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**EXPANSION OF THE DEFINITION OF COMMUNITY OF PROPERTY IN  
RELATION TO THE PRINCIPLE OF *STIPULATIO ALTERI*: A CASE OF WIDOWS  
OF MINE WORKERS IN LESOTHO**

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**By**

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in Women's Law, Southern and Eastern African Regional Centre for Women's Law,  
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## Abstract

**This work was written by a legal practitioner who, before the research, had been finding it difficult to defend the rights of the widows of mine workers in Lesotho's courts against the application of the common law principle of *stipulatio alteri* in relation to the benefits of employment earned by their deceased husbands who had nominated a person other than their wife in their employment contract.**

**She found that the courts and lawyers in Lesotho consistently uphold the claims of nominees paying scant attention to the large body of both national and international laws that regulate and seek to protect the rights of spouses to their matrimonial property both before and after the dissolution of their marriage. As a result she realised that court decisions are repeatedly leaving widows destitute and vulnerable to multiple forms of deprivation due to their husbands' potentially stereotypically influenced decisions at the time they nominate their beneficiary.**

**Alive to the provisions of various human rights instruments that advocate for the protection of widow's inheritance rights to the estates of their husbands, she analysed the grounded realities of widows of mine workers in Lesotho. By using various methodologies within the overall ambit of the women's law approach, she explored and revealed that the situation faced by these women is an extremely detrimental one which affects women from all walks of life, even lawyers like herself. This arises from the excessive sensitivity surrounding the issue as it involves discussing the posthumous disposal of money which had been earned by a spouse before their death.**

**In order to overcome the difficulties women face having to discuss and obtain answers from their husbands about this contentious issue of nomination, she advocates widespread campaigns aimed at eradicating the influence of all stereotypes in the minds of women and men of all walks of life. Such campaigns should also specifically aim to empower women to be able to speak up and for men to disregard the stereotypes.**

**She further noted that it is critical for law enforcement agencies, particularly lawyers, to be equipped with in-depth understanding of international instruments to advance widows' rights. Also the courts should be judicially active and gender sensitive in advancing women's rights. This would go a long way in protecting society from the ripple effects triggered by breaches to their property rights, so succinctly observed by Human Rights Watch as follows, *'When a woman's property rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women's lives often resulting in poverty, inhumane living conditions, and vulnerability to violence and disease for women and their dependents***

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**Declaration**

I, MATS'ELISO KHESA, certify that this dissertation is my original work, it is an honest and the true effort of my personal research it has not been presented for any study in any university or college or for any thesis.

The ideas and views safe where expressly indicated are mine and I take full responsibility for them.

Signed----- Date -----

## ***Dedication***

*To my mother, my love, I say this is, in accordance with your wishes, one day I will make you proud.*

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To God the Giver of knowledge; without Him all things are impossible, with this work Your Name shall be magnified for generations to come. I am nothing without Your love.

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## **List of abbreviations and acronyms**

Banjul Charter	African Charter of Human and Peoples' Rights, 1981
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women, 1979
DCPF	Defined Contribution Pension Fund
DCPFA	Defined Contribution Pension Fund Act, 2008
DEVAW	Declaration on the Elimination of Violence against Women
GC	General Comment
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCMPA	Legal Capacity of Married Persons Act, 2006
Maputo Protocol	Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, 2003
NGO	Non-governmental organization
SADC	Southern African Development Community
SEARWCL	Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe
TEBA	The Employment Bureau of Africa
UDHR	Universal Declaration of Human Rights

## **List of international instruments**

African Charter of Human and Peoples' Rights, 1981 (Banjul Charter)

Beijing Declaration, 1994

CEDAW General Comment No. 33

CEDAW General Recommendation on women's access to justice. CEDAW Committee, 2015.

CEDAW Committee. Concluding Observations of the Committee on the Elimination of Discrimination against Women. United Nations, 2011.

Convention on the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW)

Declaration on the Elimination of Violence against Women, 2004 (DEVAW)

International Covenant on Economic Social and Cultural Rights (ICESCR) General Comment No. 16

Protocol to the African Charter of Human and Peoples' Rights (Banjul Charter) on the Rights of Women in Africa, 2003 (Maputo Protocol)

Southern African Development Community Protocol on Gender and Development, 2008 (SADC Protocol on Gender and Development)

Universal Declaration of Human Rights, 1948 (UDHR)

Vienna Declaration of Action, 1993

## **List of national legislation**

Administration of Estates Proclamation, No. 19 of 1935

Defined Contribution Pension Fund Act, 2008 (DCPFA)

Inheritance Act, No. 26 of 1873

Intestate Succession Proclamation, No. 2 of 1953

Labour Code Order, 1992

Land Act, 2010

Laws of Lerotholi

Legal Capacity of Married Persons Act, 2006 (LCMPA)

Marriage Act, 1974

Pensions Proclamation, No. 1 of 1950

Proclamation, No. 2B of 1884

Public Officers Defined Contribution Pension Fund (DCPF) Rules

Sexual Offences Act, 2003

## **List of cases**

*Mako v Mako* CIV/APN/424/2012

*Maneo Moremoholo v Mantsupi F. Moremoholo and Others* CIV/APN/135/2010

*Crookes NO v Watson* 1956 (1) SA 277

*Johannesburg Municipality v Cohen's Trustee* 1909 TS 811

*Mahao v Lesotho Electricity Corporation and Others* C of A (CIV) No. 8/09

*Mannuku Nkama v The Master of the High Court and Others* CIV/APN/32/2002

*Masophia Ndlovu v The Employment Bureau of Africa Ltd - TEBA* CIV/APN/142/98

*Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C)

*Moletsane v Moletsane* 2000-2004 LAC 960

*Mosena v Mosena* CIV/APN/388/87

*Mota v Motokoa* 2000-2004 LAC 418

*Ms. A.T. v Hungary* Communication No. 2/2003

*Ramahata v Ramahata* LAC 1985-1989 184

*Rens v Esselen & Others* 1957 (4) SA 8

*Seluka v Suskin and Salkon* 1912 TPD 265

*Senate Masupha v The Senior Magistrate & 7 Others* CC No. 5 of 2010

*Senti v Total Lesotho (Pty) Ltd* CIV/APN/11/2010

*Shozi v Minister of Justice, Kwazulu* 1992 (1) SA 338

*Tjemolane v Tjemolane and Others* CIV/APN/2014 (unreported)

*Tsepe Molefi v IEC & 4 Others* CIV/APN/135/2005

*Tsosane v Tsosane and 3 Others* CIV/APN/517/2013

*Wakilo v Nokaneng* 2010 2 BLR 360 HC

*Wallach's Trustee v Wallach* 1914 AD 202

*Wendywood Development (Pty) Ltd v Rieger* 1971 (3) SA 28

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## **Executive summary**

The property rights of spouses married in community of property are governed by various statutes in Lesotho that regulate matrimonial property and international instruments to which Lesotho is a signatory. The relevant pieces of local legislation are fragmented and range from the 1935 Administration of Estates Proclamation (which stipulates how spouses will inherit from each other) to the latest 2010 Land Act which gives women power to own land and enjoy rights to land even after the death of their husbands.

All the various laws advance in different ways the rights of spouses, in particular, women to access resources and inherit from their husbands. The importance of upholding women's property and inheritance rights has also been the subject of various international instruments. They give rise to the shared belief that women's rights to access economic resources may be used to address the interlocking oppressions from which they routinely suffer.

This paper addresses issues surrounding the property rights of spouses which has been overlooked by many but which when taken for granted has serious reverberating consequences for particularly vulnerable women (widows). While working as Crown Counsel for the Government of Lesotho, the researcher was confronted with the case of a widow whose deceased husband's employer refused to pay her his death benefits (benefits of employment) because, according to his employer, her late husband had not nominated her as the beneficiary in his employment contract. The nominee claimed their right to the benefits on the basis of the principle of third party beneficiary (the common law principle of *stipulatio alteri*) while the widow claimed her rights on the basis of matrimonial rights property law.

The researcher found that according to the Roman Dutch common law definition of 'community of property' as read with section 5 of the Legal Capacity of Married Persons Act, 2006 provide that spouses jointly own what they acquire during the subsistence of their marriage and they are obliged to consult each other before engaging in any activity that has implications for their joint estate. These two read together with various international instruments, particularly article 21 of the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, 2003 (Maputo Protocol), which provides for a widow's rights to inherit from the estate of her husband, form the back ground of the research problem.

During the research the author was dismayed to discover that the courts in Lesotho have consistently ruled against widows and in favour of nominees on the basis that a nomination with regard to employment benefits has nothing to do with the joint estate of the spouses, regardless of their marriage regime. While reviewing the relevant literature on the subject, the author discovered that this extraordinary approach has been adopted for a long time by the courts of Lesotho and is used to deprive many women of property to which they had a legitimate expectation to inherit.

In trying to understand the reason motivating mine workers, in particular, to nominate people other than their wives as beneficiaries under their employment contracts, the author unpacked the problem using various methodologies in conjunction with the women's law approach. The preliminary assumption was that such nominations may be influenced by stereotypes and lack of knowledge. The research took her beyond this assumption and she discovered that people are in fact aware of the law but that women (even lawyers such as herself) face a particular dilemma which prevents them from using their knowledge to protect themselves. This arises from the deeply sensitive issue of benefiting from moneys derived upon the death of a spouse.

Therefore recommendations made to correct the situation are that the courts should be more judicially active and take it upon themselves to *mero moto* advance the rights of women in line with the country's international obligations. The legislature should seek to consolidate the fragmented laws and provide detailed provisions of what constitutes community property and settle once and for all the issue whether or not the benefits derived from the spouses' employment form part of their joint estate.

# CHAPTER ONE

## 1.0 INTRODUCTION AND BACKGROUND

### 1.1 Introduction

*‘Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination.’*

*(General Comment No. 16 to the ICESCR 2005)*

According to article 1 of the Protocol to the African Charter of Human and Peoples’ Rights on the Rights of Women in Africa, 2003 (Maputo Protocol) as read with the Convention on Elimination of all forms of Discrimination against Women (CEDAW) ‘discrimination against women means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.’ For the purposes of this paper emphasis on the definition of discrimination is placed on the ‘exclusion and restriction’ of women’s access to economic resources in the form of their inheritance from the estates<sup>1</sup> of their husbands. Further, the exclusion and restrictions referred to are those based on stereotypes<sup>2</sup> and lack of legal knowledge.

Research has revealed that family, employment and property law are closely related to each other (Glendon 1981). It shows that developments in labour laws, property laws, social welfare, constitutional and family law reflect and promote expectations that an individual’s economic security against illness and old age or family disruptions by death or divorce will no longer in principle be provided by the family, but that it will in principle be provided through her/his own work and work related benefits<sup>3</sup> (Glendon 1981).

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<sup>1</sup> An estate is the net worth of a person at any point in time alive or dead. It is the sum of a person’s assets, legal rights, interests and entitlements to property of any kind. [http://www.absoluteastronomy.com/topics/archbishoppric\\_of\\_bremen](http://www.absoluteastronomy.com/topics/archbishoppric_of_bremen).

<sup>2</sup> Defined extensively below in paragraph 1.9.

<sup>3</sup> In the event of death such benefits are referred to as death benefits, but in essence the benefits are accumulated during employment.



This paper takes its point of departure from the wording, understanding and interpretation of the law and its legal effects with the objective of understanding their possible implications for gender and development. The crux of the research emanates from professional engagement with the application of the principle of *stipulatio alteri*<sup>4</sup> to the benefits that accrue from the employment of a deceased miner who dies leaving a legal spouse who is prevented from inheriting those benefits as the result of the deceased miner having signed a nomination form (presented to him by his employer) that a third party should rather receive the benefits.

Particular focus has been put on the rights of widows who often find themselves discriminated against, oppressed and deprived of their inheritance rights because of customary practices and stereotypes of the people among whom they live. Article 5 of CEDAW provides:

‘States have an obligation to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices...of the ideas of inferiority or superiority of either of the sexes or on *stereotyped* roles for men and women’ (CEDAW 1979) (emphasis added).

The point of departure is informed to a great extent by the international provisions which provide for widows’ rights to inheritance and the elimination of stereotypes that are often used to exclude or discriminate against women. Article 1(e) of the Southern African Development Community Protocol on Gender and Development, 2008 (SADC Protocol on Gender and Development) provides that States Parties shall enact and enforce legislation to ensure that a widow shall have the right to an equitable share in the inheritance of the property of her husband. Article 20 of the Maputo Protocol provides that State Parties shall take appropriate legal measures to ensure that widows enjoy all human rights, and in article 21 adds that a widow shall have the right to an equitable share in the inheritance of the property of her husband.

This research asks the question whether the common law principle of *stipulatio alteri* that originally emanates from the law governing business contracts can be applied strictly against the defence of the existence of a community of property marriage (in which the marriage property falls into a joint estate), which raises issues of inheritance and consultations between

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<sup>4</sup> *Stipulatio* is simply referred to as a contract for the benefit of a third party. Further explanation will be found below under conceptual framework in paragraph 1.9.

spouses in the administration of their joint estate.<sup>5</sup> This is asked in the light of the fact that for a contract to be enforceable, it must be shown to be based on a *iusta causa*, or a reasonable motive, and that a [iusta causa](#)<sup>6</sup> is still a necessary element of contract.

## 1.2 Setting the scene and background to the study

Although Lesotho has ratified various international conventions which impose obligations to protect women against all forms of discrimination and violence (including, according to CEDAW, the eradication of stereotypes and beliefs which subordinate women), it appeared from my research into judicial precedent (i.e., generally, past court decisions that bind future decisions) that women still suffer grievous discrimination and prejudice at the hands of those who have an obligation to protect them, especially the courts.

The problem addressed by this paper arises from the interpretation and enforcement of the common law principle of *stipulatio alteri* by the courts in Lesotho. It is my contention that as a direct result of the courts' strictly interpreting and applying this principle without due regard to statutory provisions<sup>7</sup> which the legislature enacted for the specific purpose of protecting the property rights of spouses to joint estates (particularly the rights of widows to the property of their deceased husbands), the rights of those widows are definitely violated.

I also observed that the absence of a constitutional provision in Lesotho which should provide for how international law becomes part of national law, has led to the problematic and undesirable situation of uncertainty and unpredictability as to what the law is. This is evidenced, for example, in the form of inconsistencies between judicial statements as to the value of international instruments in Lesotho (Pholo 2013). For example, in its 2012 judgment in the case of *Senate Masupha v The Senior Magistrate & 7 Others* CC No. 5 of 2010, the Constitutional Court said:

‘[I]nternational principles are aids to interpretation, not the source of rights enforceable by Lesotho citizens.’

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<sup>5</sup> The Marriage Act defines ‘community of property’ and section 5 of the Legal Capacity of Married Persons Act, 2006 (LMPCA) emphasises the need for consultation between the spouses in the administration of the joint estate property.

<sup>6</sup> *Iusta causa* is a Latin term that means ‘just cause’. ‘Just cause’ means a legally sufficient reason. *Iusta causa* means a reasonable and lawful ground for an action. <http://definitions.uslegal.com/c/causa-justa/>.

