

---

**‘WIDOWS AND DAUGHTERS WITHOUT HOPE’: INTERROGATING THE  
CONCEPT OF ‘CUSTOMARY HEIRSHIP’ IN LESOTHO**

---

**BY**

**Palesa MPAPA**

**Supervisor: Ms Rosalie Katsande**

**A Dissertation submitted in partial fulfilment of the requirements for a Masters Degree  
in Women’s Law, Southern and Eastern African Regional Centre for Women’s Law,  
University of Zimbabwe**

**2014**

## ABSTRACT

In Lesotho there is an alarming and disturbing practice among ‘customary heirs’ who, instead of caring for the deceased’s widows and daughters, routinely dispossess them causing their destitution and homelessness. Sadly, widows and daughters are without hope because the law and their families fail to assist them. This widespread, rampant abuse continues to take place unabated. Deep down the problem lies with the courts’ interpretation and application of section 14(1) of the Laws of Lerotholi. The section protects the ‘customary heir’ by prohibiting his being dispossessed of a greater portion of the deceased’s estate. It also imposes on him the responsibility of maintaining the deceased’s dependants. In practice, while he has the authority to share the deceased’s property with his brothers, the danger is that ‘the customary heir’ may do so even to the detriment and exclusion of the deceased’s widows and daughters because, under the law, they cannot inherit. The Constitution of Lesotho fuels this problem. It retains the constitutional model of strong cultural relativism in that section 18(4) of the Constitution allows the unfettered application of customary law which flies in the face of the spirit of international human rights. As a consequence, ‘customary heirs’ do not fulfil their responsibilities to the widows and daughters of the deceased. In an attempt to curb this abuse, people have resorted to writing wills that dispossess the ‘customary heir’, but, despite this, the courts still feel inclined to enforce the position of the Laws of Lerotholi irrespective of prevailing realities. In other words, the law as it stands and is enforced through the courts is allowing ‘customary heirs’ to abuse their dependents who are the widows and daughters of the deceased with impunity. This study, conducted by a legal officer at WLSA (Lesotho), interrogates the concept of ‘customary heirship’ as applied in Lesotho and whether it is still meaningful and relevant. Using a combination of methodologies, conducted within the ambit of the grounded women’s law approach, it emerged from the research data that ‘customary heirs’ do not maintain the deceased’s dependants and that ‘customary heirship’ has lost its meaning and relevance as a result of current socio-economic realities. A vital finding of the study is its verification of ‘living custom’ which offers hope to dependants because it reveals the living reality of how the Basotho respond positively to increasingly challenging and changing socio-economic realities in the realm of recognising and protecting widows’ and daughters’ inheritance rights. Hence, the study’s recommends constitutional reform which will recognise and embrace ‘living custom’ as a legitimate source of law and the recognition of the right of unlimited freedom of testation in order to protect the inheritance rights of widows and daughters. The conservative attitudes of the Basotho will also need to be addressed through the dissemination of educational material before and during the implementation of such law reform so that their benefits may be fully understood, accepted and enjoyed by the populace and its intended beneficiaries. Lastly, the courts will need to make full use of the opportunity ‘living custom’ affords in the positive development of the law.

## **Declaration**

I PALESA MPAPA, certify that this dissertation is my original work. It is an honest and true effort of my personal research. I certify that the work has not been presented anywhere else before for any other thesis.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Submitted through the supervision of ROSALIE K. KATSANDE to the Southern and Eastern African Regional Center for Women's Law University of Zimbabwe (SEARCWL).

