding but Elea has taken another woman to live with him. He has thrown contempt for Christian marriage and he must pay the penalty for so doing. Two people, Elea and Florina, made a contract and took vows to be true to each other. Elea has broken the contract by taking another woman as wife and he must suffer for his ill doing. Divorce granted. The guardianship of the children to be given to the wife"<sup>69</sup>.

- 66 Although their Christian marriages were not legal, women persisted in ending their marriages in magisterial courts. There, their brazenness during their court interrogations is remarkable and striking. All refused to return to their husbands pointedly and resolutely, using emphatic words and phrases that included "absolutely refuse", "positively refuse", "will never return", "would rather die than return", "would rather turn a prostitute than return", "living with him was like living in hell", "I have left him for good". Other wives with alienated affections brazenly informed their husbands that they would marry their lovers<sup>70</sup>.
- 67 This was manifestly a far cry from the view of silent, powerless African women more comfortable in the "private sphere" of the home than in the hurly burly "public sphere" of men's courts, where the differences of gendered power were highly visible and palpable. Although we are not vouchsafed the opportunity to see their demeanors during interrogation (Rathbone 1989: 445-461, 1993), we can gauge from the words they used that these divorce-seeking women who appeared in colonial courts were assertive. Dissolving one's marriage entailed giving testimony, answering questions about highly personal and intimate issues, enduring cross examination, and procuring witnesses.
- 68 In all these, women advanced their individual interests in court single-mindedly, accounted for their actions vigorously, and asserted their preferences steadfastly. The colonial court, as patriarchal as it was, afforded these women the rare opportunity for engaging in public discourse on matters that directly affected their lives. As Khadianala has noted, "courtrooms are extraordinary sites, in which the legal process temporarily suspends social and political inequalities. Through the acts of testifying and cross-examining witnesses, women reverse the subordination assigned to them by the institutions of everyday life" (Khadiangala 2002: 101-21). Women certainly relished in the dramatic opportunity offered them to cherish the power that they struggled to wield in their households.
- 69 We do not yet know how these divorcing women and their children survived without their husbands' economic support and resources to fall back on. Yet a lone example hints at their determination, amid overwhelming odds, to accept responsibility for themselves and their children and to assert themselves. Florina took the court's-granted child custody to extremes, tenaciously rebuffing her divorced husband's offers of child maintenance. By her own admission, when her husband, Elia, sent two sacks of corn to her to help feed the children, she rebuffed them, saying that she "did not know who they came from". Later, when Elea asked her to send the children to school, offering to pay their school fees, she sulked and "made no answer". When Elea repeated the request, she vexed: "I do not know what children you mean!" Afterwards, Elea sent the children some blankets, but she declined them, mocking: "Were the children naked when government gave them to me?"<sup>71</sup>.