<sup>7</sup> In which case e becomes a later law and more specific hence takes precedence in accordance with statutory interpretations. See emerging issues.

This position contradicted the earlier decision of *Tsepe Molefi v IEC & 4 Others* CIV/APN/135/2005, in which the judges quoted CEDAW and the SADC Declaration on Gender and Development and declared:

‘Lesotho is a signatory to several international conventions, these conventions also impose certain duties on the State.’

This has culminated in a situation in which lawyers rarely invoke the principles of international law when advancing the rights of their clients. In fact I observed that in none of the cases that will be discussed later in this paper were any international provisions concerning the rights of widows relied upon to support their claims.

My interest in widow’s inheritance rights and the principle of *stipulatio alteri* was aroused by a case<sup>8</sup> I dealt with at my work place in which the Master of the High Court was joined. In that case, the deceased, a miner working in South Africa, had nominated in his contract of employment that his mother was to be the beneficiary of his death benefits. Upon his death, his wife claimed that she was the sole heir to the estate of her deceased husband. The recruiting agency, The Employment Bureau of Africa (TEBA),<sup>9</sup> which is the link between the employer and the miners, was unable to resolve the matter. The mother of the deceased brought the case to court alleging exclusive rights to the benefits based on the principle of *stipulatio alteri*.

The court had to determine whether the nomination form constituted sufficient legal basis to award the rights exclusively to the nominee to the exclusion and detriment of the legal dependents of the deceased being at this point his wife and minor children. Unfortunately the court, as it has done in many other cases of this nature, concluded that the principle of *stipulatio alteri* is to be given a strict interpretation, meaning that the nominee becomes the sole beneficiary. Reference was made to the case of *Mabofokeng Mosena v Matiisetso Mosena*,<sup>10</sup> in which Mr Mda, for the applicant, submitted:

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<sup>8</sup> *Matheko Grace Tjemolane v Mamonaheng Tjemolane and Others* CIV/APN/2014 (unreported).

<sup>9</sup> TEBA is a labour recruitment and management service provider offering a number of services including human resources, social and financial services both during and post employment. <http://www.teba.co.za/about-us/company-profile> Accessed 16/03/2016.

<sup>10</sup> CIV/APN/388/87.

‘The matter of entitlement to benefits in an insurance scheme has nothing to do with family succession. Benefits accruing from such insurance do not form a part of the deceased’s estate. The insurance money goes directly to the beneficiary named by the insured person who was the deceased, and he could choose whomever he wished to name as his beneficiary.’

Support for this submission was also placed on many other cases which are to be discussed later in this paper.

The widow’s loss of this case confused me. I was perplexed as to how benefits that have been financed by the salary of a spouse (who is married in community of property) can fall subject to the common law principles of contract to the clear prejudice of their surviving spouse. My interest and curiosity to pursue the truth behind this problem was even further provoked as I studied the course on methodologies in SEARCWL’s Master’s in Women’s Law programme in which I conducted an in-depth interrogation of the Maputo Protocol, particularly articles 20 and 21.

### **1.3 Research problem and the overarching research question**

According to Weitzman, in a community of property system the earnings of each party together with all other property acquired during the subsistence of the marriage becomes part of the community of property which is jointly owned by the spouses. Each spouse is entitled to half of the community. This system assumes that both spouses have contributed equally to the economic assets whether by homemaking or by earning a salary, including pension, retirement benefits, insurance, the goodwill of a business and shares in companies (Weitzman 1985).

On the basis of the Weitzman’s definition, the questions to be determined in this paper are, firstly, whether or not the benefits accruing from the employment of a spouse form part of the joint estate. If the question is answered in the affirmative, then, secondly, should it not automatically follow that anything financed by the salary (as a benefit of employment) of the spouses benefit both spouses equally?

The second question that this paper asks is whether it is just to invoke a strict interpretation of a common law principle (i.e., *stipulatio alteri*) against statutory provisions so that it has the

direct effect of disinheriting those who are specifically protected by the statute, that is to say, where the statute provides wider protection.

The research problem of this paper is informed by the apparent current judicial interpretation<sup>11</sup> given to the nomination of a beneficiary, other than the deceased's surviving spouse, to the death benefits that accrue from the employment of a person who had been married in community of property. The paper seeks to address the legal problem by asking whether the courts in Lesotho are bound by the strict interpretation of the principle of '*stipulatio alteri*'; or, whether they should invoke the enabling principles of international law on women's rights which Lesotho has ratified as well as its national matrimonial property and inheritance law to prevent the application of that principle from defeating the rights of widows to their equitable share of the joint estate.

#### **1.4 Justification and objective of the study**

According to the Declaration on Elimination of Violence against Women, 2004 (DEVAW), violence against women includes the denial of women to access to economic resources, and it goes without saying that the contested benefits here are economic resources. Furthermore, it is worth noting that the basis of the assumptions that inform this research is taken from article 5 of both CEDAW and the Maputo Protocol both of which refer to the elimination of all forms of stereotypes and prejudices against women and girls. As such one of the assumptions is that sometimes this disinheritance is caused by both a lack of knowledge and the influence of stereotypes.

In line with my understanding of the definition of community of property and the requirement that spouses consult each other concerning any activity that has implications for their joint estate, together with the international instruments that protect the rights of inheritance of spouses and widows, it is my perception that the nomination of a third party over the deceased's surviving spouse is both illegal and unfair. Moreover it is also my perception that the over-reliance on the precedents that support this unfortunate arrangement by the lawyers as legal advisers of the court is fraudulent and misleading to the courts and is also a result of a lack of both appropriate knowledge and lack of judicial activism.

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<sup>11</sup> This is evidenced by a plethora of judicial precedents that will be discussed throughout the paper.

The objective of this paper is to establish the legal problem which is faced by widows who become victims of the unconscious stereotypes of their husbands which is manifested when they are deprived of their rights of inheritance as widows. At the end of this paper it is my desire that the various actors in the justice delivery system benefit in the following ways:

- (1) That the courts will realise the extent of the impact caused by the deprivation and discrimination that is caused by the strict application of the principle of *stipulatio alteri*, particularly with regard to death benefits, which particularly deprive women of their inheritance.
- (2) That the law makers will see from these findings the need to be more specific defining what constitutes community of property rather than leave this work to interpretation by the courts. This is in line with my understanding that the salary of a spouse is part of the community of property of marriage which is jointly owned by the spouses.
- (3) That a level of clarity will be achieved especially in so far as the freedom of testation is concerned where spouses are married to each other in community of property and do not have a joint will. This is because my understanding is that although there is constant contention that the benefits that accrue from employment do not form part of the joint estate, the reality, however, is that they are part of the estate of the deceased. And in this regard it should be borne in mind that the widow has rights to inherit from the estate of her husband (article 21 of the Maputo Protocol).

### **1.5 Assumptions that informed this research**

- (1) That community of property extends to (i.e., includes) the employment benefits and pension funds of the spouses.
- (2) That in the event that a deceased nominates a person other than his surviving spouse as the beneficiary of his death benefits, the strict application of *stipulatio alteri* against the wife of a mine worker disinherits her as a widow. This violates her right to property both under domestic and international law.
- (3) That the nomination by most mine workers of a person other than their spouse as their beneficiary is based on stereotypes and a lack of informed understanding of the implications of their act.

- (4) The lack of legal knowledge and information about the community of property matrimonial regime is a result of the influence of the persistent stereotype that if a wife is nominated as the beneficiary on the death of her husband, she will kill him to get her hands on his money.
- (5) That the failure by the courts to be judicially active in their protection of the rights of women against the operation of the principle of *stipulatio alteri* contributes to the violation of women's rights to property.
- (6) The laws of Lesotho regarding what constitutes matrimonial property are fragmented leading to ambiguity and discrimination against the rights of women.

## **1.6 Research questions based on the assumptions**

- (1) Does community of property extend to (i.e., include) the employment benefits and pension funds of spouses?
- (2) Does the strict application of the principle of *stipulatio alteri* designed to disinherit widows constitute a violation of their human rights in accordance with the provisions of international law?
- (3) Is the nomination by most mine workers of a person other their spouse as their beneficiary based on stereotypes and a lack of informed understanding of the implications of their act?
- (4) Is the lack of legal knowledge and information about the community of property matrimonial regime a result of the influence of the persistent stereotype that if a wife is nominated as the beneficiary on the death of her husband, she will kill him to get her hands on his money?
- (5) Is the court's failure to be judicially active in the protection of women against the strict application of the principle of *stipulatio alteri* contributing to the violation of women's rights to property?
- (6) Are the laws of Lesotho regarding what constitutes matrimonial property unclear and ambiguous and as such leading to discrimination against the rights of women?

## **1.7 Limitations of the study**

Various cases were found in the High Court related to the research topic however the researcher could not access the widows who suffered the blatant prejudice of the strict application of the principle of *stipulatio alteri* because of their geographic location as

most of them lived in the remote rural areas of Lesotho. As a result only two widow's voices have been captured in this research and these are the widows whose cases I was personally responsible for in my work as Crown Counsel in the office of the Attorney General representing the Master of the High Court. It was not possible for me to contact the specific judges who delivered judgments concerning the principle of *stipulatio alteri* because of their tight schedules and their various commitments at the end of the judicial calendar year. However, in spite of these limitations I was still able to collect sufficient credible data for the research.

## **1.8 Delimitations**

This paper is limited to the legal problems which widows of mine workers face as a result of the uncritical application of the principle of *stipulation alteri* by the courts in Lesotho. The paper seeks to illustrate that the principle of *stipulatio alteri* can be discriminatory if it is applied in the context where it deprives and excludes the enjoyment of the rights of a woman due to stereotypes of her gender (article 2 of CEDAW).

The research is primarily focused on benefits that accrue from the employment of spouses married in community of property. This is because in line with the above definition of what constitutes community property (see para 1.3, above), it is my perception that each spouse has a legitimate expectation that the benefits that accrue from the employment of the other spouse whether it be during their employment in the form of a salary or at the termination of their employment at the time of their death in the form of death benefits will form part of the joint estate.

The paper also focuses specifically on mine workers and their widows as a case study in this regard because of their specific attributes. It is common cause that most mine workers in Lesotho hold very low education qualifications, if any at all. Most of them come from the country's rural areas where stereotypes are still strongly held and have a significant influence on the conduct of women and men. Also rural women and men live closely under the influence of semi-autonomous social structures,<sup>12</sup> like the family, which continue to have a great impact on the decisions that men and women take in the administration of their

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<sup>12</sup> These are the structures which themselves generate rules and coerce or induce compliance. They are the fundamental unit of social control which is directly connected to behaviour norms of conduct (Lempert 1972).



marriages. Also most wives of mine workers are often unemployed or are involved in very low earning jobs which make them totally dependent on the income that their husbands earn for the maintenance of their families, particularly their children.

The delimitation of the paper is further based on the scenario where the miner (now deceased) was at all material times in his life living peacefully with the now widow and were also in a legally recognised marriage. This delimitation is material in that there are situations where there is evidence that before the miner's death the spouses may have been separated for various reasons in which case the disinheritance may reflect a clear intention by the deceased to disinherit his legitimate spouse.<sup>13</sup> However, even in such cases it is still my contention that the courts should be in a position to look at the surrounding circumstances of each case in dispensing justice rather than adopt an armchair approach.

## 1.9 Conceptual framework

Below is the conceptual framework that forms the basis of the ideas advanced in this research. The concepts are used based on an understanding of the definitions adopted from various sources and their relevance to the research topic.

- (1) *Stipulatio alteri*. This is a common law principle which provides for an agreement in terms of which one party, A, agrees with another, B, to perform something for the benefit of a third party, C, the beneficiary (Malan 2008). This principle entitles the third party beneficiary, C, a claim to enforce what is stipulated against the whole world although the third party, C, was not present when the contract was entered into. In labour contracts employees can stipulate for payments of their pension to their dependents or anyone.

However, it should also be noted that in the case of employment, in fact A enters into a contract with B for himself to benefit through the salary and all other benefits that accrue from the employment contract. However, A makes a provision that should he fail to receive such benefits from his employer due to death such should be given to

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<sup>13</sup> In the case of *'Maneo Moremoholo v 'Mantsupi F. Moremoholo and Others CIV/APN/135/2010*, the applicant alleged that she had been married to the deceased according to customary law but that they had separated. However, the applicant was unknown to the deceased's employers. She failed to prove her claim of marriage to the deceased. There is no evidence of any right of claim of the estate of the deceased or portion thereof, by this applicant.

C. It should further be noted that at this point C does not essentially enter into a contract with B but rather B merely has an obligation to give the benefits to C and their relationship ends.

This distinction is important because with the attribution of the principle of *stipulatio alteri* to the nomination for employment benefits there seems to be an assumption by the proponents that the contract between the employer and the deceased was for the benefit of the third party. And to give the employment contract such a narrow interpretation leads to absurdity.

- (2) **Stereotypes.** Stereotypical thinking is thinking that can be adopted about specific types of individuals or certain ways of doing things. As Webster<sup>14</sup> says, ‘it is to believe unfairly that all people or things with particular similar characteristics are the same.’ For the purpose of this paper, the stereotypes that form the basis of the discrimination that women suffer due to the influence of semi-autonomous social fields, include, but may not be limited to, the following: Wives kill husbands for the money and enjoy the money with their lovers and friends; Wives do not know how to administer money because they are minors; Women cannot handle a lot of money and they need help of a male; Widows should not be go around in mourning clothes, they should rather stay at home and mourn the death of a loved one (the assumption here being) so that they will be unable to enforce their claim to the death benefits of their deceased husbands.

As a typical Mosotho villager, who grew-up in the rural areas but was enlightened by exposure to urban life and education, later becoming a lawyer, it is my belief that some of these and other stereotypes from time to time inform the decisions of miners when they nominate the beneficiaries of their death benefits. And it is the effects of these stereotypes which ultimately disinherit the wives of most mine workers. The operation of these stereotypes should generally be limited to where the deceased has nominated a parent, a sibling or relative to the benefits rather than where he has nominated a second wife in a putative marriage or a lover, in which latter case there

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<sup>14</sup> <http://www.merriam-webster.com/dictionary/stereotype>.

may be other factors that influence the decision to disinherit the legitimate wife which are outside the scope of this paper.

- (3) **Community of property marriage.** In a community of property system the earnings of each party together with all other property acquired, other than special inheritance and gifts, during the subsistence of the marriage become part of the community property. Each spouse is entitled to half of the community. This system assumes that both spouses have contributed equally to the economic assets whether by homemaking or by earning a salary (Weitzman 1985).

Property, for purposes of this paper, goes beyond the physical assets that the spouses have accumulated to include pensions, retirement benefits, insurance money, the goodwill of a business and shares in companies (Weitzman 1985). In a community of property regime, any money or possessions belonging to either spouse at the time of the marriage, or acquired afterwards, become part of their joint estate, which is owned by the spouses in equal, undivided shares. Community of property marriages give birth to a joint estate which means that the property is owned by both spouses, jointly with the same interest, and with the same right of possession. According to the laws of Lesotho, spouses are obliged by law to consult each other in the administration of their joint estate and their failure to do so may lead to the nullification of acts purportedly done without such consultation.<sup>15</sup>

- (4) **Benefits that accrue from employment.** This is the amount of money that an employee would receive from their employment in terms of the rules of their employer if they were to leave their employment as a result of their resignation or retirement (pension). For the purpose of this paper the benefits in question are termed ‘death benefits’, in that the employee dies before accessing the benefits himself. *There have been confusing and inconsistent approaches from our courts as to when and whether these benefits accrue to the joint estate.* It should be noted however that ‘pension interest’<sup>16</sup> should be regarded as an asset which falls automatically into the joint estate of parties married in community of property immediately upon the

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<sup>15</sup> Section 5 of the Legal Capacity of Married Persons Act, 2006.

