

# THE IMPACT OF CUSTOMARY LAW ON CHILDREN'S RIGHTS IN LESOTHO

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**Abstract:** Lesotho has a dual legal system, one based on customary law and the other on the received law. This appears clearly from the Constitution that ring-fenced customary law from any constitutional scrutiny. A customary practice may continue even if it discriminates against women and children. As a result of this, various human rights of children are violated. Firstly, if parents are married in terms of customary law and separated, the custody is granted to the father and the mother merely having the right to visit. Secondly, female children are excluded from property inheritance. Lastly, marital power of a husband still continues under customary law and therefore females are still treated as perpetual minors. The latter infringement of rights is not in the best interest of children and conflict with Lesotho's international obligations. Lesotho is a signatory of numerous international and regional human rights instruments and it is suggested that it has to accelerate the incorporation of human rights instruments into domestic law in order to safeguard the best interest of children.

**Keywords:** best interest of children, equality rights, marital power & property inheritance

## Introduction

The Kingdom of Lesotho is a constitutional monarch that is uniquely situated right in the belly of South Africa.<sup>1</sup> It is unlike many African countries with various ethnic groups, Lesotho is inhabited by Sotho speaking people with a single ancestry.<sup>2</sup> In addition to this, Lesotho has a dual legal system composed of the received law and customary law. From the advent of European colonialists, the received law promoted and still continues to favour European sense of justice and morality to the detriment of African values.<sup>3</sup> It is beyond any doubt that the received law was highly informed by ethnocentrism hence Africans were treated as lesser human beings and their law worthy of recognition subject to a condition that it does not conflict with European sense of justice and moral standards (the so called repugnancy clause).<sup>4</sup>

Be that as it may, the emerging jurisprudence around Africa has confirmed that there is a clash between customary law and human rights (part of the received law) and has critically appraised the failure of some aspects of customary

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<sup>1</sup> Poulter S & Palmer V *The Legal Systems of Lesotho* (1972) 101; Juma L "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" (2011) 23 *Pace International Law Review* 97.

<sup>2</sup> Weisfelder R "The Basotho Nation-State: What Legacy for the Future?" (1981) 19 *Journal of Modern African Studies* 221-223.

<sup>3</sup> Mutua "Why Redraw the Map of Africa: Amoral and Legal Enquiry" (1995) *Michigan Journal of International Law* 1113; Juma L "Africa, Its Conflicts and Its Traditions: Debating a suitable Role for Tradition in African Peace Initiatives" (2005) *MSU Journal of International Law* 463.

<sup>4</sup> Juma L "From Repugnancy to the Bill of Rights: African Customary Law and Human Rights in Lesotho and South Africa" (2007) 21 *Speculum Juris* 88; Sanders *The Internal Conflict of Laws in South Africa* (1990) 2; Pieterse "it's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" (2001) *South African Journal on Human Rights* 374; Thomas and Tladi "Legal Pluralism or a New Repugnancy Clause" (1999) *Comparative and International Law Journal of Southern Africa* 354-363; Koyana "Indomitable Repugnancy Clause" (2002) *Obiter* 98-115; Taiwo "Repugnancy Clause and Its Impact on Customary Law: Comparing the South African and Nigerian Position- Some Lessons for Nigeria" (2009) *Journal of Juridical Science*.

law in meeting positive legal aspirations of a contemporary society.<sup>5</sup> In South Africa, for example, a series of thought provoking decisions of the Constitutional Court<sup>6</sup> have agitated the debate on the future of African customary law in the face of growing popularity of international human rights.<sup>7</sup>

International and regional human rights instruments have been ratified by many countries of the world including the Kingdom of Lesotho; to the contrary, many of those instruments are not yet incorporated to Lesotho's domestic law. This is evident from the Constitution of the Kingdom of Lesotho that ring-fenced<sup>8</sup> customary law by stipulating that the discriminatory provision does not extend to cover persons that are subject to customary law and from its reservations to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). The latter convention entered into force in 1981 and has been the significant international instrument for the protection of rights of women and it is like international bill of rights for women.

This paper intends to begin by discussing the position of children that are subjected to customary law and reveal that the current position encroaches upon their rights to equality.

The second part of this paper intends to discuss duties and responsibilities of Lesotho under international law and make recommendations on what should be done by Lesotho in order to comply with its international human rights obligations and to attain sustainable development.