- 70 As should already be obvious, it was Christianised women who relished the new power granted them by the colonial administration. Not only had missionaries empowered them, but they continued to call upon the influential assistance of their missionary mentors to champion their causes with colonial administrators. For other women, however, it is doubtful if colonial innovations had substantial impact on their access to colonial courts. Marital litigation was itself cumbersome even for Christianised women. The first step was for the plaintiff to give her affidavit to the resident magistrate, stating her case. Then the plaintiff had to provide proof that a marriage subsisted—a certified copy of the register of marriage if it was celebrated in church. This could only be obtained from the church that solemnized the marriage, and it could be located at a place far from where the woman now lived. The proof was then forwarded to the chief magistrate's office at the colonial headquarters in Maseru. The chief magistrate then decided on the date of the hearing of the case. Next, he published a citation of the case in the local media and summoned the litigants to appear before the court on the appointed date.
- 71 Proof that a marriage subsisted was unavailable for non-Christian women. One of the intentions of the colonial administration to have marriages registered was precisely to produce such proof, with an eye to future litigation. But this regulation remained a dead letter and was soon dropped. The sheer burden of traveling long distances to register a marriage at a magistrate's office discouraged even would-be-law-abiding citizens. Couples marrying by customary law sustained little determination to register their marriage, for the couple and their community acknowledged the validity of the marriage without colonial registration. Additionally, it was expensive to register a marriage—a fee of 2/- was charged, making registration beyond the means of most couples, especially polygynists. Consequently, very few customary marriages were registered.
- 72 Extensive traveling was involved. It could be expensive especially when the plaintiff had to be accompanied by her witnesses. If the litigating wife still lived with her husband, traveling to the court to begin the litigation process, and eventually to attend the trial, exposed the plaintiff to her husband, who might stop her from proceeding with the suit, often by beating her. Other family and community members might also intervene to discourage plaintiffs from going ahead with the divorce process, preferring to exhaust remaining extra-judiciary avenues to reconcile the parties.
- 73 Despite, seemingly a substantial number of non-Christian women did use colonial courts to settle marital conflicts and their outcomes. For example, a magistrate from a remote district reported in 1878 that in that year alone he had heard sixty-four civil and divorce cases<sup>72</sup>. Reporting for all the districts, the governor's agent stated in 1878 that BaSotho were bringing all of these cases to the magistrates<sup>73</sup>. Also, an important indicator of the extent to which women used the courts to negotiate and contest gendered relations within marriage is the mounting opposition this engendered from men and patriarchs.
- A Threatened Patriarchy
- 74 Missionary and colonial collusion in ending marriages and granting child custody to divorced wives inspired dissent and resistance on the part of patriarchs. They found their paternal prerogatives over their offspring and their patriarchal status in marriage challenged by missionaries and judicial intervention in their family matters. As we have seen, their protests started as early as the 1840s when the missionaries succeeded

in pressing King Moshoeshoe to divorce two of his wives who had converted to Christianity and wished to be removed from a polygynous marriage. This action by the King enraged influential elements among his people and unleashed a mass exodus from the church.

- 75 Later, in 1871, when the new colonial regulations were enacted, the content of these regulations so alarmed BaSotho patriarchs that they sought immediate representation to the Cape parliament to express their dissatisfaction<sup>74</sup>. Their protest forced the Cape government to stall on enforcing the regulations and to appoint an on-the-spot investigation of BaSotho customs, especially their marriage customs<sup>75</sup>. The recommendations of this commission were responsible for amending the original regulations, resulting in regulations that acknowledged BaSotho customary marriages and allowed them to be regulated, in large measure, according to BaSotho customs.
- 76 Patriarchs sustained their protests throughout the decade. In 1872, the missionaries enraged BaSotho patriarchs when they enacted far-reaching church laws that even the arch rival of the BaSotho marriage institution, Emile Rolland, found to be “treading upon the civil rights of the people”<sup>76</sup>. Expectedly, the regulations unleashed a new wave of exodus from the church. Additionally, many “heathen” parents withdrew their children from mission schools to avoid their indoctrination and a national clamour for the establishment of non-denominational government schools began<sup>77</sup>. Eventually, these growing dissatisfactions culminated in the BaSotho rebellion of 1880. Although the rebellion’s immediate spark was the Cape government’s unwise decision to disarm Africans, its fundamental cause was the mounting dissatisfaction among BaSotho patriarchs against the government’s crusade of emasculating them through empowering women (Bradlow 1968; Burman 1981; Mohapeloa 1971).
- 77 When the Crown resumed the administration of the country in 1884, it refrained from interfering with BaSotho marriages<sup>78</sup>, as long as aspects of it were not “repugnant to natural justice, equity or good conscience”<sup>79</sup>. Imperial officials explicitly supported bohali, preferring to leave the administration of marriages to heads of families and Chiefs. Despite, the issue of granting divorces and child custodies to women remained a sore thumb in the relationship between BaSotho patriarchs and imperial officials. It came to the fore in 1888.
- 78 In that year, a woman, Nkhoo, whose mother was King Moshoeshoe’s daughter, filed a divorce and custody suit with the court of the assistant commissioner of the Mafeteng district. She had been married by Christian rites to Tsitso in 1871, and they had six children of the marriage. Typically, Tsitso later married two other wives customarily—first a minor girl who had not yet come to live with him, and second, a daughter of the heir to the BaSotho kingship, Chief Lerotholi. By her own testimony, Nkhoo continued “sleeping with” Tsitso after he married his second wife, because she had not yet come to stay with him. However, when the third wife arrived, Nkhoo refrained from “sleeping with” her husband. She acknowledged that since the arrival of Tsitso’s third wife, he had continued to “treat [her] kindly and made provision for [her] till she complained to the court about his ‘adultery’ with his third wife. He then ‘thrashed her with his fist for having come [to the court] to complain’”.
- 79 In his defence, Tsitso claimed that he had consulted Nkhoo before marrying his subsequent wives, and that she had not objected. When Nkhoo told him that if he married another wife, she would leave him, he thought she was “joking”. He also counter accused her of committing two adulteries for which he had “forgiven her”. For