<sup>16</sup> Which can become ‘death benefits’ if the employee dies during employment.

marriage coming into being (Marumoagae 2014). And this is the basis of the argument that this paper seeks to make.

- (5) **Freedom of testation.** This is the liberty with which the person wishes to distribute the assets he/she collects in life to the surviving family or any person of choice after his/her death.

‘While nothing is as precious as freedom, if complete freedom of testation was permitted, this would result in a blatantly unfair situation.’<sup>17</sup>

The concept of freedom of testation becomes relevant in this paper as follows. It emerged during the research that while there was no doubt that the benefits in issue form part of the deceased’s estate, the question that kept arising was whether such nomination could be referred to as a form of testation. If this were the case, the freedom of testation of a spouse married in a community of property is curtailed by the rules of equality that prescribe that a spouse is only free to dispose of his half share of the joint estate. But this was rebutted by those who claimed that in fact the application of the principle of *stipulatio alteri* has nothing to do with the laws of inheritance as will be seen later on in chapter three.

- (6) **Inheritance and disinheritance.** Inheritance is the practice of passing on property, rights and obligations upon the death of an individual. Disinheritance means to exclude a person from inheritance or to deprive a person of a natural or established right or privilege (Rhodes 2008). These two concepts found relevance in this research in that the research is based on the premise that the wife has rights of inheritance *ab initio* from the estate of her husband.<sup>18</sup> Therefore, by excluding the wife from through the operation of the *stipulatio alteri* principle is in fact disinheriting her.

- (7) **A widow.** A widow is a woman whose spouse has died during the subsistence of the marriage, regardless of whether at the time of death the couple was living together, separated or even in the process of divorce (Mpapa 2014). The definition of widow in this research becomes imperative because the point of departure is taken from the

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<sup>17</sup> *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C).

<sup>18</sup> Which emanates both from national and international laws which are to be discussed in detail in chapter three.

widows' rights to inheritance in accordance with national and international laws. As such where there is a dispute over an inheritance it is vital for one to establish the fact of widowhood, through the establishment of the requisite formalities of a marriage (Aphane 1995). It is also important to note that in cases where widowhood has to be established due to a lack of formal documentation, such as a marriage certificate, the influence of the semi-autonomous social fields becomes very controversial. Widows of mine workers are routinely affected by this principle of *stipulatio alteri*.

### **1.10 Overview of the research area**

The research was conducted in the district of Maseru and Mafeteng. Maseru was chosen because it is the Lesotho's capital city where the High Court is housed and all other pertinent institutions for this research such as the office of the Master of High Court, Pension Fund, the Labour Commission and TEBA. Most of the lawyers who participated in the research were also located within Maseru. Mafeteng was chosen firstly because of its close proximity to Maseru and also because this is the residence of one of the two interviewed widows whose cases informed this research. Also Mafeteng is a rural area and the residence of the Assistant Master of High Court who referred the case of *Tjemolane v Tjemolane and Others* CIV/APN/2014 (unreported) to our offices.

It is also worth noting that only the High Court has jurisdiction to hear disputes in these cases because of the nature of the case and also because of the amount of money in dispute. It becomes clear that if the case can only be heard by the High Court it may be unaffordable for the majority of widows to approach it for redress as legal costs associated with the High Court are quite high. And also the High Court's geographical location in Maseru may also make it costly and unaffordable for widows to travel to the court. All these factors combine to prevent widows from accessing justice.

### **1.11 Research outline**

This paper is divided into five chapters with specific sub-headings. The assumptions, objectives, limitations and conceptual framework and an overview of the research topic are introduced in chapter 1. Chapter two discusses the methodologies and methods that were employed in the collection of relevant data. This chapter reveals the important issues that emerged during the field research. Although they had not been issues at the outset of

research, when they later emerged, they enhanced the substance of the research problem. In analysing the situation of women and the impact of the application of the principle of *stipulatio alteri*, from a human rights and feminist perspective, chapter three interrogates the findings on the ground and lived realities of widows affected by the principle. It also analyses the laws that regulate matrimonial property regime knowledge and the application of such laws by both women and the judiciary. It is in chapter four that the influence of actors on structures is fully discussed, the actors being the lawyers and the judges, and it identifies the gaps that the research found which point to the pressing need to protect the rights of widows. Chapter five concludes the paper and covers the conclusions and recommendations regarding the research.

## CHAPTER TWO

### 2.0 METHODOLOGY AND THEORETICAL FRAMEWORK

#### 2.1 Introduction

*'In the changing composition of the total economic resources of family members traditional family property is of less importance for most people than benefits derived from work. New property has afforded more economic security to many who are property-less in the old sense.'*

*(Glendon 1981)*

The research topic has been approached from broader human rights perspectives which afford spouses married in community of property equal rights to their joint estate. Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status (Rudman 2009). We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.<sup>19</sup> Universal human rights are often expressed and guaranteed by law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts in order to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>20</sup> Also international laws impose obligations on State Parties for acts committed by non-state actors (article 5 of CEDAW).

In this chapter the methodologies which were chosen to carry out the research were those that would help clearly elicit the importance of the benefits that accrue from the employment of spouses to their joint matrimonial estate. As a Women's Law student at Masters' level I have been enlightened by looking at the gendered nature of the law which results in discrimination against women. The data in this regard is analysed through a feminist lens in that focus is placed on the discrimination that women as a group at times suffer simply for being women. By interrogating laws using this perspective I quickly realised that in various cases where the common law principle of *stipulatio alteri* is invoked and strictly applied vulnerable women and children become its victims in that their rights contained in local laws and international instruments are directly violated.

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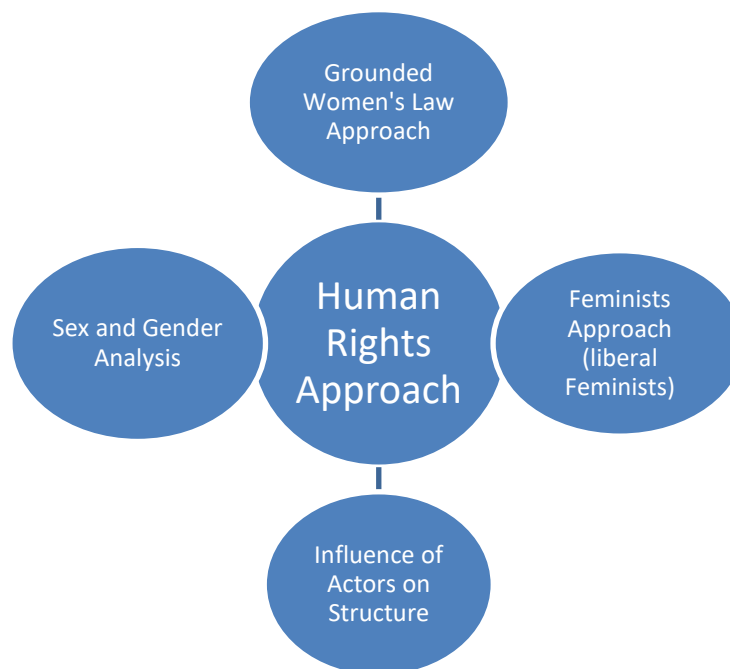
<sup>19</sup> <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

<sup>20</sup> <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

## 2.2 Applied methodologies

This paper leans heavily towards a gender perspective and strives to understand and to explain the law and its legal and social effects on the power relations between men and women qualifying as beneficiaries under the legal system (Rudman 2009). Because the paper is written in pursuit of women's rights law, a women's law methodology that explores how human rights can be used to address the problems of women has been used and to accomplish this, various international human rights instruments ratified by Lesotho have been used to illustrate that human rights are indivisible and that where the national law seems to be insufficient to protect the rights of widows, international laws can and should be invoked to protect the rights of women. The following methodologies (as illustrated in Figure 1) were used.

**Figure 1: Diagram showing research methodologies**



### 2.2.1 Women empowerment as human rights

This approach uses the guidelines set by international human rights instruments to analyze the inequalities lying at the heart of the problems related to women's rights to access property and economic resources (A.W.Bentzon, 1998). For a long time now, the economic empowerment of women has been a human rights concern which is at the heart of most



international human rights institutions. It is a shared belief that women's access to economic resources can be used to address many of the interlocking oppressions afflicting women.

The human rights protection offered by international instruments are used to challenge the social and legal injustices and to support the argument that advocates for the protection of the rights of women affected by the principle of *stipulatio alteri* and the need to be clear and unambiguous about what constitutes community of property.

My second assumption is that in the event that deceased mine workers nominate persons other than their surviving spouses as the beneficiary of their death benefits, the strict application of *stipulatio alteri* against them disinherits them as widows. This violates their right to property both under domestic and international law. In order to prove this I made reference to international instruments such as articles 20 and 21 of the Maputo Protocol, CEDAW and the SADC Protocol on Gender and Development. This approach was important because, as Hellum says, the rights based approach places the individual as a holder of basic rights at the core process of development (Hellum 2000).

Therefore, by holding widows as holders of the basic right to inheritance from the estates of their husbands, I was able to then ask myself questions such as, 'What, if any, is the obligation of the State to ensure that widows are empowered to enjoy this right?' The answer is that the State can achieve this through enactment of legislation and it has indeed done so through for example the enactment of Legal Capacity of Married Persons Act, 2006. But then I discovered from the judicial decisions of the country's courts of law that it is the courts and/or husbands who are preventing women from enjoying the protection promised by international human rights instruments and domestic legislation.

Using the question of state responsibility in the protection of human rights I asked myself the further question as to whether the government of Lesotho can be held liable under international law for the failure to protect human rights. I accordingly read article 5 of CEDAW as read with the case of *Ms. A.T. v Hungary*<sup>21</sup> in which the CEDAW Committee held that:

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<sup>21</sup> CEDAW Committee Communication No. 2/2003.

‘Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights.’

I then came to the conclusion that Lesotho should be held liable for the failure by its courts and husbands to protect the rights of widows to the property of the estates of their deceased husbands.

### **2.2.2 Widows’ reality: Grounded research**

This methodology was chosen and used for its nature to draw on the interaction between the external and internal factors which constantly inform the process of legal change. It is an approach which allows the researcher and the researched woman the opportunity to act as agents of change rather than as passive observers (Katsande 2006). This methodology was chosen for this research since the research was basically designed to reveal the interaction of widows (women) and the law. Relying on empirical data collected on the ground and it uniquely takes the woman as the research’s starting as well as its constant reference point throughout the research journey in examining and understanding her lived realities and experiences based on different life situations, like sexuality and care work, for the analysis of her position in law and society (A.W.Bentzon, 1998).

The lived realities that seemed common to the women who influenced this research was, firstly, their widowhood to mine worker spouses, secondly, their geographic location in the rural areas and hence their higher risk of influence to stereotypes as highlighted above in chapter one, and, thirdly, their heavy reliance on the income of their mine worker spouses.

And in analysing their position in law, I came to realize that not only are they geographically situated far from the courts, but they are also economically disadvantaged and unable to take their cases to court. Furthermore, the Ministry of Justice’s legal aid facility which is intended to benefit them is only situated in the capital city making it inaccessible to many rural women and in any event some women did not even know about its existence.

With this women’s law approach there is also constant engagement with data, theory and lived realities which help in the shaping of data collection and interpretation of already collected data. It allows one to go deeper into finding the possible causes of the problems of women and the corresponding possible interventions (Katsande 2006). As I thought more

deeply trying to discover the possible causes for mine workers nominating parties other than their wives to benefit from their death benefits, I concluded that there were two possibilities: either, that there was a great lack of knowledge of the law amongst the people, or, they came under the strong influence of the stereotypes that have been highlighted earlier. Hence I settled on my third assumption which is to the effect that the nomination by most mineworkers of a person other than their spouse as their beneficiary is based on stereotypes and a lack of informed understanding of the implications of their act.

It was through these deep engagements that I had occasion to do an introspection of myself as a woman, and whether there was a possibility that I, regardless of my being a lawyer, could be affected by this principle. I placed myself in the position of those women and found that it is a very difficult thing for a Mosotho woman or, 'I guess', any other woman, to ask her spouse whom he has nominated to benefit from his death benefits; for upon asking such a question, the most likely retort would be, as my supervisor puts it, 'Why do you ask? Do you want me to die?', and clearly not many women are prepared to put themselves on the spot of having to answer this awkward, if not, threatening question, not even I.

This approach elicited the lived realities of women who have been affected by operation of this principle. It enabled the understanding of why women are unable to insist on knowing who their spouses have nominated in their employment contracts.

### ***2.2.3 The gendered nature of the application of the principle of stipulatio alteri***

The sex and gender analysis was first applied when examining judicial precedents in which parties based their position on the principle of *stipulatio alteri*. They were analysed to determine which sex is mostly adversely affected by the application of the principle. This analysis reflected that more women than men are adversely affected by the strict application of this principle. It also showed how seldom women nominate persons other than their spouses as their beneficiaries as opposed to how often men do.

In line with this methodology, 'gender' describes the social relations and characteristics of men and women. It concerns their participation in the core activities of their lives including their access to rights, power and control over resources (Coates 1999) in (Katsande 2006). It is through 'gender stereotyping' that women and men are taught so-called appropriate behaviour and attitudes, the roles and activities for them and how they should relate to each

other. This was evidenced by research data which revealed the reality on the ground and to which even I can personally testify to the effect that it is men who hold power and control over the resources of the family and that although women may be considered the stewards or administrators of the household budget, they literally never enquire as to its source. These gender roles remain unchallenged although they have direct effects on communities, households and individuals, in particular, women and children (Coates 1999), (Katsande 2006).

When this analysis was used to collect data, particularly during conversations with respondents, their emotional responses became significant. For the bulk of the women who were interviewed, this topic raised painful emotions. Both the professional and non-professional women respondents were familiar with the effect of the principle either in their own lives or in the lives of someone they knew or had heard of. However they all felt helpless about how to approach this sensitive issue with their spouses.

I vividly recall one friend telling me that once she had asked her male colleagues at work how she could approach this question of who her husband had nominated as beneficiary. This was because when they got married, her husband was already working, so she thought it logical to assume that he had nominated his parents as beneficiaries. She now wanted to find out whether her husband had updated his file to include her and their children. However, the response from her male colleagues shut her down for good. One of them said:

‘You see, the problem with you women is that you think too much, you stress yourselves with unnecessary things!’

Another male colleague said:

‘Women and money! Hei! You are already fantasising about the money you will get should your husband die!’

She told me she was so embarrassed by their responses that she never wanted to raise the issue again with anyone. Up till the time of our conversation she still did not know whom her husband had nominated as his beneficiary, some nine years after their marriage. How sad!