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

## ***Dedication***

*This dissertation is dedicated to all daughters in Lesotho. Our struggle continues!*

*To my loving parents,*

*MapalesaMpapa and MafekaMpapa,*

*My brothers,*

*Relebohile and Pholoho.*

*My parents studying away from home,*

*Chobokoane and Seetsa's family.*

*My sisters,*

*Hlompho, Mosili, Senate, Mookho, Madeliwe and Litsabako.*

*My friends,*

*Mats'eliso, Rets'epile, Mannini and Masethothi.*

*My relatives,*

*Life is all the brighter because of you. Extending thanks in memory of my grandmothers,*

*Mats'otangMpapa and MalebusaSeetsi.*

*Women and Law in Southern Africa Research and Education Trust (WLSA) - Lesotho*

*For the support, love and unceasing encouragement throughout my studies. Knowing that there is someone who cares was enough inspiration to keep me going.*

## **Acknowledgements**

I am indebted to my WLSA clients for giving me insight into the challenges that they face as women. Your lived experiences are the reason for this research. Continue raising your voices! *'Kea leboha'*.

My respondents, I am humbled by their willingness to share their experience despite their tight schedules. The research could not have been a success without your contributions. *'Kelebohilehaholo'*.

Rosalie Katsande my supervisor, I benefited immensely from your professional guidance throughout the study. I am grateful for your support and patience. *'Mazvita'*.

Prof Stewart, you have been a mother and a pillar of strength. When the way seemed tough, you were there to remind us 'there is nothing magical about it, trust yourself and you will certainly do it'. You deserve all the credit.

Prof. Tamale, Dr. Phillips, Prof. Rudman, Prof. Munalula, Prof. Himonga and Dr. Tsanga, for the professional guidance, your insights and contributions made to the feminist debates relating to women's position in society family, law and human rights regarding inheritance. You deserve a special vote of thanks.

SEARCWL staff, your contribution is greatly appreciated.

Omari, you helped me realize my capabilities and potential. You instilled in me all the reasons to always stay calm and believe in myself. You have been one in a million. *'Asante'*.

My colleagues in the Women's Law Class of 2013/2014, I benefited from the experiences of different countries. Theresia, Rachel, Sarah, Wilbert and Bruce, you created a family away from home. Thanks a lot.

I am grateful to NORAD for the Scholarship that enabled my participation in this Masters Programme.

Giving honour to the Almighty God!

## **List of abbreviations**

ACRWC	African Charter on the Rights and Welfare of the Child
AFDB	African Development Bank
AU	African Union
BLR	Botswana Law Reports
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CPWA	Children's Protection and Welfare Act
CRC	Convention on the Rights of the Child
FIDA	Federation of Women Lawyers
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
LAA	Land Administration Authority
LNFOOD	Lesotho National Federation of Organizations of the Disabled
LLR	Lesotho Law Reports
MGYSR	Ministry of Gender, Youth, Sports and Recreation
OAU	Organization of African Union
SA	South Africa
SADC	Southern African Development Community
UN	United Nations
WLSA	Women and Law in Southern Africa
ZLR	Zimbabwe Law Reports

## **List of human rights instruments**

African Charter on the Rights and Welfare of the Child 1990 OAU Doc CAB/LEG/TSG/Rev. 1 (ACRWC)

Beijing Platform of Action (15 September, 1995) Reproduced in (1996) 35 International legal Material 404

Convention on the Elimination of All Forms of Discrimination against Women December 18, 1979. 1249 UNTS 13 (CEDAW)

Convention on the Rights of the Child, Adopted by General Assembly Resolution 44/25 of 20 November 1989 (CRC)

International Convention on Civil and Political Rights. Adopted by General Assembly Resolution 2200A (XXI) PF 16 December 1966. Entered into force 23 March 1976.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003. Assembly/ AU/Dec.14. Maputo Protocol/ African Protocol on Women's Rights.

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

UN Declaration on Gender Equality in Africa 2004.