all this, she ought to be thankful: “She is my wife and although she committed these faults, I took care of her and provided for her with all she required.” Further, he told the court that the conjugal unhappiness did not start with him marrying his subsequent wives. Once when his wife had visited her maiden home, she had refused to return to him after recalling her thrice. He then went to fetch her and stayed at her maiden home for three days. All awhile, she had “declined to sleep with [him] before [he] even thought of marrying another wife”. This showed that “she then wanted to be divorced”.

- 80 Chief Lerotholi gave evidence at this prominent case where his daughter was destabilising his grand father’s daughter’s marriage. He testified that when Tsitso remarried his daughter, Letsie–Lerotholi’s father–had demanded that Tsitso should belatedly exchange bohali cattle for Nkhoo because he had proved to be “a coward and [had] run away from the Christian law” of monogamous marriage. This would assure paternal custody of the children. Arrangements to receive the bohali cattle were at an advanced stage, and Lerotholi sought to persuade the court to let the matter be resolved by the respective families. The court, however, adjudged in Nkhoo’s favour, dissolved the marriage and granted Nkhoo custody of the minor children of the marriage. Worse, it declared her entitled to half of the joint estate<sup>80</sup>.
- 81 BaSotho patriarchs were enraged. They immediately convened a national assembly (pitso) at the king’s headquarters at Matsieng on 22 July 1888, soon after the court’s judgment in the Nkhoo’s case. The pitso’s war-cry was “the government and missionaries are granting easy divorces to our wives, taking away our children and destroying the lineage”! Attendance of principal chiefs, including the king, signified the pitso’s import. Standing accused, and represented at the pitso by nine clergymen were the PEMS missionaries, who had instigated these transformations. BaSotho evangelists and Christian converts attended, although only a few–three–spoke. Also present were two Roman Catholic clergymen who unreservedly defended their mission’s support for bohali marriages.
- 82 A tense and apprehensive mood pervaded the proceedings of the pitso. The king’s senior counselor, Setha Matete, opened the proceedings by enumerating the many cases of easy divorces and maternal custodianships, including Nkhoo’s, granted by the colonial government at the missionaries’ instigation. Speakers rose in turn to castigate the colonial government and missionaries for “taking away our children” by granting custody to their mothers on parents’ divorce. “Children are their father’s blood”, vexed Chief Jonathan–himself a Christian defector–“how can they be given to their mothers?” “*Leloko ke ntho e kholo*” (“the lineage is fundamental to our life and culture”), echoed the most recalcitrant Chief Masupha, “and missionaries and the government are destroying it”. Another speaker attacked the missionaries where it hurt most: “What kind of Christianity is this that you have brought to us? Christianity that sets apart what God joined together? Does not your bible state: ‘at marriage the two shall become one flesh, separated only by death’? The last word belonged to the king’s most senior counselor, Ramabilikoe: ‘*ha re nyale mosali re nyala popelo*’ (‘we do not marry a woman, we marry her womb’)<sup>81</sup>.
- 83 What, then, do these court cases of spouses embroiled in marital litigation tell us about BaSotho women’s encounter with colonial legislation?<sup>82</sup> We behold here deeply fractured conjugal relations–Christian and non-Christian. These were manifestly unhappy marriages, made so by gendered conflicts. Yet women, especially Christian



women, could extract themselves from undesirable marriages. Some clearly decided that no marriage was better than a bad one, and were resolute to escape marital misery. So, they deserted undesirable marriages. Later, they regularized their “self-divorce” by formally divorcing their husbands and winning child custody rights when formal divorce became available.