However, on the same set of issues with the conversations and interviews with men very little emotions were observed. I recall an interview with one lawyer, who boldly said:

‘You see, like me right now, since I got married I have not upgraded my file to include my wife in my employment file; therefore, should I die today before I include her, hard luck to her.’

This reaction was totally different from the reaction of my female colleague who, during our interview, was so surprised that she even said:

‘Right now, after this conversation, I am going to the office of human resources to upgrade my file to include my husband and child.’

#### **2.2.4 Feminist theory**

Feminist theory was engaged in order to analyse how, from a feminist perspective, the stereotypes are a part of the historical and persisting oppression of women by men. By asking the ‘woman question’, liberal feminists analyse how the law fails to account for values or experiences that are more typical of women than men and how present legal principles might disadvantage women (Rudman 2009). Thus they advocate for law reform for laws that are more gender sensitive.

The ‘woman question’ rests on the assumption, correlating with the core message of feminist legal theory, that the law may not be neutral and further that it may even be ‘male’ orientated in a specific sense. The purpose behind asking the ‘woman question’ is to make these features visible (Rudman 2009). Asking the question has the potential to expose the ways in which political choice and institutional arrangement contribute to the subordination of women. It reflects how the position of women in society is a matter of organisation rather than an inherent characteristic of women. For the purpose of this paper, then, by asking the ‘woman question’ helped in eliciting the fact that the application of the principle of *stipulatio alteri* with employment benefits was a neutral law that had the potential to affect women negatively as opposed to men. In fact, during one interview the respondent (a lawyer) who was in favour the strict application of the principle, said:

‘Ms Khesa, I think you are missing the point. This principle is not designed to discriminate [against] women, as you want to assume, but rather, this is a common law principle that has nothing to do with your feminism, anyone is free to use it.’

The systematic undervaluation of female activities, values and characteristics by law and society is seen as the main source of women’s subordination (A.W.Bentzon, 1998). Its nature

of being a grounded approach also enables the emergence of the interlocking realities that burden women on the ground, and, through this methodology, the legal situation in question is considered in the light of women's needs and values with regard to information, participation, self-determination and evaluation of their work.

### **2.2.5 Structural barriers**

The actors within structures approach was engaged with the objective of finding their perception of the situation on the ground, and how families, as semi-autonomous social structures, are contributing to the stereotypes; how courts are failing to protect women; and how insurance companies and their human resource officials are failing to inform their employees of the implications of their nominations when taking up contracts of employment.

The actors for the purpose of this paper are the officials who directly or indirectly deal with issues associated with the administration of the employment benefits of deceased persons, and, in this regard, the following officials were interviewed.

The Manager of TEBA which is the main agency between the mines in South Africa, the mine workers and their families in Lesotho and the Labour Commissioner who was also a vital actor in that the national Labour Commission, established by the Labour Code, 1992, regulates TEBA, a labour recruitment agency.

The Manager of Pension Fund Lesotho was also interviewed. She was a key actor who was able to give quite a unique insight into the approach that is taken by the courts with regard to the nomination of beneficiaries and in her interview she made reference to section 26.5 of the Public Officer Defined Contribution Pension Fund Rules which provide that:

‘payment of death benefits shall be in line with the prevailing legislation in Lesotho.’

She explained this to mean that to them a nomination is a guide. However in accordance with the Act, if the nomination is contrary to Lesotho's national laws, they totally disregard it. An example of this occurred in the case of *'Mannuku Nkama v The Master of the High Court and Others'*<sup>22</sup> in which the court held that:

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<sup>22</sup> CIV/APN/ 32/2002.

‘According to the Fund rule, the trustees are granted a discretion as to how they are to distribute the benefits to the extent that they are allowed even to ignore the request of a member for the sake of equity.’

She gave an example of a recent case in which the nomination excluded the employee’s spouse. The mother of the deceased was the only beneficiary nominated, but as a result of their own inquiries, they discovered that the deceased did in fact have a wife. When his wife was contacted she told them that the ‘family of her late husband’ had told her that because she did not have a marriage certificate the Fund could not accept the customary law confirmation of their marriage. The Manager told me that they reversed the nomination of the deceased’s mother and substituted it with his widow and made her sole heir.

I also identified and engaged with lawyers and judges as actors within the judicial system. Their role as administrators of justice was important in trying to understand from them how they are able to distinguish benefits of employment from the estate with a spouse. Although I found conflicting interpretations between them, I ultimately concluded that they place great reliance upon judicial precedents or judgments, even those which are bad in law.

According to my personal observation, this reliance is a result of lack of the necessary skill to interrogate the law in-depth. Here, I shall make particular reference to myself when I was confronted with the case of *Tjemolane v Tjemolane and Others* CIV/APN/2014 (unreported). The manner in which I responded to that case then is totally different from the way I would respond to it now. I discovered during the field research that most of my colleagues lose cases of this nature because of the approach they take to defend the case and at the end of the day they literally fail to protect the rights of widows. Unfortunately, Judges are also failing to be pro-active in protecting the rights of women.

## **2.3 Emerging issues**

### ***2.3.1 Hierarchy of application of common law against statute***

Lesotho has a pluralist legal system in which customary law, common law and statutory law apply concurrently. I am of the view that now only civil law applies to all citizens, the argument that customary law applies to certain people and not others having worn thin. However with regard to the civil law (which comprises common law and statutory law), the following million dollar question posed by this research arises:

‘To what extent or how far does common law penetrate or apply in a particular situation where statutory law is silent?’

A few lawyers raised the fact that *stipulatio alteri* is a common law principle, and therefore because there are statutes regarding the distribution of benefits that accrue from employment,<sup>23</sup> the rules of interpretation are that where there is a conflict between the common law and a statute, then the statute will take precedence over the common law in terms of the hierarchy of laws. This means, therefore, that the strict application of the principle in this regard is improper and contrary to the rules of law.

There is in this case a clear conflict of laws between, on the one hand, the law that protects the rights of a beneficiary under the *stipulatio alteri* contract and the rights of the widow (the deceased’s surviving spouse) to inherit from the estate of her late husband. The first set of rights is completely regulated by the principles of common law which is clearly the earlier law in this regard. The second set of rights, on the other hand, emanate from statutes and international laws which constitute the later law. I now move to determine how the law resolves conflicts of this nature.

According to the rules of interpretation of statutes, legislation<sup>24</sup> should be interpreted in such a way that it accords or agrees with existing laws (Botha 1998), so the question at this point would be, ‘What existing law does the strict application of the principle of *stipulatio alteri* comply with?’ It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of common law.<sup>25</sup> In the case of *Seluka v Suskin and Salkon*,<sup>26</sup> the court had the following to say:

‘This presumption is rebutted if the legislation in question clearly provided that the common law is being altered.’

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<sup>23</sup> The Labour Code, 1992 and the DCPFA, 2008.

<sup>24</sup> Legislation here is used loosely to encompass all applicable laws be it common law, statute and judicial precedents, as the case might be.

<sup>25</sup> *Johannesburg Municipality v Cohen’s Trustee* 1909 TS 811.

<sup>26</sup> 1912 TPD 265.



It is clear from the wording of the Legal Capacity of Married Persons Act, 2006 (LCMPA) that the marital power which allowed husbands to do as they pleased with their estates has been altered. Section 5 of the Act provides:

‘(1) Subject to the provisions of this Act with regard to the administration of a joint estate, the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed.’

Botha further says that the legislative repeal by implication will be accepted by the court only if the subsequent legislation manifestly contradicts the earlier legislation (Botha 1998). And this, it is submitted, is exactly the result brought about by the passing of the LCMPA.

However in the unlikely event that the above argument does not hold, it can still be argued that in the interpretation of common law against statute, an attempt should be made to read the earlier and subsequent legislation together and to reconcile them.<sup>27</sup> In the case of *Shozi v Minister of Justice, Kwazulu*,<sup>28</sup> the court said:

‘...if two apparently contradictory provisions are capable of a sensible interpretation which would reconcile the apparent contradiction that interpretation should be preferred, if such reconciliation is impossible, it has to be presumed by necessary implication that the later of the two provisions prevails, resulting in the amendment or repeal of the earlier one.’

This is the point where judicial activism is crucial in advancing protection by giving a sensible interpretation that is aimed to reconcile both laws.

### ***2.3.2 At what point does a spouse’s salary become part of the joint estate?***

This question emerged during the research as an important one because during the debates and conversations the issue constantly arose as to the point at which a spouse’s salary forms part of the joint estate. Some lawyers were of the view that the salary forms part of the estate when it goes into the personal account of the spouse and others said that it is when the spouse has earned it and has a right to receive it. This question was crucial because my first assumption was that community of property extends to (i.e., includes) the employment

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<sup>27</sup> *Wendywood Development (Pty) Ltd v Rieger* 1971 (3) SA 28.

<sup>28</sup> 1992 (1) SA 338.

benefits and pension funds of the spouses. This was simply based on the assumption that a spouse's salary forms part of the community property and as such anything financed by that salary should also form part of the community of property. As Marumoagae puts it:

‘When parties are married in community of property it does not make any sense why the “pension interest” will be regarded as falling into the personal estate of the member, as if a “pension interest” is a non-patrimonial benefit’ (Marumoagae 2014).

Once the salary has been earned, the working spouse has rights and the other spouse has at least a legitimate expectation that it will be brought into the joint estate (Weitzman 1985).

Marumoagae says in his article:

‘I submit that since the contributions towards such benefits were made from the member's salary which ostensibly formed part of the patrimonial benefits of the marriage, there is no reason why post-divorce (or death for the purpose of this paper) pension benefits cannot be regarded as forming part of the joint estate as it existed before...’ (Marumoagae 2014).

## **2.4 Methods of data collection**

The research was mainly qualitative and as such the sampling of interviews was mainly based on those respondents who had firsthand experience with the application of the principle of *stipulatio alteri*, be it at work or as a victim. The following methods of data collection were used to help me achieve the objectives of the research.

### **2.4.1 In-depth interviews**

In-depth interviews were conducted with key informants who were mainly lawyers and officials dealing directly or indirectly with issues of distribution of death benefits that accrue from employment and those who have dealt with the *stipulatio alteri* principle as applicants or respondents in the courts of law. The value of the informants was directly linked to their professional experience. The lecturers interviewed were those who teach family law and property law. My main concern was to find out from them what was their understanding concerning salary being property that benefits spouses married in community of property and exactly when it becomes part of their joint estate. The Judge interviewed was asked questions revolving around the fifth assumption concerning the effect of judicial activism and how

judges use their positions to advance the rights of widows in the face of lawyers seeking to defend the positions of their clients.

**Table 1: Showing details of respondents with whom in-depth interviews were conducted**

<b>Respondent</b>	<b>Women</b>	<b>Men</b>	<b>Total</b>
Judge	1		1
Manager of a pension fund	1		1
Lecturers	1	1	2
Lawyers	6	7	13
TEBA Manager		1	1
Labour Commissioner	1	1	2
Insurance personnel	1	1	2
Master of the High Court	1	1	2
	<b>12</b>	<b>12</b>	<b>24</b>

#### **2.4.2 Harvesting from conversations**

During the research period I constantly engaged in casual discussions with friends, family and colleagues during which I would often pose a question relating to the topic to find out their opinions about this issue. I discovered a great deal of valuable information from these conversations because instead of preparing their answers, people felt more relaxed with this kind of informal interaction and seemed more encouraged to speak sincerely from their hearts based on their own experiences or stories which they had witnessed. Their emotional reactions to the application of this principle were also more likely to be revealed.

My father, himself a former mine worker, was quite informative about this topic. My colleagues, including my boss, immediately headed to the human resource office to update her file after our conversation. I sometimes found that during such conversations people were actually learning about this principle and how it applies to them. One woman actually said:

‘You want to tell me that the laws of Lesotho will allow my husband to nominate his lover as death beneficiary and I am left destitute with HIS children?’

When I said ‘Yes!’, she astutely observed:

‘This means the law protects adulterous relationships more than it does marriages!’

### **2.4.3 Group discussions**

From the group discussions that I had, one being with the miners the other two with lawyers, I came to realize that they helped to unpack both the stereotypes about women and the misconceptions about the law. The purpose of the group discussions was to open a platform to unpack the principle and its application under controversial and contested circumstances as those in issue in this paper. From the lawyers group discussion conflicting views were raised particularly with regard to the issue of whether benefits of employment constitute part of the community of property (i.e., the joint estate of the spouses) or not. But ultimately the conclusion was for us to agree to disagree.

The most important contribution that I harvested from the group discussions was a comment from one of my colleagues. He said that it may take a long time for legislation as the result of law reform to be passed to resolve and define what property forms part of community of property. Therefore, he suggested, in view of the urgency of the matter, the next practical step would be to bring a public interest litigation case so that the courts have an opportunity to decide the issue. The court in question should make a ruling only after hearing arguments based on the various perspectives on women’s human and property rights (similar to those advanced in this work). This would be necessary as to date such arguments have not been sufficiently cogently advanced before the courts.

Table 2 shows details of respondents from whom I obtained data either from holding conversations with them or during group discussions. Widows are included among those with whom I held conversations because, although they were the key subject of the research, the approach I took when talking with them was more like a casual, interactive conversation than a formal interview. My attitude was that such informality would let them see me simply as just another woman who would understand what they were going through which would encourage them to open up and explain in detail how the application of the principle of *stipulatio alteri* affected them.

**Table 2: Showing details of the respondents involved in conversations or group discussions**

<b>Respondent</b>	<b>Male</b>	<b>Female</b>	<b>Total</b>
Widows		2	2
Lawyers	4	5	9
Mine workers	9		9
Other respondents with whom conversations were held	4	7	11
	<b>17</b>	<b>14</b>	<b>31</b>

#### **2.4.4 Desktop research**

The present research problem stems from a court case. Therefore, a plethora of case law regarding the application of this principle was interrogated to show how courts in Lesotho approach the interpretation of the principle particularly in the cases where the (widow's) defence to the enforcement of the principle of *stipulatio alteri* was based on her in community of property relationship with the stipulator. Case law was used to illustrate the attitude of the courts in Lesotho towards international law and other enabling legislation designed to protect the rights of widows to property and inheritance.

Legal text sources were used to illustrate how the principle has been used and interpreted widely and how community property is perceived in the modern day. Extensive desk research on the principle of *stipulatio alteri*, its origin and application in the law of contract and its relationship with the laws of inheritance was also conducted. The distinction between the principle and the freedom of testation was also interrogated. A number of cases (which will be discussed at different points throughout the paper) were found in which the principle was upheld and they were contrasted with the view held by the literature, statutory and international instruments that consider that benefits that accrue from employment form part of the joint estate.

Case law also reflected the ability or inability of defence lawyers to take advantage of the plethora of both national and international legislation to advance arguments against the disinheritance of widows. As noted earlier, in none of the cases that were reviewed was reference made to the international laws on the rights of widows to inheritance of the estates

of their husbands which could have persuaded the courts to rule in their favour. What I did observe that was common to all the cases was the dismissal of the application of national inheritance laws on the basis that when the principle of *stipulatio alteri* is invoked, the benefits are considered not to form part of the joint estate. For example, in the case of *Tsosane v Tsosane and 3 Others*<sup>29</sup> Justice Hlajoane had the following to say:

‘The monies concerned have nothing to do with the deceased’s estate, as the question of inheritance is irrelevant. The right of the beneficiary flow directly from the contract itself and as soon as he accepts he is entitled to enforce it.’