### **Position of Children under Customary Law**

#### **a) Custody**

Custody is defined by Bekker as 'the capacity of a person to have actual physical "possession" of the minor, to live with him or her, to take care of him or her in his or her daily life.'<sup>9</sup> The position under customary law is that custody of children that are born out of wedlock is granted to the mother of a child and her family group.<sup>10</sup> However, if parents were married in terms of customary law and then separated or divorced, the father is granted custody of children and the mother has mere visitation rights.<sup>11</sup> In a situation where the husband has complied with the payment of lobolo (bogadi in Sotho & in Tswana),<sup>12</sup> he and his family group has full custody over children. This is aptly summed up in the case of *Madyibi v Nguva* as follows:

By nature the progeny of woman accrue to her father's group and are members of his group and are members of his group and tribe for religious and practical purposes. These rights and duties are transferred by native law to another group only on contraction of a valid customary union whereby the woman's group receives lobolo from the other group and transfers the natural right to woman's productive powers and her progeny to the group providing lobolo.

<sup>5</sup> Coldham S "The Status of Women in Zimbabwe: Veneria Magaya v Nakayi Shonhiwa Magaya (SG 210/98)" 43 *Journal of African Law* 248; Moseneke D "Transformative Adjudication in Post-Apartheid South Africa-Taking Stock After a Decade" (2007) 1 *Speculum Juris* 2-8, Dlamini CRM "The Clash Between Customary Law and Universal Human Rights" (2002) *Speculum Juris* 42; Mkabela N *Towards an African Philosophy of Education* (1997) 18.

<sup>6</sup> *Mthembu v Letsela* 2000 (3) SA 867 (SCA); *Bhe and others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) (the Constitutional Court declared the principle of male primogeniture as unconstitutional and that it failed to meet positive legal aspirations of a modern society) and *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

<sup>7</sup> Ndima D "The African Law of the 21<sup>st</sup> Century in South Africa" (2003) 34 *Comparative and International Law Journal of Southern Africa* 323; Ntlama N "Equality Misplaced in the Development of Customary law of Succession: Lessons from *Shilubana v Nwamitwa* (2009) 2 SA 66 (CC)" (2009) 20 *Stellenbosch Law Review* 333; Knoetze E "Westernization or Promotion of African Women's Rights?" (2006) 20 *Speculum Juris* 105.

<sup>8</sup> Section 18 (4) (b) & (c).

<sup>9</sup> Bekker and Van Zyl "Custody of Black Children on Divorce" (2002) *Obiter* 128.

<sup>10</sup> Schapera I *Handbook of Tswana Law and Custom* (1970) 126.

<sup>11</sup> Bennett T *Customary Law in South Africa* 285 when he argued that this is so because in customary law, the parental rights are determined by the payment of lobolo.

<sup>12</sup> For different names assigned to lobolo in different languages, see also Ngema NM "The Enforcement of the Payment of Lobolo and Its Impact on Children's Rights in South Africa" (2013) 16 *Potchefstroom Electronic Law Journal* 405; & Ngema NM "Considering the Abolition of Ilobolo: Quo Vadis South Africa?" (2012) 2 *Speculum Juris* 32.

In line with the above, custody together with parental rights ends up being exercised by many people in woman's family group (if she is not married) and husband family group (if she is married).<sup>13</sup> This type of decision making process does not always promote the best interest of children because many people are entitled to make decisions. This may lead to conflicting solutions to particular problems and it is not always possible to get decisions made as quickly as possible due to the large number of opinions to be solicited even when the best interests of the child require a quick solution.<sup>14</sup>

The child's opinion is not taken into consideration in custody decisions taken under customary law and this conflict with the principle of the best interest of the child. The latter principle has been evolving under international law and can be traced back to 1924 when the League of Nations adopted the Declaration on the Rights of a Child.<sup>15</sup> The 1924 declaration served as a foundation for the creation of a catalogue of children's rights in the world and emphasized that human kind has a duty to give the best it got to give to children.<sup>16</sup>

### **b) Inheritance rights**

Customary law of succession and inheritance in the Kingdom of Lesotho is governed by the principle of primogeniture. This principle prefers the inheritance of males as opposed to the inheritance of females. This means that if the parents were married in terms of customary law and therefore their estates would devolve in terms of customary law. This is a common practice all over Southern African Development Community (SADC) and this was emphasized in the case of *Mthembu v Lestela* as follows:

The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendent. When the eldest son has predeceased the family head without leaving a male issue, the second son become heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds... woman generally do not inherit in customary law.<sup>17</sup>

In a similar vein, the Lesotho's court of appeal in *Makhahliso v Tekane*<sup>18</sup> the deceased left four children behind, one of them was an eldest son and three married daughters. On the 6<sup>th</sup> of June 2002 the deceased bestowed her entire fixed property and movable property to the appellant (third daughter of the deceased) through a will and appointed her to be the executor of the will and administrator of the estate. The deceased died on the 16<sup>th</sup> of July 2006 and was buried on the 5<sup>th</sup> of August 2006. On the 7<sup>th</sup> of August 2006 the headmen of the village revealed to the deceased descendants that the deceased left the will.

The will was challenged by the customary law heir to the deceased (respondent) based on three grounds:

1. That the deceased had not abandoned a customary mode of life;
2. That the will had not been registered or deposited with the office of the master of the high court;
3. That as the deceased's customary heir the respondent could not be deprived of more than half of the deceased estate.

The Lesotho's Court of Appeal held that the respondent is the customary heir of the deceased estate and that is in line with section 11 (1) of the Laws of Lerotoli providing that 'the heir [in Lesotho] shall be the first male child of the first married wife.' The appeal was dismissed with costs and the appeal court held that the court a quo was correct in declaring the respondent as the sole heir because the deceased never abandoned customary way of life.

The above decision of the Appeal Court of Lesotho has a severe blow on the face of female children that are subjected to customary law. In view of the fact that poverty, high unemployment rate, and other factors linked to the market economy have made it a great challenge for many black people to access land and develop it.<sup>19</sup> It can be

<sup>13</sup> Kaime T The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective (2009) 116.

<sup>14</sup> Kaime (supra) 117.

<sup>15</sup> Hodgson D "The Historical Development and internationalization of the Children's Rights Movement" (1992) Australian Journal of Family Law 25.

<sup>16</sup> Kaime (supra) 11-12; it is noted that the principle of the best interest of the child is protected in various formulations under international law such as 1959 Declaration on the Rights of the Child; & 1989 Convention on the Rights of the Child.

<sup>17</sup> 2000 (3) SA 867 (SCA) para 8.

<sup>18</sup> 2010 ( C of A (CIV) no. 17/09.

<sup>19</sup> Mbatha L "Reforming the Customary Law of Succession" (2002) South African Journal of Human Rights 263.

argued that the exclusion of female children from inheritance and succession deprive them from opportunities to access land and to develop themselves. This is a clear form of discrimination and subordination that is directed to female children.

This leads to a thought provoking question, why this clear discrimination was ever permitted in the first place? This discrimination that is perpetuated by the principle of primogeniture was acceptable in the context of a patrilineal society preoccupied about preserving the cohesion and stability of the extended family. The principle of primogeniture fitted well in that society because there were safety measures designated for ensuring fairness in the entitlements to property. One of the measures in ensuring fairness was the duty imposed upon an heir to inherit property together with responsibility to take care of other family members.<sup>20</sup>

Traditional society has not escaped from the winds of change and the high influence of western laws, moral values and economic structures. This led to greed that seriously undermined traditional responsibilities of heirs.<sup>21</sup> Nowadays children and widows of the deceased husbands are sometimes not supported or maintained by an heir.<sup>22</sup>

### c) Marital Power of a Husband

Women under customary law are treated as perpetual minors as they are under the control of their fathers or legal guardians (when not yet married) and under the control of their husbands (when they are married). The patrilineal nature of customary law in Lesotho deprives women from having locus *standi in judicio* (that is the right to sue and to be sued before a court of law).

This has a severe blow on the rights of women to development. They cannot develop easily because they have no legal right to conclude legally binding contracts, no right to own or alienate property, cannot open bank accounts or obtain loans without the permission of their legal guardians or husbands.

This minority status of women contravenes their equality rights and contravenes articles 3 and 26 of CEDAW.