- 84 For all their ill effects of restructuring BaSotho gender, especially marital, relations, missionary endeavours and early colonial legislation opened new opportunities for women. Women used the struggles between colonial and indigenous patriarchies to gain new sorts of power that enabled them to free themselves from unwanted marriages and to pursue their own autonomous interests. Specifically, early colonialism did provide women with unprecedented access to divorce courts. These courts were receptive to women’s pleas and routinely granted them divorces and child custodies. They also gave women space to articulate their marital concerns and to negotiate and contest their marital relations.
- 85 These gains were soon to be reversed throughout the first half of the twentieth century when the need to control female mobility and to quell widespread rural restlessness brought about a coalescence of interests between colonial and indigenous patriarchies (Barnes 1992; Bennett 1995; Bonner 1990; Pape 1990; Schmidt 1991, 1992; White 1990). Colonial administrators gradually colluded with indigenous patriarchs, reinforcing patriarchal dominance and strengthening male authority over women. Colonial courts became less sympathetic to women and increasingly favoured husbands. Especially, whereas earlier these courts had granted easy divorces to women who pleaded unhappy marriages, they now forced disgruntled wives to stay in unhappy marriages, and forcibly returned those that had already left failing marriages to husbands they no longer cherished (Epprecht 2000; Kimble 1983; Maloka 1997: 101-122, 2004; Murray 1981).

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## NOTES

1. Makubutu vs Makolometse, court of the Assistant Resident Magistrate of the District of Thaba-Bosiu, Mafeteng, 23 September, 1874, Lesotho National Archives (LNA), Maseru, unreferenced.
2. Domestic relations and marriage in the nineteenth century are unresearched topics in African historiography. For the few existing studies on marriage and divorce in Africa in the nineteenth and early twentieth centuries, see ALLMAN & TASHJIAN (2000), BYFIELD (1996: 32-51), COOPER (1997), HODGSON (1996: 106-123), JEATER (1993), LOVETT (1996: 52-68).
3. The literature on BaSotho traditions of origin and migrations and the formation of BaSotho state is too extensive to list here. The main secondary literature used for this study includes (ASHTON 1952; CASALIS 1861; DORNAN 1909; ELDREDGE 1993; ELLENBERGER & MACGREGOR 1912; KIMBLE 1978; MACHOBANE 1990; SANDERS 1975; THOMPSON 1975; TYLDEN 1950).
4. The literature on the various reasons why men need to control women's sexual and reproductive capacity is vast. A sample includes ENGELS (1972), FOX (1967), GAULIN & SCHLEGEL (1980: 301-309), GINSBURG & RAPP (1991: 311-343), HARRIS & YOUNG (1981: 109-147), LEVI-STRAUS (1969), MUKHOPADHYAY & HUGGINS (1988: 461-495), RUBIN (1975: 157-210), YANAGISAKO & COLLIER (1987: 14-50).
5. Letsie's statement, *Report and Evidence of Commission on Native Laws and Customs of the Basutos, 1873* (Cape Town: reprinted Morija: Morija Press): 47.
6. The historical presence of children is still a *terra incognita* in African Historiography. For the reason for this lacuna and an impressive beginning to redress it, see COHEN (1970: 40-49); ROBERTS (1997).
7. The Comaroffs give a detailed discussion of the influence of the Enlightenment Movement on nineteenth century European missionaries in Southern Africa (COMAROFF & COMAROFF 1991); For another study that also emphasizes the influence of the Enlightenment on European missionaries who came to South Africa in the nineteenth century, see HAYES (1985).
8. "Marriage with Cattle", Little Light of Basutoland, reproduced in Report on Commission on Laws and Customs of the Basutos, 33.
9. Quoted in Commission on Laws and Customs, 26.