## **List of statutes**

### *Lesotho*

Administration of Estates Proclamation, No. 19 of 1935

Children's Protection and Welfare Act, No. 7 of 2010

Constitution of Lesotho Commencement Order, 5 of 1993

Intestate Succession Proclamation, No. 2 of 1953

Land Act, No. 8 of 2010

Laws of Lerotholi, 1909

Marriage Act, No. 10 of 1974

### *Statutes from other jurisdictions*

Constitution of Botswana, 1966

Constitution of Kenya, 2010

Constitution of the Republic of South Africa Act, No. 108 of 1996

Law of Succession Act Chapter 160 Laws of Kenya

South African Black Administration Act, No. 38 of 1927



## **List of cases**

### *Lesotho*

*Lerotholi vLerotholi* LLR 2010

*Majara vMajara* CIV/APN/138/89

*Mmusi and 3 Others v Ramantele*(2010 Botswana case, unreported)

*Ramootsi v Ramootsi* C of A (CIV) No. 14/08

*Senate GabasheaneMasupha v The Senior Resident Magistrate of Berea and 10 Others*CC  
No. 5/2010

### *Cases from otherjurisdictions*

*Attorney General v Dow* 1992 BLR 119 (Botswana)

*Bhe v Magistrate, Khayelisha and Others* 2005 (1) SA 580

*ChikuLidah v Adam Omari at Singida (PC)* Civil Appeal No. 34 of 1991

*Jengwa v Jengwa* 1999 (2) ZLR 120

*Mabena v Letsoalo* 1998 (2) SA 1068

*Re Wachokire* Succession Cause No. 192 of 2000 (Kenyan)

**List of figures**

Figure 1: Diagram representing the methodological choices made within the overarching women’s law approach during the research journey .....23

Figure 2: A pie chart representing the sources of data for the research.....28

Figure 3: Findings on the utilization of the CPWA to protect girl’s inheritance rights.....44

Figure 4: Summary of analysis of findings .....64

**List of tables**

Table 1: Showing key informants interviewed .....30

Table 2: Showing details of the focus group discussions conducted.....31

Table 3: Showing conversations conducted.....32

## **Executive summary**

As a Mosotho girl I grew up knowing that girls are not as important as boys in the family. I was often reminded that I am not entitled to inherit any portion of my father's estate. Working as a Legal Programme Officer at WLSA, I often interact with deceased's dependants seeking the court's intervention as a result of property dispossession by the 'customary heirs'. Pursuant to the current socio- economic conditions, the 'customary heirs' seem to be desperate for money and are looking for every opportunity of making some. Consequently, they sell the deceased's matrimonial home, rendering the deceased's dependants homeless. Oftentimes the law has had no solution for cases of this nature or it may come into play when much damage has already been done, leaving the dependants vulnerable. Widows are dispossessed of even household property, and major decisions in their families are taken without their consultation. Vulnerability on the part of daughters has been a pathway to early marriages as a means of survival. This leaves 'widows and daughters without hope' as neither the law nor the family is of any assistance.

The problem lies with section 14(1) of the Laws of Lerotholi. It ensures that the 'customary heir' is not dispossessed of a greater portion of the deceased's estate. He can only share property with his brothers to the exclusion of widows and daughters, whether the deceased dies intestate or testate. As a result of the fact that the 'customary heirs' do not fulfil their responsibility of maintaining the deceased's dependants, people have opted to write wills that dispossess the 'customary heir'. The courts still feel inclined to follow the rule irrespective of the prevailing realities. They have missed opportunities of realizing 'living custom' to develop the law for the benefit of the dependants.

The 1993 Constitution of Lesotho exacerbates the problem. It retains the constitutional model of strong cultural relativism. Section 18(4) contains a claw-back clause that allows the unfettered application of customary law. This contravenes the international human rights instruments that Lesotho has ratified. In its 2011 Concluding Observations on Lesotho, the CEDAW Committee raised concerns about its persistent discriminatory customary laws and practices, especially with regard to inheritance, necessitating constitutional reform.

In this study, I interrogate the concept of ‘customary heirship’ as applied in Lesotho. I consider whether the concept of ‘customary heirship’ is still meaningful and relevant. I sought to find out from the people whether the ‘customary heir’ still fulfils his obligation. I further considered whether the Children’s Protection and Welfare Act, No. 7 of 2011 is ever utilized to protect girl’s inheritance rights. Moreover, I assessed whether the application of a plurality of laws presents legal uncertainty in married women’s inheritance rights. Lastly, I draw conclusions from my findings and make recommendations.