International human rights instruments which were examined reveal the international obligations Lesotho owes towards its widow citizens and the protection and realisation of their rights. This involved analysing the mechanisms that Lesotho used to adopt, become party to and bound by international instruments and the extent to which Lesotho has since complied with its international obligations towards its widow citizens. These international instruments are used to support this paper’s human rights approach that has been taken as the starting point of this research. The same instruments have been used to show the nature of the State’s obligation towards its subjects after its ratification of them and the extent to which they act as measures to ensure that married women enjoy their rights on an equal basis with men. National laws were examined to determine the extent to which Lesotho has complied with its international obligations to incorporate and domesticate principles of international law which protect women’s rights to property and inheritance in marriage settings.

National laws on the laws of marriage and inheritance were explained and reviewed which showed not only their vastness but also their vulnerability to abuse based on their fragmentation and lack of clarity.

Legal texts were accessed to show the feminist approach, in other words, how feminists think the law should be used to protect the rights of women and to eliminate persistent harmful stereotypes about them. They also introduce ideas about how information dissemination can be used to bridge the knowledge gap and provide the interventions necessary to assist women in accessing justice. The literature review focused on the interpretation and application of common law and statute.

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<sup>29</sup> CIV/APN/517/2013.

The views of different authors concerning whether spouses' salaries and benefits accruing from their employment fall into the joint estate of those married in community of property were discussed. The literature review also discussed the impact of property grabbing on the lives of women who are already vulnerable due to various interlocking oppressions from which they suffer due to their sexual identity as women.

#### **2.4.5 *Experiential data***

My personal and professional experiential encounter with the principle of *stipulatio alteri* forms the backbone of this research. At a professional level I have dealt with two cases in which the principle was alleged against the legitimate dependants of the stipulator. In my own personal life I have seen the consequences of the application of this principle in the lives of people whom I personally know. However, at the professional level I must confess that due to a lack of in-depth analysis and understanding of the injustices of women I was unable to successfully protect the rights of women.

However with the knowledge, insight and research skills I acquired from the Master's programme at the Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe (SEARWCL), I have come to realise that there was a way I could have done more to secure the rights of the widows. My background as a lawyer helped a lot in securing appointments with lawyers and judges. Even with other officials at times I found that my background helped in scheduling appointments earlier than maybe the official would have otherwise done. And for some reason the bulk of the informants were people with whom I had previously interacted at a professional level at one time or another.

##### **2.4.5.1 Personal experience of the issue**

A long time ago while I was still a law student I remember a woman who was one of our neighbours and who had been divorced from her husband for a number of years. Her ex-husband worked for the government of Lesotho. He had remarried and was living in another district. One day a message came that he had died and then a few days later she received a call summoning her to her ex-husband's work place. Upon her arrival she was informed that she was still the beneficiary of all the death and employment benefits of her ex-husband despite the fact that they had been divorced for many years. She accepted the nomination and the benefits with full knowledge that there was a wife of the deceased who had a legitimate

expectation to benefit from the monies. To make matters worse the legitimate wife was rejected when she attempted to recover the benefits in preparation for the funeral.

The woman (my neighbour) upon this enlightenment she went further to approach the insurance company that she knew the ex-husband had a policy with, upon arrival when she discovered that they were processing payment to the current wife she sought and obtained a court order interdicting the insurance company from giving those benefits to the second wife as she had learned that she was still the main beneficiary.

She stopped the funeral preparations pending finalization of the case, she succeeded in obtaining a final court order and ultimately the family and the wife of the deceased were dependent on her for financial assistance to bury their son and husband. She did help with the burial ceremony but soon afterwards, she left with all the benefits from both the deceased's employment benefits and those in terms of the burial policy.

This scenario seemed very unfair to the deceased's legitimate second wife who was left destitute as the result of the intervention of a long time ex-wife of her husband who managed to walk away with his employment benefits that could have helped her and her minor child to survive. I also found the scenario to be unfair to the deceased himself who was in no position at this time to have a say as to who should or should not benefit. I felt that as a result of his ignorance of the law, there must have been an omission on the part of the deceased to substitute the name of his second wife for that of his former wife in all his important contracts and policies. I also felt that the law had failed to protect his current wife who was probably not even aware that this scenario could befall her, or at least it never even crossed her mind to inquire about whom her husband had nominated as beneficiary of his benefits, not necessarily out of ignorance but because it was taken for granted that such an issue could not arise.

#### **2.4.5.2 Professional experience with the principle of *stipulation alteri***

Now come with me as I fast forward my life to 2014, when as a lawyer working for the government of Lesotho in the Ministry of Law and Constitutional Affairs under the office of the Attorney General representing the government in civil litigation, and among the cases I deal with are those brought by the Master of the High Court where there is a legitimate case involving minor children.



I then came across the case of *Tjemolane v Tjemolane and Others* CIV/APN/2014 (unreported). In this case a man had worked for the mines in South Africa. He then retired due to ill health and died a couple of years later. A conflict between his mother and his surviving spouse ensued when it appeared that during his time of employment the deceased had nominated his mother as his death beneficiary on a form called a 'Nomination Form' in terms of which The Employment Bureau of Africa (TEBA) considers that only the nominated beneficiary is entitled to receive the deceased's employment benefits.

The widow of the deceased approached the Master of the High Court for intervention, but the intervention did not succeed. The deceased's mother and other interested parties then applied to court for an interdict preventing TEBA from releasing the benefits to his widow pending the finalization of an application in which they claimed that the deceased's mother be declared the sole beneficiary of such funds in accordance with the principle of *stipulatio alteri*.

In their founding papers, the applicants referred to the plethora of case law in support of their claim.<sup>30</sup> They won the case due to the overwhelming precedents in their favour but I remained convinced that there was something that could have been done to protect the rights of the widow and her child. It is through the enlightenment I received in pursuit of my studies for my Masters in Women's Law that I gathered the courage to defend the rights of widows negatively affected by this typical application of this principle of *stipulatio alteri*.

## **2.5 Conclusion**

This chapter has outlined the various methods and methodologies used in the research period for purposes of data collection. Most importantly the key issues that emerged during the field work have been highlighted. The importance of the emerging issues in this regard has simply been to show the complexity of the principle of *stipulatio alteri*, particularly concerning issues of interpretation where it is applied against the laws of inheritance of spouses married in community of property.

Another emerging issue has covered the importance of the need for detailed legislation that does not need to be interpreted by the courts. In other words, there is a real need for

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<sup>30</sup> The case law will be referred to throughout this paper.

legislation to become more precise in its determination as to the exact point at which a spouse's salary forms part of the community of property. Clarification on this point is critical because it became clear during the field work that there is a perception that before an employee has received his salary it does not form part of the community of property he shares with his wife and that he is also at liberty to direct what the employer should do with it. This perception clearly leads to injustices against his spouse.

The next chapter illustrates the impact of the strict application of the principle of *stipulatio alteri* on the lives of widows who at all material times during the lives of their husbands depended wholly on the income their husbands brought home in the form of salary. It also shows all those laws national and international that can be used by lawyers and judges to protect the rights of widows against this modern day form of property grabbing.

## CHAPTER THREE

### 3.0 CHALLENGES RESULTING FROM THE STRICT APPLICATION OF THE PRINCIPLE OF *STIPULATIO ALTERI*

#### 3.1 Introduction

*'State Parties undertake to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'*

*(Article 2(f) of CEDAW)*

The aim of this chapter is to analyse from a human rights and feminist perspective the situation of women and the impact of the application of the principle of *stipulatio alteri* on their lived realities. By using the findings on the ground and the lived realities of widows affected by the principle, this chapter is designed to make courts realise that it is time they take into considerations issues of marriage and inheritance rights whenever they are seized with an application on the basis of *stipulatio alteri* in the manner contested in this paper.

From the outset it becomes imperative to note that for most people their employment, profession and work-related benefits have come to be their principal form of wealth. These new forms of property are not only a form of wealth but also the basis of various levels of status in our society and as such they should be accorded legal protection analogous to that which the legal system offers to more traditional forms of wealth (Glendon 1981).

According to my personal experience within the context of Lesotho, this would refer to the fact that in the past families relied extensively on traditional forms of wealth like cattle, sheep and fields for their survival; however, with increased migration both to the urban and largely South African mines, there has been a change in which the benefits of employment form the bulk of a family's wealth. What this means is that very often men migrate to South African mines and their wives remain behind looking after their homes and children in the full, legitimate expectation that (1) their husbands will continue maintaining them through remitting to them their employment benefits and that (2) in the event of their husband's death, they are protected from any threat which could lead to the loss of these benefits.

Furthermore, the heavy reliance of families on employment benefits can never be over-emphasised especially in the current era of climate change in which the traditional wealth of animals and fields have lost their value. We are also witnessing a time in which women's unemployment is escalating as are their burdens of care due to the HIV/AIDS' death toll. In addition, women in Lesotho continue to suffer various forms of discrimination and deprivation of economic resources due to the uncritical and unconscious protection of customary practices which are perpetuated by patriarchal and stereotypical attitudes.

This simply means we need comprehensive legislation to protect the employment benefits of spouses married in community of property similar to the protection which has been afforded to rights to immovable property by, e.g., section 10(1) of the Land Act, 2010 which provides:

‘Where persons are married in community of property, either under civil, customary, or any other law and irrespective of the date on which the marriage was entered in to, any title to immovable property allocated to or acquired by anyone of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both.’

Section 10(3) provides:

‘Transactions in relation to land shall be conducted by both spouses in monogamous marriages in community of property jointly or with the consent of another spouse, and where any document requires a signature the document shall be signed by both spouses unless they agree in writing that one spouse shall represent and sign on behalf of the other.’

### **3.2 Situation analysis**

*‘With the changes in the economic sources and social behaviour of the modern society, hereby earnings and proprietary rights are no longer confined to physical property but also include future interest and future earnings such as investments, trust fund and business ventures, it is perceived that the scope of claims on matrimonial property shall also be revolutionised to include claims in future.’*

*(Norliah Ibrahim 2014)*

The subject matter of this research proved vital for me to analyse the impact of the strict application of the principle to of *stipulation alteri* to the lives of the widows who (1) were during the lives of their husbands primarily reliant on the income brought in by their

employment; and who (2) would logically anticipate that in the unfortunate incident of the death of their husbands, would continue to be sustained by the benefits of their employment; but who (3) are dismayed at the nomination of another person to such benefits, and who (4) unfortunately, find themselves helpless and vulnerable when the courts rule against their rights and disinherit them.

In *Crookes NO v Watson*,<sup>31</sup> Schreiner JA had the following to say regarding the principle of *stipulatio alteri*:

‘The typical contract for the benefit of a third party is one where A and B make a contract in order that C may be enabled by notifying A to become a party to a contract between himself and A....broadly speaking the idea of such transactions is that B drops out when C accepts and hence forward it is A and C who are bound by each other.’

It is obvious to me from this definition that B only drops out when C accepts being party to the contract with A. It truly beats normal reasoning to assume that the case of the nomination of a person as a next of kin or a death beneficiary can be equated with the principle of *stipulatio alteri*, since the reality is that the contract between A and B is in essence for the benefit of B, not C who is only incidental.

On this basis it is my opinion that to impose a strict application of the principle of *stipulatio alteri* in a situation involving an employee’s nomination of the beneficiary of his death benefits without taking into consideration all the surrounding circumstances, especially those of his surviving spouse, is tantamount to denying her, his widow, the right to access to justice.<sup>32</sup> This is because as was found during the research period some nominations might have been done a long time before the employee got married or may even have been done by him without fully understanding the implications of his actions or he was under the influence of harmful stereotypes.

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<sup>31</sup> 1956 (1) SA 277.

<sup>32</sup> CEDAW GC No. 33 Paragraph 14(c) provides that ‘accessibility’ requires that all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination.

### 3.3 Legal obligations of Lesotho to protect property rights of women

Article 1 of CEDAW defines ‘discrimination against women’ as any distinction, *exclusion* or *restriction* made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, *enjoyment* or *exercise by women*, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, *economic*, social, cultural, civil or any other field. The words that have been highlighted are critical in defining the discrimination from which women suffer in the context of this paper.

The ‘exclusion’ refers to the failure by a husband to nominate his wife as the beneficiary of the benefits that accrue from his employment. The ‘restriction’ also refers to the strict interpretation given by the courts constantly to cases of this nature. Instead of giving a wider interpretation of what constitutes the joint estates of spouses for the purposes of inheritance, the courts find it easier to rule like one did in the case of *‘Matumo Tsosane v ‘Malikoebe Tsosane and 3 Others*<sup>33</sup> in which Hlajoane, J held:

‘The benefits concerned have nothing to do with the deceased’s estate ...hence the question of inheritance is irrelevant.’

The judge went further in reinforcing the exclusion of the woman against the possible chance of inheriting from the estate of her husband by validating the customary saying that *‘mantsoe a mofu a aheloa lesaka’*, which is literally translated to mean that a deceased person’s words are respected. The judge continued:

‘The principle of stipulation it would seem legalised that Sesotho saying. By nominating the second respondent as beneficiary the deceased made his intentions clear that he wished to give out what was due to him from his employment to her.’

The judge made this statement in full knowledge of the rights of spouses married in community of property both nationally and internationally that not only speak of the spouses’ equitable shares in their joint estate but also to the elimination of all harmful cultural

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<sup>33</sup> CIV/APN/517/2013.

practices.<sup>34</sup> In this particular case the judge deliberately sanctioned an historically oppressive and detrimental customary principle and invoked it specifically to exclude and restrict a widow's right to inheritance from the estate of her deceased husband.

To show that she was in fully alive to the rights of inheritance of widows in concluding her judgment, the judge had the following to say:

‘Applicant as the lawful wife of the deceased had it not been because for the wishes of the deceased it would have been fair that she too and their daughter be awarded something from the benefits of the fund.’

According to CEDAW, ‘harmful practices’ means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity. A judge is legitimately expected to detect a customary practice or saying that is harmful and in this context it is obvious that to uphold this customary saying has had a negative effect on the fundamental rights of women.

### **3.4 State obligations**

*‘The best ways of addressing the issue of women rights or giving legitimacy to women human rights issues is the use of international legal instrument. Leaving women rights to national or domestic law will surely leave women's rights at the mercies of national and cultural prejudice.’*

*(Michelle 2004)*

Multilateral human rights conventions are in the nature of *stipulatio alteri* contracts in that they are agreements between States which provide minimum protection for third parties, which in the present case, are individuals under the jurisdiction of contracting States (Malan 2008). The State undertakes in agreement with other States to provide for the best attainable human rights protection on behalf of their nationals. The States also undertake to be bound legally for failure to provide such stipulated protections.

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<sup>34</sup> The Sesotho customary saying that the words of the deceased are respected brought in the context of death benefits in this context becomes a harmful cultural practice as it has the effect of disregarding the rights of the widows to inheritance.