## Lesotho's Obligations under international Law

### a) Promotion of equality and development of the child

Lesotho is a signatory to the Convention on the Rights of the Child (CRC), an international treaty that specifically recognizes human rights for children. The child is defined as a person below the age of 18 years.<sup>23</sup> The CRC imposes the duty upon member states to ensure that children are not discriminated<sup>24</sup> in any form and assist children to develop their personalities, abilities and talents to the fullest potential.<sup>25</sup>

Member states of the African Union (AU) believed that they have a duty to promote and protect children's rights that are enshrined in the CRC. However, members of the AU believed that the CRC lacked important socio-cultural and economic realities particular to Africa, then adopted the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990 and it came into effect in 1999. The ACRWC expressly emphasized that its provisions supersede any custom, traditional or religious practice that conflicts with the rights, duties and obligations in the charter.

Lesotho is also a signatory to numerous international human rights instruments that prohibit discrimination. This right to non-discrimination is protected in various formulations in the instruments such as the United Nations Charter,<sup>26</sup> the Universal Declaration of Human Rights,<sup>27</sup> the international Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>28</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>29</sup> and the Convention on

<sup>20</sup> Maqutu WCM Contemporary Family Law of Lesotho (1992) 169.

<sup>21</sup> Bhe v Khayelitsha Magistrate and others 2005 (1) SA 580 (CC) para 237.

<sup>22</sup> Ndulo "Widows under Zambian Customary Law and the Response of the court" (1995) Comparative International Law Journal of Southern Africa 92; Kerr AJ Inheritance Rights under Customary Law of Immovable Property and of Succession (1990), Magaya v Magaya 1999 (1) ZLR 100 (S).

<sup>23</sup> Article 1 of the Convention on the Rights of the Child.

<sup>24</sup> Article 2.

<sup>25</sup> Article 6.

<sup>26</sup> Articles 1 (3), 13 (1) (b), 55 (c) and 76.

<sup>27</sup> Articles 2 & 7.

<sup>28</sup> Articles 2 (1) (2) & 3.

<sup>29</sup> Articles 2, 3 & 26.

Elimination of all forms of Discrimination against Women (CEDAW).<sup>30</sup> The promotion of equality rights by the above human rights instruments reflects a strong normative commitment to the promotion of gender equality. However, Lesotho failed to ensure that its laws comply with its obligations to promote equality for all under CEDAW and other instruments protecting equality. This is reflected in its laws that promote discrimination in inheritance and intention to continue with the following reservation to CEDAW:

... The Lesotho government's ratification is subject to the understanding that none of its obligations under the Convention especially in Article 2 (e) shall be treated as extending to the affairs of religious denominations.

Furthermore, the Lesotho government declares that it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho.

In fact this is not the only reservation entered by Lesotho; upon ratification of CEDAW Lesotho entered a reservation covering three aspects.<sup>31</sup> Fortunately, two aspects covered by the original reservation were reconsidered and withdrawn by Lesotho on the 25<sup>th</sup> of August 2004. This is a commendable step towards the achievement of equality. However, there is still a long way to go because Lesotho still retains a reservation to succession to the throne.

Freedom from discrimination is enshrined in section 18 of the Lesotho's Constitution,<sup>32</sup> and sex is included as one of the prohibited grounds of discrimination. This section goes on to stipulate that freedom from discrimination do not apply to personal matters under religious law or customary law.<sup>33</sup>

### Conclusion

As argued above, the current customary law exemption from discriminatory provisions of the Constitution of Lesotho constitutes discrimination against female children. This discrimination has no reasonable justification in our contemporary society and it remains a major obstacle to the attainment of a sustainable development for female children. Lesotho ought to incorporate the Convention on Elimination of all forms of Discrimination against Women (CEDAW) together with the Convention on the Rights of the Child (CRC) to its national laws. In addition to this, Lesotho ought to withdraw its remaining reservation to CEDAW because it is an incompatible reservation<sup>34</sup> with the object and purpose of the entire Convention and not permissible in terms of the Vienna Convention on the Law of Treaties. Moreover, Lesotho ought to abolish the provisions of section 18 (4) (b) & (c) in order to pave the way for equal development opportunities for all children regardless of their gender.

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<sup>30</sup> Articles 2 & 16.

<sup>31</sup> Mamashela MP "The Significance of the Convention on Elimination of all forms of Discrimination against Women for a Mosotho Woman" (1993) 5 ASICL Proc 153.

<sup>32</sup> The Constitution of the Kingdom of Lesotho of 1993.

<sup>33</sup> Section 18 (4) (b) & (c).

<sup>34</sup> Marijke de Pauw "Women's Rights: from bad to worse? Assessing the evolution of incompatible reservations to the CEDAW Convention" (2013) 29 Utrecht Journal of International and European Law 52.