I employed various methodological choices in conducting the study. The choices range from grounded theory as a tool of the women’s law approach, actors and structures approach, sex and gender analysis and the human rights approach.

I found that the ‘customary heirs’ do not maintain the deceased’s dependants. The concept of ‘customary heirship’ seems to have lost its meaning and relevance because of prevailing socio-economic realities. The Children’s Protection and Welfare Act is silent on implementation of girl’s inheritance rights and Basotho’s cultural attitudes on inheritance have not been addressed for them to appreciate the reform, therefore the Act is not utilized for protection of girl’s inheritance rights. It emerged that, in terms of custom, succeeding the deceased meant taking on a great deal of responsibility. The widow was still respected and no decision would be taken by the successor to the deceased without consulting her. It also emerged, based on the Sesotho phrase *‘lefa lea sebeletsoa’* (meaning, ‘inheritance is worked for’), girls often took care of their parents until their deaths and, for that reason they always felt the need for their daughters to inherit. This is still the feeling among the Basotho, hence the need to ensure that *‘hoaheloamantsoe a mofulesaka’* (meaning, ‘building a kraal around the words of the deceased’) which means that the wishes of the deceased are to be respected and implemented to the letter.

Interestingly, there appears to be an on-going transition in the development of customary law in the wider sense of the term which has been taking place since the codified version of customary law became effective. Ironically there is some hope emanating from the realization that the ‘customary heirs’ do not fulfil their obligations. Socio-economic realities has led to change through ‘living custom’. The Basotho appreciate the need for Constitutional reform, for the recognition of widows’ and girls’ inheritance rights. Moreover, the development of the law, the Land Act No. 8 of 2010, the Children's Protection and Welfare Act and judicial

precedent from *Ramootsi vRamootsi* C of A (CIV) No. 14/08 are giving birth to positive solutions for widows and girls. The Law Reform Commissions is currently in the process of harmonizing and codifying inheritance laws and this is expected to bring more hope.

The Basotho want to have unlimited freedom of testation. I have recommended legal reforms to inheritance laws. Firstly, there is need to abolish the ‘mode of life test’ and section 18(4) of the Constitution. Secondly, customary law should be subjected to the Bill of Rights. Thirdly, international conventions should be made part of the national law upon ratification, as Parliament is still slow at domesticating them in the normal course of its business. Fourthly, judicial officers should be sensitised at promoting gender justice by realizing and giving voice to living customary law in order to develop the law in a manner which is responsive to lived realities on the ground. Lastly, the cultural attitudes among the Basotho should be addressed to ensure that awareness is created once law reforms are effected. This struggle demands a concerted effort of everyone and political will.

## Table of contents

Table of contents.....	ii
Declaration.....	iii
Dedication.....	iv
Acknowledgements.....	v
List of abbreviations.....	vi
List of human rights instruments.....	vii
List of statutes.....	viii
List of cases.....	ix
List of figures.....	x
List of tables.....	x
Executive summary.....	xi
CHAPTER 1.....	1
1.0 INTRODUCTION AND BACKGROUND OF THE STUDY.....	1
1.1 Introduction.....	1
1.2 Historical background to the problem.....	2
1.3 Statement of the problem.....	4
1.4 Justification of the study.....	5
1.5 Research objectives.....	6
1.6 Research assumptions.....	6
1.7 Research questions.....	6
1.8 Glossary of Sesotho concepts.....	7
CHAPTER 2.....	8
2.0 THEORETICAL AND CONCEPTUAL FRAMEWORK.....	8
2.1 Introduction.....	8
2.2 Inheritance.....	8
2.3 The heir.....	10
2.3.1 <i>Male primogeniture</i> .....	12
2.4 Written instructions.....	12
2.5 Plurality of laws.....	13
2.6 Exploring the intersections.....	14
2.6.1 <i>Semi autonomous social fields</i> .....	14
2.6.2 <i>Who is a widow?</i> .....	15