The CEDAW Committee has stated on many occasions that *traditional attitudes* by which women are regarded as being subordinate to men contribute to violence against them. Article 2 of CEDAW provides that:

‘all State Parties shall take all appropriate measures to eliminate discrimination against women by *any person*,<sup>35</sup> *organization*<sup>36</sup> or enterprise.’

In the case of *Ms. A. T. v Hungary* brought before the CEDAW Committee, the Committee had the following to say:

‘Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights.’

The developments brought about by this article is that, firstly, it places responsibility on individuals to protect the rights of others in accordance with the UDHR and that, secondly, the State is obliged to ensure that individuals observe the human rights of others. The CEDAW Committee goes further and says that failure by the State to protect the individual even from acts of non-state actors may lead to liability on the part of State.

Lesotho, like other member States to various international instruments, acquires responsibilities by ratifying international and regional instruments. In its concluding remarks of 2011, the CEDAW Committee recognised the efforts of Lesotho to promote gender equality and protect women’s rights, such as the establishment of the Law Reform Commission with its mandate to review discriminatory laws (CEDAW 2011).

However, judicial precedents that pre-date the ratification of the conventions and protocols do not reflect any grounded development to enhance the protection of widows’ rights of inheritance to the estates of their husbands in cases where such estates are contested through the common law principle of *stipulatio alteri* by someone other than the rightful widow of the deceased.

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<sup>35</sup> In this case, a husband who nominates a person other than his spouse as beneficiary of his employment benefits and who becomes his widow upon his death.

<sup>36</sup> In this case, a court as a state organ for failing to take appropriate measure to protect the rights of widows.



Article 4(2)(d) of the Maputo Protocol provides that States have an obligation to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women. Article 5 further provides that States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Based on the findings on the ground I observed that the stereotypes against women do still indeed persist, and ultimately may still influence the decision of some mine workers to nominate a person other than their spouse as their beneficiary. This shows that Lesotho still has to adopt appropriate measures to modify such practices as women are continuing to be prejudiced by them.

Read together articles 5 and 6 of CEDAW provide that States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Article 13 provides that States Parties shall take all appropriate measures to eliminate discrimination against women in *other areas of economic* and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular, (a) the right to family benefits. Article 16(1) provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ... (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

It emerged during the research that the legislature in Lesotho has generally attempted to advance the provisions of CEDAW through the LCMIPA, 2006, as will be seen in paragraph 3.5 below. However the problem lies with the understanding and application of the law by both lawyers and the judges. In an interview with a lawyer who supports the principle of *stipulatio alteri*, he vehemently emphasised that the common law principle of *stipulatio alteri* should be given strict interpretation regardless of the circumstances as long as it is clearly established.

This stance is also evident in the various judgements where the principle has been upheld by judges who maintain that where the principle is raised, the question of inheritance cannot be raised as the subject of *stipulatio* does not form part of the estate of the stipulator.

Article 18 of the African Charter on Human and Peoples Rights (the Banjul Charter) provides that the States shall ensure the elimination of all forms of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. According to article 19, all peoples shall be equal and shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Based on personal experience as a legal officer both for Women and Law in Southern Africa, Lesotho during 2011-2012 and currently with the government, I am positive that there are attempts by the government of Lesotho to eliminate various forms of discrimination against women and girls particularly gender based violence and violations of their property rights. And there have also been considerable developments leading to the enactment of Acts such as the Sexual Offences Act, 2003 (which is quite detailed as to what constitutes sexual violence and it also recognises and criminalises marital rape) and the Land Act, 2010 which also goes some way to increasing the land rights of women and girls. However, there seems to have been an oversight concerning the benefits of employment as a potential area of dispute, particularly for those people who are not employed by the government.

Article 8 of the SADC Protocol on Gender and Development states that States Parties shall enact and adopt appropriate legislative administrative and other measures to ensure that women and men enjoy equal rights in marriages and are regarded as equal partners in marriage. In its preamble, the LCMPA, 2006 specifically codifies article 8 of the Protocol by providing for the elimination of marital power which a husband historically exercised over the person and property of his wife and which makes husbands and wives equal partners with equal rights to the property they both accumulate during the subsistence of their marriage.

In terms of paragraph 61(b) of the Beijing Declaration, States agree to undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property. And, according to paragraph 125(e), States also agree to organize, support and fund community-based

education and training campaigns to raise awareness about violence against women as a violation of women's enjoyment of their human rights and states agreed to mobilize local communities to use appropriate gender-sensitive traditional and innovative methods of conflict resolution.

Beyond the abovementioned enabling legislation on the protection of spouses in community of property, the government of Lesotho administratively engages the Ministry of Gender Sports and Recreation to organize, support and fund community-based education and training campaigns to raise awareness about violence against women at various levels and also during the worldwide celebrated 16 days of Activism Against Violence Against Women And Girls.

In view of the fact that Lesotho as a country is a party to all the abovementioned progressive human rights instruments, it is, with respect, deplorable that its courts not only continue to disregard the rights of widows, but they even seem to be at pains to entrench their violation through a combined problematic application of the most discriminatory aspects of common and customary law, as evidenced by the case of *Tsosane* (above).

### **3.5 Analysis of the State's compliance with its international obligations to protect women's rights**

In determining the extent of the State's compliance with the international instruments (reviewed above) which seek to protect the rights of women to property and inheritance, this research established that, under customary law, the heir to the estate of a married couple is still the first male issue of the family, giving the widow only the rights of use to the property without depriving the heir half of the estate (Laws of Lerotholi). This remains the position under customary law despite the developments which have taken place in international law.

Section 13(1) of the Laws of Lerotholi provides that the heir shall inherit all unallotted property of the deceased estate and is obliged to use the estate with the widow and to share with his junior brothers. This happens subject to section 14 which provides that if a man during his life time allots his property or he leaves written instructions, his wishes must be carried out provided the heir has not been deprived of a greater share of the father's estate.

However, as indicated above (in paragraph 2.3.1), I am of the view that now only civil law applies to all citizens, the argument that customary law applies to certain people and not others (in terms of Proclamation No. 2B of 1884) having worn thin. According to the test, the estates of those who have abandoned the customary way of life are administered in terms of section 3 of the Administration of Estates Proclamation, 1935 and the Intestate Succession Act, 1953 in which it is provided that the remaining (surviving) spouse inherits her half share and a share equal to that of a child's share.

For the purpose of this paper, it should be noted that the estates in issue can never be administered under customary law due mainly to the fact that the disputed issue, i.e., employment benefits, are administered according to civil law. This now requires us to question the reasoning by Hlajoane, J in the case of *Tsosane v Tsosane* (above). The honourable judge referred to Sesotho customary principles to resolve a dispute over employment benefits yet refused to apply civil laws of inheritance. She did so based on the fact that where the principle of *stipulatio alteri* is invoked, the nature of the relationship between the beneficiary and the stipulator is irrelevant and the question of inheritance or rather the threat of disinheritance of the stipulator's surviving spouse cannot be raised.

The development of the laws of inheritance and the administration of joint estates in line with international law gave birth to the Legal Capacity of Married Person's Act, 2006. In section 1 it provides:

‘Subject to the provisions of this Act with regard to the administration of a joint estate, the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed.’

Section 5 provides:

‘Spouses married in community of property have equal capacity to do the following in consultation with one another:

- (a) dispose of the assets of the joint estate;
- ...
- (c) administer the joint estate.’

The implications of the LCMPA as harvested from the interviews and the group discussion are that neither of the spouses has the power to do as he/she pleases with their employment benefits because they are part of what they acquire during the subsistence of their marriage and as such they form part of their community of property, their joint estate, and they have to be administered in consultation with one another. It then surpasses comprehension as to how, in spite of the clear provisions of the LCMPA, judges still insist that employment benefits fall outside the joint estate of the spouses.

However upon taking a closer look at section 78 of the Labour Code Order, 1992 new light is thrown on the issue since it provides:

‘After the death of the employee the employer shall as soon as practicable pay or deliver to the labour commissioner, for distribution in accordance with law “all ways” and other remuneration due to and all property belonging to the deceased employee which is in the employer’s possession.’

The Labour Commissioner referred to this section during our interviews during which I asked how the Labour Commission regulates the TEBA’s compliance with this and other laws of Lesotho to ultimately ensure that the employment benefits of deceased miners reach their lawful dependents. The paradox here was that particularly with regard to miners working in South Africa through TEBA this was not happening at all. She indicated that this is what is supposed to happen but they are rarely engaged and they almost thought all was still going on fine.

Furthermore, another problem is the approach taken by the management of TEBA. Whenever there is a dispute concerning the administration of employment benefits, TEBA submits it to the courts. The Manager of TEBA indicated that whenever there is a dispute regarding the nomination of the beneficiary they leave the matter to be decided by the courts and they simply comply with the court’s order. This approach by TEBA is clearly not in compliance with section 78 of the Labour Code to which TEBA is bound as a labour recruitment agency operating in Lesotho.

As indicated at paragraph 2.2.5 above from the Defined Contribution Pension Fund Act, 2008 (DCPFA) the following is construed. Section 2 provides:

‘A dependant means a person in respect of whom a member, pensioner is legally liable for maintenance, or not legally liable for maintenance if such a person was at the death of the member in fact dependent upon such a member for maintenance or is the spouse of a member.’

To show that the legislature understands that the contribution of the member may have implications for the spouses’ joint estate, section 32 provides:

‘A benefit granted under this Act shall not be assignable, executable, payable or transferable except for the purpose of satisfying:

- (a) ...
- (b) A maintenance order
- (c) A divorce order.’

On the other hand section 3(1) of the Public Officers Defined Contribution Pension Fund (DCPF) Rules, 2008 which provides for payment of the contribution says that:

‘A member’s contribution in terms of the Act and the rules shall be deducted by his or her employer from his or her salary or wages...’

This provision fully supports my first assumption that employment benefits, whatever form they take, are financed by the salary of the employee.

The Rules go further to provide in section 26(5) that:

‘Payment of death benefits shall be in line with the prevailing legislation in Lesotho.’

This was emphasised by the Manager of the Pension Fund when she indicated that they do indeed regulate death benefits in line with the laws of Lesotho. She added that where they found that an employee has made a nomination which is contrary to the country’s laws they have the power to disregard it totally.

Based on the written provisions the abovementioned legislation one would swear that the law is water tight in its protection of widow’s inheritance rights and that Lesotho is complying with its international obligations. But compliance is a matter which extends beyond commitments on paper and unfortunately it is clear from the cases that have been referred to

(beginning with the case of *Tjemolane v Tjemolane and Others* CIV/APN/2014 (unreported)), that, in spite of clear internationally supported legislative protection, widow's rights are being routinely overridden by the application of common law principles.

### **3.6 The reality faced by widows affected by the principle of *stipulatio alteri***

*'... Cultural prejudices ... are incompatible with the dignity of and worth of human person and must be eliminated.'*

*(VDPa 1993)*

Regardless, of favourable statutory and international provisions the courts have on a number of cases invoked strict interpretations of the principle of *stipulatio alteri* to the detriment of widows. The question is whether the courts are bound to use principles of international law to protect the rights of widows. The Court of Appeal in the 2010 case of *Senate Masupha v The Senior Magistrate & 7 Others* (above) in response to the submission of *amici curiae* who submitted that the court should invoke principles of international law in its decision, stated:

*'International principles, are aids to interpretation, not the source of rights enforceable by Lesotho citizens.'*

This contradicted the prior decision of *Tsepe Molefi v IEC & 4 Others* CIV/APN/135/2005 in which the judges relied on CEDAW and the SADC Protocol on Gender and Development to confirm that:

*'Lesotho is a signatory to several international conventions, these conventions also impose certain duties on the State.'*

As a result I found that it is very confusing as to whether in Lesotho principles of international law can be used in courts to protect women's rights.

It emerged from the interviews that most of the respondents are cynical about the application of the principle of *stipulatio alteri* in the manner in which it is used in the courts of Lesotho. The following were the views of advocates.

*'I agree that there is quite a bulk of precedents on the issues of stipulatio alteri, I think the principle is abused by being used by manipulative laws who*

find an environment that is conducive from judges who do not have judicial activism' (Advocate).<sup>37</sup>

'I am really failing to understand how the courts of Lesotho are able to separate a person's employment benefits from the joint estate while those benefits are sustained by the efforts of the joint estate' (Advocate).<sup>38</sup>

'This is a clear case of fraud to the joint estate if one party can divert benefits that are inherently part of the joint estate and give them to someone else under the pretence of *stipulatio alteri*' (Advocate).<sup>39</sup>

Concerning the first assumption, I came across conflicting views with some respondents holding the view that a spouse's salary does not form part of the joint estate while others believed that it does. These conflicting views were also reflected in the literature that was reviewed.

I found that according to domestic legislation and international laws, spouses married in community of property have equal shares to all things they acquire individually and collective during the subsistence of the marriage and that they also have to consult each other in connexion with any act that will have an impact on the joined estate (the LCMPA, the Maputo Protocol, CEDAW, etc.). Accordingly widows have the right to inherit from the estates of their deceased husbands regardless of where the estate is kept. Although widows have a fair understanding of these laws, that knowledge often counts for nothing if the common law principle of *stipulatio alteri* is used to block them from enforcing their rights.

### **3.7 The link between patriarchy and women's access to economic resources**

Patriarchy is the dominant culture in Lesotho and views of an ideal family are very traditional in which men are considered to be the heads of their households (Kaori Izumi 2009). Patriarchy is defined by radical feminists who use it to describe the social structures which allow men to dominate women. To radical feminists all men are actively involved in the oppression of women (Karin Van Marle 2007).

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<sup>37</sup> 19 November 2015.

<sup>38</sup> 16 November 2015.

<sup>39</sup> 17 November 2015.



The removal by law of the minority status of women in 2006 through the LCMPA improved the position of Basotho women but the country's traditional culture still holds strong. For example:

‘A Basotho man will still introduce his family as “his children” and that includes his wife’ (Gymm 2015).

Whilst legislation has increased and improved the rights of women on paper, there is still a long way to go before this makes a difference to women on the ground, because the patriarchal attitudes are so engrained in our culture that it will take some time to eliminate them.

Today, Basotho women face severe disadvantages brought about by patriarchal culture which keeps women oppressed and makes them more vulnerable to abuse, poverty and disease. These values are strongly held, especially in the rural communities (Gymm 2015). This stance was confirmed through the voices of the women with whom I engaged in conversations. Most of them indicated that they knew about the laws that provide that they are equal partners with their husbands in marriage regardless of the type of marriage they have entered into, be it a customary or civil marriage. However they indicated that they have neither control over whom their husbands nominate as their beneficiary nor can they ask them about this because of the sensitivity and controversy surrounding the issue of death benefits. The reason for this is that, as I indicated earlier, to ask this question only serves to reinforce the stereotypes that are already held about women with regard to their husbands' benefits.

The importance of the link between patriarchy and women's access to economic resources is that, whilst women may work, they are less likely to be in paid employment than men and are also responsible for carrying out unpaid work in the home. As a result they rely largely on the income earned by their husbands to sustain themselves, their children and other caring responsibilities. It is also important to note at this juncture that that the responsibilities of care work for her household and that of her husband's family continues even after the death of her husband. As a result the woman has a legitimate expectation that the estate of her deceased husband will remain within her household to enable her to continue performing her duties.