10. *Journal des Missions évangéliques* (JME), 14, 1839, 1887, 1893.
11. JME 15, 1840: 126; 16, 1841: 403, 410-412; 20, 1845: 282-285; 24, 1849: 353; 25, 1850: 6 & 336; 28, 1853: 165; 29, 1854: 208.
12. More details accounting for the missionaries' ephemeral success are discussed in (PHOOFOLO 2007): 363-386.
13. Regulations enclosed in Philip Wodehouse to Buckingham, no. 31, 2 May 1898, Colonial Office Archives (CO) 48/441.
14. Griffith to colonial secretary, 30 December, 1872, *Report on Laws and Customs of the BaSutos*, 5.
15. *Cape Argus*, 7 November 1872.
16. Scholars studying African nuptiality have long recognized the looseness of the marriage tie and the tendency for marriage relationships to be impermanent; See, for example BLEDSOE (1990: 115-125), MEEKERS (1992: 61-78); An important study on the texture of marriage in Malawi, convincingly argues that the modern crisis in marital relationships dates back to as far as historical evidence is available, and probably even beyond; see KALER (2001: 529-556); Marital disharmony and its outcome have been noted universally even in countries where Christian marriages were a much longer established tradition: see for example BAILEY (2003), LENEMEN (1996: 465-483), PHILLIPS (1988), POSKA (1996: 871-882), STONE (1992); An historian has gone so far as to characterize marital disputes as "wars" (FERRARO 2001).
17. The pervasiveness of this phenomenon of husband desertion across space and time is striking and intriguing, for some examples, see BUTLER (2006), KAPLAN (1997), LEAVITT (2000), MBILINYI (1988).
18. Mokhelosane's statement in Mokhelosane vs Rakharebe, 23 May 1878, LNA.
19. Ramosala's statement in Modise vs Boloto, 18 February 1876, LNA.
20. Mamohalane's statement in Jankoko v. Pari-a-Maphari, 17 February 1875, LNA.
21. Masoane's statement in Mosoane v. Nosi, 22 June 1874, LNA.
22. Tsilela's statement in Tsilela vs Matsau, 24 August 1882, LNA.
23. Sithuntsa's statement in Ranakause vs Sethuntsa, 3 June 1889, LNA.
24. Elsie's statement in Elsie Makai vs Moiloa, 28 September 1882, LNA.
25. Ntlakana's statement in Bereng Molomo vs Ntlakana, 7 June 1875, LNA.
26. Setori's statement in Setori v. Kopi Elea, 22 July 1889, LNA.
27. For a detailed discussion, see PHOOFOLO (2004: 499-518).
28. Sishemane's statement in Sishemane v. Moqalane, 4 February 1880, LNA.
29. Anna's statement in Antoni Khetla v. Anna Khetla, 13 August 1872, LNA.
30. For a useful review of the historical literature, see FOX (2002: 15-34); For the same period elsewhere, see, among others TOMES (1978: 328-345); For earlier periods, see, among others PLECK (1979: 60-74, 1987), DOLAN (1994).
31. For a few incursions into this territory in Africa, see MAMA (1997: 46-62), REDDING (2004).
32. Tebela's statement in Phiri vs Lekau, 17 February 1875, LNA.
33. Ranasilo's statement in Sello vs Ralitseole and Montsi, 2 September 1874, LNA.
34. Ramakosele's statement in Komane vs Ramakosele, 2 September 1874, LNA.
35. Victorina's statement in Victoriana v. Tjapane, 14 June 1888, LNA.
36. Madelena's statement in Madelena vs David Motsieloa, 18 July 1879, LNA.
37. Herman Dieterlen to governor's agent, 5 November 1879, encl. in Victorina vs Tjapane, 14 June 1888, LNA.