2.7	Living customary law: Bridging the gap between codified customary law and social reality	16
2.8	Culture as an identity .....	18
2.9	Female discrimination: An outcome of ‘customary heirship’ .....	18
2.10	International human rights and the Constitution of Lesotho .....	19
2.11	Conclusion.....	21
CHAPTER 3 .....		23
3.0	METHODOLOGY OF THE STUDY .....	23
3.1	Introduction .....	23
3.2	Methodological framework .....	23
3.3	Sources of data.....	28
3.4	Data collection methods .....	29
3.4.1	<i>Experiential data</i> .....	29
3.4.2	<i>Key informant interviews</i> .....	29
3.4.3	<i>Focus group discussions</i> .....	30
3.4.4	<i>Conversations</i> .....	32
3.4.5	<i>Legal literacy</i> .....	32
3.4.6	<i>Legal advice</i> .....	32
3.4.7	<i>Library research</i> .....	33
3.4.8	<i>Ethical considerations approaching respondents</i> .....	33
3.5	Limitations of the study.....	34
3.6	Conclusion.....	34
CHAPTER 4 .....		35
4.0	FINDINGS AND ANALYSIS: CHALLENGES FACED BY DECEASED’S DEPENDANTS .....	35
4.1	Introduction .....	35
4.2	Are the deceased’s dependants maintained?.....	35
4.3	Reasons for not maintaining the deceased’s dependants .....	38
4.3.1	<i>Socio-economic constraints</i> .....	38
4.3.2	<i>Migration and lack of knowledge of heirship responsibility</i> .....	40
4.4	Challenges faced by widows .....	41
4.4.1	<i>Semi autonomous social fields</i> .....	41
4.5	Challenges faced by daughters .....	43

4.5.1	<i>Being homeless as a pathway to early marriage</i> .....	43
4.6	Is the CPWA utilized to protect girl’s inheritance rights?.....	44
4.7	Conclusion.....	46
CHAPTER 5 .....		47
5.0	A CASE FOR THE RECOGNITION OF WIDOWS’ AND DAUGHTERS’ INHERITANCE RIGHTS .....	47
5.1	Introduction .....	47
5.2	Opportunities created for daughters to inherit .....	47
5.2.1	<i>Utilizing written instructions: Response of the courts</i> .....	47
5.2.2	<i>Willingness to recognise daughters’ inheritance rights</i> .....	48
5.2.3	<i>Development of the law: Children’s Protection and Welfare Act, No. 7 of 2011</i> .....	49
5.3	Opportunities for the recognition of widows’ inheritance rights.....	50
5.3.1	<i>Definition of inheritance by old women</i> .....	50
5.3.2	<i>The customary concept of ‘malapa ha a jane’</i> .....	50
5.3.3	<i>Judicial precedent: Ramootsi and Others v Ramootsi C of A (CIV) No. 14/08</i> .....	51
5.3.4	<i>Development of the Law: Land Act, No.8 of 2010</i> .....	52
5.4	A case for legal and constitutional reform.....	52
5.4.1	<i>Legal reform</i> .....	52
5.4.1.1	Unlimited freedom of testation .....	52
5.4.1.2	Repealing the ‘mode of life’ test.....	53
5.4.2	<i>Constitutional reform</i> .....	53
5.5	Role of the court in promoting gender justice .....	57
5.6	Addressing cultural attitudes: Bridging the gap between cultural conservativeness and law reform .....	58
5.7	Conclusion.....	59
CHAPTER 6 .....		61
6.0	CONCLUSION AND RECOMMENDATIONS .....	61
6.1	Conclusion.....	61
6.2	Recommendations .....	62
Bibliography .....		65