### **3.8 The harm resulting from the strict application of the principle of *stipulatio alteri***

*'The improvement in the intestate position of the surviving spouse and the trend towards property and the steady expansion of a surviving spouse's protection against disinheritance are all too often explained as following from some single principle of justice which requires sharing of matrimonial property between spouses.'*

*(Glendon 1981)*

When the law fails to protect the rights of vulnerable people it is in essence turning a blind eye to the repercussions that are likely to be suffered by those affected. At this juncture I turn now to outline the possible and yet incomplete list of some of the injuries, damage and general harm caused by the strict application of the principle of *stipulatio alteri* in the lives of widows.

#### **3.8.1 Human rights violation**

If Lesotho has indeed ratified and thereby committed itself to be bound by the Maputo Protocol, CEDAW, SADC Gender Protocols and other international conventions whose spirit is to afford the widest possible protection for the rights of women, with specific provisions particularly for the rights of widows, it is regrettable but necessary to say that failure to so abide by such commitments in deference to the strict and harmful application of a common law principle of *stipulatio alteri* clearly constitutes a human rights violation for which the State should be held responsible.

#### **3.8.2 Damaging effects to economic welfare**

Insecure property rights perpetuate poverty and gender inequalities and lead to a vicious cycle of deprivation. Property grabbing often leads to loss of shelter and livelihoods, which further cause destitution (Kaori Izumi 2009). As indicated earlier in this paper most widows of mine workers are unemployed, their role in the family being that of home-making, and as such they rely heavily upon the benefits they receive from their husbands for the maintenance of themselves and their children. Therefore, to suddenly deny them the rights to the death benefits from their husband's estate (as a result of the strict application of the principle of *stipulatio alteri*) inevitably destines them to a life of poverty, a shocking and devastating process which Human Rights Watch so astutely describes as follows:

‘When a woman’s property rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women’s lives often resulting in poverty, inhumane living conditions, and vulnerability to violence and disease for women and their dependents’ (Human Rights Watch 2003: 30).

This unfortunate reality was triangulated during the research period when one of the widows I interviewed told me that during the lifetime of her husband, she had never obtained any formal employment because her husband provided for her and their children. But since he had died and it turned out that he had left all his employment benefits to his mother, she (his surviving spouse) has had to find employment. Unfortunately because of her lack of any skill she has had to resort to leave her home in Lesotho and take up housekeeping jobs in South Africa to earn better pay. This has meant, however, that some of her children have had to drop out of school during her working absence which has barely enabled her to eke out a living and earn just enough to put bread on the table and clothes on their backs.

### ***3.8.3 Harmful effects to health***

Kaori observes that food insecurity has the potential to drive women to engage in risky sexual behaviour of unprotected sex or sex work which increases the risk of HIV infection (Kaori Izumi 2009). It may be safely concluded that depriving a widow, who relied on the salary of her spouse, from benefiting from his death benefits in order to continue sustaining her family leads to food insecurity. This in turn may very well drive her into engaging in risky sexual conduct in her bid to achieve food security for herself and her children.

Trauma and stress caused by property grabbing is also likely to weaken the immune systems of widows, making them more vulnerable to infectious diseases including HIV/AIDS. HIV infections coupled with poor nutrition and living conditions could lead to the premature deaths of widows causing the creation of many young orphans (Kaori Izumi 2009).

A review of the relevant literature review shows that the potential of property rights and access to economic resources can help prevent the spread of HIV/AIDS by promoting women’s economic security and empowerment and thereby reduce their vulnerability to domestic violence, unsafe sex, and other AIDS-related risk factors. Conversely, the denial of property and inheritance rights drastically reduces the capacity for households to mitigate the consequences of a member becoming infected with HIV (Strickland 2004). Although none of

the respondent widows reflected any potential vulnerability to infectious disease because of their age, one can only imagine the vulnerability of younger widows with little education who may opt for sex work to maintain their children.

#### **3.8.4 Harmful psychological effects**

*'The trauma that results from severe human rights violations often leads to new human rights violations, as conflict intensifies, hatred accumulates and makes restoration of peace more difficult.'*

*(Michelle 2004)*

The psychological trauma that widows suffer due to the uncritical strict application of this principle is unimaginable. One of the widows interviewed said that for a while she thought it was not a serious issue, until she got to TEBA and was told that her mother-in-law had already made a claim and that as a result there was nothing for her. She said she went numb. The confusion, the fear for the future of her children and how she would continue overcame her because she knew that she would not get even one cent from her mother-in-law.

This terror she said was somewhat eased by a promise from the Master of the High Court that she and her children had a right to be maintained from the estate of her late husband. However, even that little hope was shattered by the judgment of the High Court that declared that benefits subject to the principle of *stipulatio alteri* do not form part of the spouses' joint estate and as such are not subject to the laws of inheritance. How unjust and tragic!

### **3.9 Knowledge of the law and the effect of stereotypes**

My fourth assumption is that the lack of legal knowledge and information about the matrimonial property regime of community of property is a result of the influence of the persistent stereotype that if a wife is nominated as her husband's death beneficiary she will kill him to get her hands on his money. This and other similar stereotypes form the basis of this paper as they persistently characterise the flood of cases that flow into the office of the Master of High Court where widows now claim that they have been disinherited from the estates of their husbands (to whom they were married in community of property) by third parties (who had been nominated as their deceased husbands' beneficiaries) and who are

claiming their rights to his employment benefits based on the strict application of the principle of *stipulatio alteri*.

I know about one stereotype in Lesotho which takes its form from the saying, '*lekoko la motho ha le thakhisoa fatse*', which literally translated means that 'the skin of a dead person cannot be dried on the ground'. This saying implies that if a person dies, someone has to be implicated in or responsible for their death. Unfortunately the widows of mine workers make easy targets for the application of this stereotype. Whenever a miner from Lesotho dies in the accidental collapse of a mine (referred to as '*Tafole*'<sup>40</sup>), such an incident is normally attributed to witchcraft. For as long as I can remember there has always been speculation that the wife of the deceased is responsible. This is because there is a myth that when a miner dies, the mine gives a lot of money as compensation and it feeds on the stereotype that because of her greed a woman would kill her husband for that money.

It is as a result of stereotypes such as these combined with their lack of legal knowledge that when most mine workers join the mines they often opt to nominate their parents or siblings as beneficiaries of their death benefits for fear that if they nominated their wives, they would kill them in accordance with these stereotypes.

The reality is that while stereotypes may persist to a certain extent with some men (as emerged from the discussions with some miners), it also became apparent that both the miners and the women who were interviewed have a certain level of awareness of the laws regarding the administration of estates as well as the importance of act of nomination (based on its consequences). They gained their awareness either from observation or from information dissemination by different stakeholders concerning the protection of women's rights. The main problem seemed to involve the use of that knowledge to either persuade the men to nominate their wives or to even ask why they have not nominated them.

### **3.10 Conclusion**

This chapter has basically outlined the realities of the impact of the strict application of the principle of *stipulatio alteri* on the lives of the widows. It also helped to unpack what the legal position is regarding the individual estates of the spouses and on that basis the next

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<sup>40</sup> Table.

chapter will pay particular attention to what is impeding the application of the law and making it a reality on the ground.

## **CHAPTER FOUR**

### **4.0 ACCESS TO JUSTICE AND THE ROLE OF JUDGES IN PROTECTING WIDOWS AND THEIR RIGHTS**

#### **4.1 Introduction**

*'Law, whether it be customary, statute or common law, has been used as an instrument of discrimination to deprive women of that which they rightly deserve and to refuse them the recognition otherwise afforded to their male counterparts.'*

*(S.M. Seeiso 1990)*

*'All human beings are born free and equal in dignity and rights.'*

*(Article 1 of the UDHR)*

*'Men and women of full age...have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.'*

*(Article 16(1) of the UDHR)*

In this chapter I interrogate and analyse the role of the judiciary and the lawyers who are the main actors in the administration of justice in Lesotho. I examine the first duty of lawyers which, as officers of the court, is the duty to direct the courts in the paths of administering justice for the people of Lesotho who are also their clients and to whom they also owe certain duties. I also look into the duty that the courts/judges owe to the parties to uphold justice and human rights. The chapter concludes by giving an outline of the adverse consequences of lawyers misleading the courts and the failure of the courts to be proactive in protecting the human rights of people.

#### **4.2 The duties of lawyers to the court and their clients**

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession (OHCR).

A lawyer's duty to the court, can be categorized as follows:

- (a) A general duty of full disclosure owed to the court;
- (b) A general duty not to abuse the court's process;
- (c) A general duty not to corrupt the administration of justice; and
- (d) A general duty to conduct cases efficiently and expeditiously.'

(Martin 2012).

Of all the duties mentioned above, the lawyer's duty to the court is paramount and must be performed, even if their client gives instructions to the contrary. A lawyer's duty to the court arises out of their special relationship with the court as an officer of the court. The essence of these duties is the requirement for lawyers to act professionally, with scrupulous fairness and integrity and to aid the court in promoting the cause of justice.

This duty to the court overrides the duties owed by a lawyer to their clients or others. The lawyer's duty to the court includes candour, honesty and fairness. The duty is actually owed to the community in general as a matter of the public interest in the administration of justice. A breach of the lawyer's duty to the court constitutes unlawful conduct (OHCR) and (Martin 2012).

The effectiveness of the administration of the justice system and public confidence in the courts substantially depend on the honesty and reliability of lawyers' submissions to the court. According to the findings, it is evident that lawyers who are proponents of the principle of *stipulatio alteri* to disinherit widows do not first consider their obligation to the court by directing it to the right laws in that lawyers who allege boldly to a court of law that the benefits of employment of a spouse married in community of property commit an act of deliberately misleading the court and misadministration of justice.

### **4.3 The duties of the courts to uphold human rights**

Administration of justice is the primary function of the judiciary. By the administration of justice is meant the maintenance of rights within a political community (Farooq 2012). Once the facts between the parties have been established, the court proceeds to decide what law is applicable to a particular controversy or circumstance. At this point the judiciary becomes the interpreter of laws, which is the primary function of the judiciary. The judiciary plays an



important role in determining what the law is and when two laws are apparently in conflict with each other, which one shall prevail.

In case any law is found to be conflict with the country's Constitutional provisions, the judiciary is empowered to declare it illegal. The judiciary also acts as the defender of the rights of individuals. This role is important as it prevents an individual's rights from being violated. In other words, the judiciary is the watchdog of the rights and liberties of the country's people (Farooq 2012).

Taking this background into account, it is upon the judiciary to first determine *mero moto* (if not advanced by the parties to the case) that there is a clear conflict of laws in cases of this nature. Then, instead of overruling the application of the laws of inheritance based on its past precedents (which is what the courts are doing in the many cases referred to), the court should take it upon itself to pronounce on what relevant legislation should be applicable and apply it to the case at hand.

#### **4.4 Judicial activism as the key to the protection of widows' rights**

*'The point is that neither society nor culture actually does anything for both are abstractions.*

*It is people who act and by acting, create and perpetuate their culture and its society.'*

*(Tsanga 2003)*

*'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'*

*(Article 8 of the UDHR)*

A claim against a deceased estate differs only in the need for more than ordinary care, a need which arises from the fact that the other party to the alleged transaction is no longer alive to give his or her version (*Rens v Esselen & Others*<sup>41</sup>). This statement very accurately describes the reason why the utmost caution and high level of judicial activism should be observed by the courts when approaching cases of the nature discussed in this paper involving the principle of *stipulatio alteri*. For example, alive to the court's authority to question the

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<sup>41</sup> 1957 (4) SA 8 at 14.

application of the principle of *stipulatio alteri*, Majara, J said the following in the case of *Mako v Mako CIV/APN/424/2012*:

‘While I am in respectful agreement with the position of *stipulatio alteri* the question that I am faced with given the particular circumstances of the present case is whether the principle should apply in equal force to the present facts...’

The facts in question concerned the provisions of the DCPFA, 2008. It is my contention that the courts are also at liberty to ask and should ask the same question in cases where the principle of *stipulatio alteri* is being used to apply to people who are not covered by the DCPFA.

My fifth research assumption was that the failure by the courts to be judicially active in protecting the rights of widows contributes to the violation of women’s rights to inheritance. On the ground I found that there is a distinct lack of judicial activism, due to the judiciary’s heavy, unquestioning reliance on its misguided precedents and the evidence brought by the lawyers who present their clients cases before the court. In an interview, one of the judge’s clerks emphasised the fact that judges rely on the evidence brought before the court and if the defence fails to convince the court that despite the principle they are still entitled to inherit, then the hands of the court are tied.

I then turned to examine the case of *Rens v Esselen & Others* (above) in which Ludorf, J pointed out:

‘Courts have to be careful of potential beneficiary to deceased’s estate who claim that deceased people made statements favourable to them. Courts have to scrutinise statements with care as it is easy to conceive of attempts by potential heirs being made to dishonestly gain advantages.’

It became apparent from my findings that when faced with cases where a third party is seeking to enforce the principle of *stipulation alteri* against a deceased’s widow, the Lesotho judges never invoke the necessary scrutiny that they should regarding either the deceased’s nomination of the third party itself or the effects such nomination may have on the widow and the deceased’s other dependents.

#### ***4.4.1 The effects of the courts' failure to be judicially active***

There is no doubt that the historical and persistent failure by the courts to protect the rights of widows whose rights have been prejudiced by the enforcement of the *stipulatio alteri* principle has adverse effects to the rights of widows generally. Over and above that, however, there are also according to my analysis other effects more detrimental in their scope to the judicial system itself and they include amongst others:

- As I looked into the different judgements that upheld the *stipulatio alteri* principle particularly with regard to benefits of employment from deceased mine workers, I observed that there is considerable collection of wrong judicial precedent which is entrenched by the continued reference to those cases.
- It has also been my outlook into the future that there is potential likelihood of ultimate break down of trust and confidence in the judicial systems by vulnerable people. If all the widows who came to court seeking protection of their estates based on what they have been taught by various legal education programmes by NGOs and various ministerial personnel who have the stake in the issues of women empowerment, if the court fails to protect those rights it is most unlikely that they will trust the system to afford them justice in any other case.
- I also observed, through the enlightenment of a colleague, that the judiciary's exclusive and heavy reliance on the evidence brought before it by the parties exposes the courts to manipulation by unscrupulous lawyers. Based on my review of the relevant literature and analysis of women's human rights, it can be safely and respectfully concluded that the manner in which the judiciary has applied the *stipulatio alteri* principle has been incorrect and harmful as a result of unscrupulous lawyers exploiting the misguided wrong precedents in order to continue misleading the courts. And if judges continue to turn a blind eye to this highly questionable ethical situation, the position will remain unchanged and widows will continue to be prejudiced.

#### **4.5 The impact of the fragmented laws**

*'Frequently, States Parties have constitutional provisions, laws, regulations, procedures, customs and practices that are based on traditional gender-stereotypes and norms and are therefore discriminatory and deny women full enjoyment of their rights.'*

*(CEDAW 2015)*

According to my sixth assumption the laws of Lesotho regarding what constitutes matrimonial property are fragmented leading to ambiguity and discrimination against widows and their rights.