38. Sitori's v. Kopi Elea, 22 July 1889, LNA.
39. Ramakause's statement, in Andrease Ramakause v. Sithuntsa Lepule, 3 June 1887, LNA.
40. Studies of extramarital relationships in nineteenth century Africa are virtually absent from the historical scholarship; For a few exceptions, see MCCASKIE (1981: 488-494), ALLMAN (1991: 176-189, 1996: 27-65), PHOOFULO (2005: 3-47).
41. Financial and Economic Position of Basutoland (1935), 42.
42. On the "double standard", see THOMAS (1959).
43. Setou's statement in Setou vs Kopi Enea, 22 July 1889, LNA.
44. Sello's statement in Sello vs Ralitsuele, 2 September 1874, LNA.
45. Governor's agent to editor of the *Cape Argus*, encl. in governor's agent to colonial secretary, 10 September 1872, CO 3205.
46. Molomo's statement in Molomo vs Bloto, 18 February 1876, LNA.
47. The first wave of men to renege from the church occurred in the 1840s and 1850s; See, for example, *Journal des Missions évangéliques* 15, 1840: 126; 16, 1841: 403, 410-412; 20, 1845: 282-285; 24, 1849: 353; 25, 1850: 6 & 336; 28, 1853: 165; 29, 1854: 208; Claude-Hélène PERROT (1970: 24-25), THOMPSON (1975: 91-93).
48. Revd. Adolph Mabile to Governor's Agent, encl. in Governor's Agent to High Commissioner, 1 September 1871, Unpublished BaSutoland Records (UBR): 281-286.
49. Ntlakala, Bereng v. Ntlakala, LNA.
50. Simon Matoloane v. Jimis Molotsane, 18 February 1873, LNA.
51. Maleshoane Molopi vs /Mohapi Nkoko, 15 May 1891, LNA.
52. For example, SHARPE (1981: 29-48); On women as perpetrators of spousal homicide in Africa in the early twentieth century, see ZIMUDZI (2004: 499-518).
53. According to Pollack, murderesses have, for "a large span of time" and in many countries used poison more often than any other weapon. They normally used arsenic, obtainable under the guise of rat poison or insecticide. Other poisons included cyanide and bichloride of mercury (POLLAK 1950: 17); Also HARVARD (1960).
54. Labane's statement in Florina Mafantiri v. Elea Mafantiri, 20 February 1888, LNA.
55. Molotsana's statement in Matoloane v. Jimis Molotsane, 18 February 1873, LNA.
56. Sello's statement in Sello vs Ralitsuele and Montsi, Assistant Resident Magistrate's court, 2 September 1874, LNA.
57. Makhobotlane's statement in Makhobotlane vs Maria Ntaba, 23 April 1880, LNA.
58. Mamohalane's statement in Jankoko vs Phari-a-maphari, 17 February 1875, LNA.
59. Statement of Romolawa in Majoro v. Romolawa, 15 November 1877, LNA.
60. Senekan's statement in Senekan vs Mpolai, court of assistant commissioner, Mafeteng, 3 March 1886.
61. Ramakause's statement in Andrease Ramakause vs Sithuntsa Lepule, 3 June 1887, LNA.
62. This "marital fluidity" seems to span time and space. I borrow the term itself, "self-divorce", from an historian of medieval England, Helmholz, who coined it in 1974: "When a man (in our case a woman) has been married for some time, then leaves and takes another woman/man as his/her wife" (HELMHOLZ 1974: 59); In this connection, compare also VICESCHOUWERS-VAN MELKEBEEK (2000: 83-98), SCHWARTZBERG (2004: 573-600).
63. Josephina Nketsitseng's statement in Josephina Nketsitseng vs Lemuel Mohapi, court of the Chief magistrate of Basutoland, 11 May 1874, LNA.
64. Thaddea vs Letha, 22 July 1887, LNA.
65. *Lesedinyana*, 1 May, 1887.