## CHAPTER 1

### 1.0 INTRODUCTION AND BACKGROUND OF THE STUDY

#### 1.1 Introduction

‘My name is Mathato<sup>1</sup> and I am a married woman. I have lost both parents who were taking care of seven grandchildren. These are children of my deceased siblings. At the time of my parents’ death, the houses that we grew up in were already ruins. They were in the process of building a new house, which they only managed to complete one side of the house. The deceased’s dependants are currently staying in a shack, when it rains the water overflows making the floor damp and muddy. The situation is even worse in winter. My older brother who is expected to maintain the deceased’s dependants as the ‘customary heir’ does not care about the welfare of the deceased’s dependants. We have had a proposal from someone who wants to buy a portion of the deceased’s land. The prospective buyer has made an offer to give us the amount for the land in cash or complete building the house because he is aware of the children’s situation. However, my brother who is in the position to decide as the ‘customary heir’ does not agree with the proposal. He wants the money to buy another car for his public transport business. He is taking the decision irrespective of the situation of the deceased’s dependants. The family has tried to intervene by holding meetings regarding the matter, but the concerned brother does not attend. We even sought assistance from the local Chief who summoned him, but to no avail. I am afraid that my brother can meet the prospective buyer, seal the agreement, and use the money. At the end of the day, though we go to court, the money will be consumed, and as to whether he will be able to pay back is another matter as the children are homeless as we speak.’

Mathato’s story is not unique. Working as a Legal Programme Officer at WLSA, Lesotho, I received cases where the deceased’s dependants face property dispossession by the ‘customary heirs’, though they are expected to maintain them. I realized the trait of selfishness among ‘customary heirs’, desperation for money and willingness to sacrifice the survival of their dependants for the benefit of their nuclear families. Despite this reality, Mathato could not even afford fees for legal representation, yet seeking the court’s intervention was the only realistic alternative.

---

<sup>1</sup> One of my WLSA clients that who consulted me in July 2012, regarding the ‘customary heir’ (her eldest brother) who was not fulfilling his obligations. Mathato’s case is the reason why I decided to conduct research into the concept of ‘customary heirship’, because ever since I consulted her I started questioning the concept and its relevance.

My research has been prompted by cases of this nature, which call for an interrogation of the concept of ‘customary heirship’. My intention is to unearth challenges that occur as a result of the impact of the concept on the lives of the deceased’s dependants in order to make recommendations in the light of current socio-economic realities and realise the need to take advantage of spaces created by living customary law of the Basotho to allow for widows and daughters to inherit. This is so that the limited resources are invested within the nuclear family, for practical realization of inheritance rights of widows and daughters as enshrined in the international human rights instruments that Lesotho has ratified.

## **1.2 Historical background to the problem**

Lesotho has not been an exception to the history of colonialism that most African countries went through. Chanock (1985) notes that African men, fearful of losing power and control over women, restated a version of customary law rooted less in the fluidity of daily practice but more in an assertion of a draconian version of custom that kept women in their place. In excluding women from norm construction, a desire to control women and prevent them from ‘becoming too independent’ was a clear aim. It is worth noting that the construction of African women as not enjoying the same rights as men would have made sense to colonial officials, not least because in the Nineteenth Century, when most of the colonization in Africa took place, ‘their (white colonial) women’ were not considered to be the bearer of rights (Fraser, 1999). It would therefore have been inconceivable that the inferior native race could grant women rights which were denied to white women.

One is struck by similarities of certain theories. Mackinnon’s assertion that in northern states the law is a masculinist construct reflective of a masculinist state and protecting male interests (MacKinnon, 1989:282-84), is similar to that put forward by Chanock on the construction of ‘African’ customary law. He sees customary law as being no more than the sum parts of a selective presentation of claims by African male elites/elders and a selective understanding of said claims by male colonial officials (Chanock, 1989).

In the early 1900s Lesotho attempted to collect and formally order customary law so that there was a definitive statement of customary law. A codified version of the customary laws was created for the sake of certainty in the Laws of Lerotholi. It had seemed that this code represents the customary law of the Basotho. However, empirical studies have shown that in

many cases codified customary laws do not reflect the actual practices of the Basotho (Bentzonet *al.*,1998). The code represents the customs and practices as collected in the early 1900s, it is thus a historical version of custom. It goes without saying that 'restating or unifying' a fluid customary system provides an ossified and static picture of customary laws. Rapid and uneven social change is a characteristic of African customary laws. As society changes such codes become increasingly dislocated from the daily lives and lived realities of the people.