There are many various pieces of national legislation that can be used to protect the rights of women dating from as far back as 1935, starting with the Administration of Estates Proclamation to 2006 and the Legal Capacity of Married Persons Act which both abolishes the marital power of husbands over the person and property of their wives and the legal requirement that spouses married in community of property consult each other concerning anything that will affect their joint estate. In my personal experience it takes a very diligent lawyer to find, understand and make use of all these laws in inheritance cases, particularly because they are not all ideally located in one single area of, say, family law, but are rather scattered all over the legislative body of work, including the country's labour laws.

As a result, the fragmentation that is widespread in terms of years and class of law leads to ambiguity and uncertainty. For instance, before I embarked on this extensive research it never crossed my mind that I could use the Labour Code to defend the inheritance rights of a widow from the estate of her deceased husband in the form of employment benefits which are not clearly stipulated in the Marriage Act.

I have also come to realise that without first taking the women's law approach and analysing all the laws that seek to protect the rights of women and analysing them against those that have a negative impact, it is impossible to calculate the potential prejudice of gender neutral laws. Therefore it was only by employing this methodology that I came to realise that the fragmented laws of Lesotho, although designed to protect women, also have the potential to be abused and used to prejudice them. The current fragmented state of the law means that there is a need for a comprehensive consolidation of all relevant pieces of legislation which

clearly stipulate, for instance, as to the point at which a salary forms part of the joint estate. Furthermore, just as the DCPFA has a provision to protect the employment benefits of public servants, so there should also be a similar regulation of employment benefits for those who are not public servants and such provision should accord with the Labour Code. Such consolidation and protective provisions should be put into a single piece of legislation which is easily accessible.

#### **4.6 Identifiable gaps**

*‘Information dissemination cannot be centred on legal remedies alone but must of necessity also put very strong emphasis on the psychology of self and critical empowerment socially economically and politically if women’s empowerment is perceived as an ultimate.’*

*(Tsanga 2003)*

It emerged from the findings that in fact to a considerable degree women are aware that the salaries of their husbands belong to both of them and that they have to decide jointly how they are administered. However, the main gap occurs in most women’s failure to use this legal knowledge because of cultural attitudes. Since the issue of death in the context of this paper is what makes employment benefits such a sensitive issue, women seem to be unable to ask their husbands the name of the person they have nominated as the beneficiary of their employment benefits for fear of being accused of greed or affirming the stereotypes about them. This is a gap because there is knowledge which people are failing to use.

Another gap identified through the analysis is a lack of oversight over the administration of TEBA by the Labour Commission which results in the disinheritance of women’s rights to the employment benefits of their spouses. According to the Labour Code of 1992, TEBA is a labour agency which has to comply with all the laws of Lesotho. Further, according to section 78 of the Code, death benefits should be dispatched to the Labour Commissioner for him to administer them in accordance with laws of Lesotho. However, according to my personal knowledge and what I learned from the Labour Commissioner, this does not happen at all, and this leads to a gap in the application of relevant laws that have the potential to protect the rights of widows.

This gap is detrimental to women because by failing to deliver such benefits to the Labour Commissioner for administration in accordance with the laws of Lesotho, TEBA instead leaves the decision to the courts, thus exposing women to the prejudice of the strict application of the common law principle of *stipulatio alteri* or to the vulnerability of having no money to defend their rights in the courts.

It emerged from the research that there is a plethora of enabling legislation in both international and national laws which is available to promote women's inheritance and property rights. There is however a failure by the lawyers (defence lawyers) to engage this enabling legislation for this purpose. As one lawyer said it also depends on what the defence lawyers say in advancing the rights of the widow to persuade the court to rule in their favour. On the same note, another gap is also the failure by the courts to be pro-active and use those enabling laws to advance protection for the rights of widows.

In all the cases that I read where the application of the principle *stipulatio alteri* was being applied to disinherit widows, not one of the widows' lawyers raised the international instruments as the starting point, none raised section 5 of the LCMPA which provides for consultation between the spouses in their dealings and further in neither of the cases was the application of common law rebutted for application of a more specific statutory provision in accordance with the rules of interpretation (Botha 1998). This means that the judicial precedents that uphold the application of the common law principle of *stipulatio alteri* is taking precedence over the actual law which should be applying.

#### **4.7 Conclusion**

It is clear from this chapter that the responsibility for the protection of human rights for everyone lies heavily on Lesotho's judiciary and lawyers. Obviously a less than pro-active judicial system with little or no intention of protecting the rights of widows will continue to expose itself to unscrupulous lawyers who will continue to misuse its misguided precedents on the principle *stipulatio alteri* to further mislead the courts in order to further disinherit widows. The next chapter will provide general conclusions and recommendations based on the research findings.

## CHAPTER FIVE

### 5.0 CONCLUSIONS, RECOMMENDATIONS AND INTERVENTIONS

#### 5.1 Introduction

*'African government's failure to develop comprehensive programmes that raise people's awareness of State law means people are often oblivious of the nature of State law even though it is generally applicable to them. This means that the bulk of the population who live in the rural areas are often unaware of the substance and operation of the laws which affect them.'*

*(Tsanga 2003)*

Even where family property remains undivided, it cannot assure subsistence for long when a family loses a provider through unemployment or death. For the majority of families, traditional assets of real property cannot take the place of income (Glendon 1981). During the time that I immersed myself in an interrogation of the laws of Lesotho to determine whether there is a need for the expansion of the definition of community of property, I came to realise that, on the basis of the findings in chapters three and four, there might be less of a need for this expansion and more of a need to (1) consolidate all the laws (in the light of the existence of enabling legislation with regard to administration of deceased estates) and (2) make sincere efforts to promote the proper use of such laws by both the judiciary and women. It is on this basis that the following conclusions have been made:

#### 5.2 Conclusions and recommendations based on the study's findings

It is my overall contention that the strict application of the common law principle of *stipulatio alteri* that totally disregards the plethora of statutory provisions relating to the administration of joint estates and the laws of inheritance prevailing in Lesotho is prejudicial to widows' rights of inheritance to their late husbands' estates and hence illegal.

5.2.1 (The first research question) Does community of property extend to (i.e., include) the employment benefits of the spouses? My conclusion based on the findings is that it is indeed the case that community of property extends to (i.e., includes) employment benefits (Weitzman 1985). Therefore, any contract entered into by the miner and employer that purports to exclude the miner's spouse from benefiting from the

benefits of his employment is in fact unreasonable, highly prejudicial, unfair, lacks proper business ethics, and is without legal merit (see, *Senti v Total Lesotho (Pty) Ltd CIV/APN/11/2010*).

This conclusion is based on the fact that benefits of employment are wholly or partly financed by the deceased's earning as such in line with the definition of what constitutes community of property the other spouse should be entitled to a share at least to the extent of the contribution made by their spouse. Because, the confusion of this principle emanates from a conflict of laws, I recommend that there has to be a clear limitation on the application of a common law principle of contract that encroaches into the statutory family law arena. Because to uphold the allegation that a man married in community of property is free to do as he pleases with his salary so long as it has not yet come into the joint estate makes a mockery of and indeed defeats the whole meaning and purpose of common law community of property.

5.2.2 (The second research question) Does the strict application of the principle of *stipulatio alteri* designed to disinherit widows constitute a violation of their human rights in accordance with the provisions of international law? In line with the provisions of the international instruments with particular reference to article 21 of the Maputo Protocol, it is my conclusion that the strict application of the principle in this regard does indeed violate the widow's rights to property both under domestic and international laws and as such should be regarded as a form of property grabbing. It is evident from the findings above supplemented by the case study that there are quite a number of women who have been prejudiced by the application of the principle of *stipulatio alteri* in the High Court of Lesotho and elsewhere in the world.

On the basis of this conclusion it is my recommendation that the legislature in Lesotho should define and address property grabbing perpetrated against a widow by her in-laws and/or other community members or even the fraudulent disbursement of property by a spouse (see, the case of *Shozi v Minister of Justice, Kwazulu*, above) by either adopting a specific and comprehensive offence which encompasses even property in the form of employment benefits for property grabbing or address it through other related offenses.



A specific offence of property grabbing should define it as the taking of property of a deceased person from the surviving wife and/or children to whom it stands to be distributed pursuant to inheritance laws prevailing in the country at the time (Advocates for Human Rights 2014). This will help secure the rights of widows. Legislation should outline aggravating factors, such as: where the property taken is valuable or important to a widow's livelihood; the taking causes significant loss to the widow in the light of her circumstances and the perpetrator takes advantage of the victim's status as a widow or other vulnerability (Advocates for Human Rights 2014).

- 5.2.3 (The third research question) Is the nomination by most mine workers of a person other their spouse as their beneficiary based on stereotypes and a lack of informed understanding of the implications of their act? From the findings it is apparent that there are a number of factors that influence a mine worker's decision to nominate a beneficiary to his employment benefits. Some nominations are made while the employee was still a bachelor and there may have been an oversight in later reviewing and amending the nomination to include his wife; other nominations are specifically essentially made to deliberately disinherit wives by replacing them with the names of concubines, while other nominations are made purely made under the influence of stereotypes and a full and proper understanding of the implications of their act.

Here, I recommend that the government of Lesotho through all relevant line ministries on issues of law and women's rights should embark on a huge campaign to sensitize all its various communities on the effects of stereotypes, particularly relating to this particular problem. Also, it is recommended human resource officers constantly advise employees to update their files and make it mandatory to nominate their spouses and children. Furthermore, because the persistence of stereotypes of this nature are common knowledge in Lesotho, when cases on this nature come to the courts, the courts should *mero moto* afford women wider protection to their rights rather than taking an armchair approach. This is judicial activism.

- 5.2.4 (The fourth research question) Is the lack of legal knowledge and information about the community of property matrimonial regime a result of the influence of the persistent stereotype that if a wife is nominated as the beneficiary on the death of her husband, she will kill him to get her hands on his money? The findings on the ground

revealed that the bulk of mine workers (as indicated in chapter three) are illiterate in terms of formal education which, factored together with location and the influence of actors and structure, can easily lead to strong beliefs in some of the stereotypes.

However, it emerged from the conversations with some of the widows and miners that they have a basic knowledge of the community of property matrimonial regime as some of the women indicated that they get the information from either the NGOs that disseminate information within the communities or from television and radio programmes. However, what now seems to be the problem for women is how they use or rather fail to use their knowledge: either, before their husband dies, by asking them whom they have nominated to be their beneficiaries and insisting that they be nominated; or, after their husbands' death, due to expenses of securing a lawyer to defend them; or, in the worst case scenario, being barred due to the application of the common law principle of *stipulatio alteri*.

It is therefore my recommendation that the government embarks on a campaign to eliminate all forms of stereotypes against women and girls in line with the international provisions which protect the rights of women so that women are empowered to use their knowledge of the law in every possible setting, ranging from their humble homes to the lofty courts. Empowerment in this sense can come in the form of widespread national information dissemination which extends to include men and be so inclusive that it makes the open discussion and questioning of stereotypes a matter of ready and easy conversation. Making this information widespread will make it easier for married couples to start openly and freely discussing the sensitive issue of nomination. In such a socially conducive climate wives will feel free to ask whom their husbands have nominated as their beneficiaries

For purposes of access to the courts, it is paramount for the government of Lesotho to afford decentralised legal aid services to its entire population. This may require giving jurisdiction to magistrates courts to deal with cases of this nature (inheritance cases) because these are found countrywide. This makes them far more easily accessible and affordable to the majority of people than the High Court which is situated only in the capital and is more expensive to access than the magistrates courts.

5.2.5 (The fifth research question) Is the court's failure to be judicially active in the protection of women against the strict application of the principle of *stipulatio alteri* contributing to the violation of women's rights to property? From the findings it became apparent that there is indeed a tremendous level of failure to exercise judicial activism. This was triangulated by the admission of a judge who said that judges rely solely on the evidence brought before them in court to make their decisions. This was corroborated by triangulation with the approach adopted by Majara, J in the case of *'Mako v 'Mako CIV/APN/424/2012*. Faced with a case involving the principle of *stipulatio alteri* where she had the opportunity to afford wide spread jurisprudence that would protect the rights of others, Majara, J limited her judgment exclusively to the Defined Contribution Pension Funds beneficiaries. In my respectful opinion, had she left the decision open, the implication of her decision would have had far-reaching protective benefits for many more vulnerable widows and children who are constantly prejudiced by the application of the principle but unfortunately are not covered by the DCPF rules.

It is therefore recommended that judicial officers should exercise their discretion to provide wider protection for the rights of women. For the courts to allow a spouse to dispose of assets of the joint estate in this manner is tantamount to contributing to the defrauding of the joint estate. Courts should take on a broad approach in the interpretation and application of a common law principle that has unconscionable results and that infringes upon the rights of others, to include the surrounding circumstances and to question critically the effect of the principle so as to reach a reasonable out come.

The establishment of domestic courts as specialised courts to deal with family issues will enhance the capacity of judicial officers to deal with issues affecting widows with the sensitivity they deserve and the required caution. This is another way to increase the judiciary's responsiveness to domestic violence. This can be done through courts that handle only domestic violence cases which include issues of inheritance rights.

Dedicating part of the court system to domestic violence issues sends a message to the community that violence will not be tolerated. Because all domestic violence cases are dealt with by the same group of judges or prosecutors, these individuals are able to

gain expertise in the issues and to ensure more consistency in the treatment of these cases. They will be more sensitive to the needs of victims and be able to direct them to additional community resources (Minnesota Advocates for Human Rights 2003).

Capacity building for reporting and information dissemination and help in the elimination of stereotypes and empowerment of women is recommended for judges, judges' clerks, lawyers, the Labour Commission, NGOs, the Master of the High Court and the media.

- 5.2.6 (The sixth research question) Are the laws of Lesotho regarding what constitutes matrimonial property unclear and ambiguous and as such leading to discrimination against the rights of women? From the literature review I found that the Marriage Act of Lesotho does not define expressly what constitutes community of property. The LCMPA also does not expressly say to what things the spouses should consult one another but simply provides that they should consult each other on anything that has implications for the joint estate. I also discovered that the Marriage Act and the LCMPA are both silent on the issue of inheritance of the property of the spouses married in community of property.

However these are regulated by the obsolete laws of inheritance of 1935 which are not specific. It is also important to note that the fragmentation is made worse by the fact that while widows of public servants may be protected by the DCPFA which provides that distribution of benefits of the member will be made in accordance with the laws of Lesotho, those whose spouses were not public servants are not afforded the same protection because the laws that regulate pensions is silent on the issue.

It is my recommendation therefore that there is a need for a comprehensive consolidation of the fragmented laws that deal with the laws of inheritance, the matrimonial property regime and the administration of estates. Clarity on what constitutes the joint estate must be clearly stated so that it is not left for the court to infer. It is important that the national legislature enact protective legislation around the property rights of widows (Kaori Izumi 2009). A suitable legal and policy framework is fundamental to protecting women's property and inheritance rights.

Succession, family and land laws need to be complemented by government policies that support the rights of widows.

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