66. The outpouring of scholarly works dealing with the pervasiveness of divorce in the past has concentrated almost exclusively on both sides of the Atlantic. But divorce was also pervasive in non-western societies during the same period. Divorce in Pre-modern Japan and Islamic Southeast Asia are beginning to attract historical attention (CORNELL 1990: 710-732; FUESS 2004), but historians of Africa have still not systematically studied divorce among African societies (BYFIELD 1996: 27-46; PETERSON 2006: 983-1010; ROBERTS 1999: 389-410).
67. Ursula vs Moe, 22 February 1872; Marietta vs Osias, 15 April 1872; Josephina Nketsitseng, 11 May 1874, LNA.
68. Statement of Josephina Nketsitseng before Richard Bright, clerk of the court of the Chief magistrate of Basutoland, 11 May 1874, in Josephina Nketsitseng vs Lemuel Mohapi, LNA.
69. Florina Mafantiri v Elea Mafantiri, 20 February 1888, LNA.
70. For example, Johanne Masehle vs Sanna, 4 September 1876, LNA.
71. Florina's statement, further proceedings on the Divorce case of Elia Mafantiri vs Florina, 20 February 1888, LNA.
72. Cape Parliamentary Papers (CPP), G. 17-78, 16.
73. Acting governor's agent to secretary for native affairs, 18 March 1878, Cape Archives (CA), NA275.
74. CPP, A18-72, 20-22.
75. Colonial secretary to chief magistrate, Basutoland, 19 August 1872, in *Commission on Laws and Customs of the Basutos*.
76. Report of the assistant resident magistrate for the district of Thaba-Bosiu for the year ending 31 December 1872, NA 272.
77. Rolland, 1872 report, NA 272.
78. Original Draft by Sir Hercules Robinson attached to correspondence between Derby and law officers, 2 January, 1884, CO 48/510.
79. For more details on the repugnancy test and how it operated in British Africa, see OTTLEY (1992: 128-145).
80. Nkhoo vs Tsitso, court of the resident commissioner of Mafeteng district, 1 May 1888, LNA.
81. "Pitso ea Matsieng" ("The pitso held at Matsieng"), *Leselinyana*, 1 July 1888.
82. Like many other issues discussed here, debates on women's experiences with the law have been euro-centric, focusing on western societies on both sides of the Atlantic. For feminist historians of the 1970s and 1980s, western criminal justice systems were fundamentally patriarchal and did very little for women. Indeed, for these historians, women were passive victims of the criminal system (BACKHOUSE 1991; KARLSEN 1987; PLECK 1987; VLARK 1987). More recent scholarship, however, endows women with agency in their encounter with the criminal justice system and argues that they were very likely to get redress from the judges (DAYTON 1993; GORDON 1988; KERMODE & WALKER (1994).

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## ABSTRACTS

This article mines court testimonies to explore the experience of African women in the colonial judicial system in colonial Lesotho. Focusing on spouses embroiled in marital litigation before colonial justices, it investigates how women manipulated legal and extralegal avenues to advance their marital and child custody interests. It concludes that for all their ill effects of restructuring BaSotho gender, especially marital relations, missionary endeavours and early colonial legislation opened new opportunities for women. Women used these newly acquired and short-lived advantages to extract themselves from undesirable marriages and to successfully claim their children's custody.

*Litiges conjugaux au Lesotho au début de la période coloniale, 1870-1900.* – En s'appuyant sur des témoignages juridiques, cet article explore l'expérience des femmes africaines dans le système juridique du Lesotho à la période coloniale. Il montre comment les femmes utilisaient des moyens légaux et illégaux pour faire valoir leurs intérêts conjugaux et obtenir la garde de leurs enfants. L'article conclut que malgré tous les effets pervers de la restructuration des liens entre les hommes et les femmes BaSotho, notamment les liens conjugaux, les efforts des missionnaires et la législation coloniale ont offert de nouvelles opportunités aux femmes. Celles-ci ont utilisé ces nouveaux acquis (pendant une courte période seulement) pour s'extraire d'unions indésirables et pour obtenir la garde de leurs enfants.

## INDEX

**Mots-clés:** tribunaux, missionnaires, adultère, femmes et droit, mariages africains, garde d'enfants, colonie, violence conjugale

**Keywords:** colonial, missionaries, gender, divorce, adultery, courts, Lesotho, African marriages, child custody, domestic violence, marital discords, marital litigation, women's agency, women and the law

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