The creation of customary laws was affected by the externally enforced and regulated integration of Africa into the world capitalist economy (Chanock, 1985, Rwezaura, 1992). The transformation of African customary law was thus shaped by the interaction between the colonial administrators and the various African political and social systems. Western consideration of justice and morality in terms of the repugnancy tests and the opinions of the male African elders, who appeared as litigants and expert witnesses in the colonial appeal courts, were merged into what has been termed state - customary law /official customary law of the state (Woodman, 1988). It is rarely reviewed by the courts, even when legislation granting recognition to custom in the regulation and determination of certain issues is, seemingly, open to the introduction of empirical evidence on changing custom and practices. The superior courts tend to exclude the actual custom and practice of the people which is continually evolving outside the formal courts (WLSA Zimbabwe 1994, Stewart 1992).

The customary law invoked in post independent states was not the flexible dynamic custom of the pre-colonial era, but the court/state/man manufactured hand-me-down customary law of the colonial era (Banda,2005). For women, the fact that they have been trapped within the colonial state's interpretation of the construction of families, its assumptions about the status of women in customary law have posed a barrier to advancement. Despite efforts to integrate the systems of law within the post colonial states, in most African countries there is still great disparity between the customary law which is practiced by the superior courts, the interpretation of the lower courts and people's customs and practices which constantly evolve outside the framework of court decisions and interpretations (Bentzonet *al.*, 1998).

### 1.3 Statement of the problem

The problem lies with section 14(1) of the Laws of Lerotholi, which ensures that the 'customary heir' is not dispossessed of a greater portion of the deceased's estate. He can only share property with his brothers; widows and daughters are excluded from inheriting. This has to be implemented whether the deceased dies intestate or testate.

Lesotho operates a dual legal system. There could be hope for widows and daughters if the testator is married under civil law because his estate will be administered by civil/general laws which recognize that the surviving spouse and the child's share on inheritance. However, application of the Intestate Succession Proclamation, No.2 of 1953 and the Administration of Estates Proclamation, No. 19 of 1935 exclude the Basotho through the 'mode of life test' which demands that a Mosotho should have been married under civil law and abandoned the customary way of life. Reality has proven its impracticality leaving widows and daughters without hope because people do not conduct their affairs with the law in mind.

The position of the Laws of Lerotholi seems to have given more powers to the 'customary heirs' by emphasizing property inheritance as against the responsibility that comes with being the successor to the deceased's estate. Because of the current socio- economic circumstances, 'customary heirs' are seen to be taking advantage of the deceased property, by either selling it or retaining it for the survival of their nuclear families. People have responded by writing wills that dispossess the 'customary heir'. The courts still feel inclined to follow the rule irrespective of the prevailing realities. They lose opportunities of realizing living custom, to develop the law.

The 1993 Constitution of Lesotho retains the constitutional model of strong cultural relativism. It allows for the unfettered application of customary law. This has been illustrated in the case of *Lerotholi v. Lerotholi* LLR 2010 where the deceased couple from the chieftainship family had bequeathed all property to their only daughter. They had no son who could be the rightful heir under customary law. The uncle contested the will on the basis that it did not comply with the inheritance laws, either under customary or common law. The case was decided in favour of the uncle for the reason that the woman does not have the right to

inherit under the laws of Lesotho. The High Court decision was upheld on appeal with one dissenting judge out of five emphasizing the need for reform on inheritance laws.

#### **1.4 Justification of the study**

There is not much literature on the concept of ‘customary heirship’ in Lesotho. The only research on inheritance in Lesotho has been by WLSA research projects (WLSA, 1994). The aim was to investigate the concepts, practices, attitudes and knowledge of inheritance in Lesotho. The intention of WLSA studies was to investigate how inheritance practices affect different members of the family and the means by which inheritance disputes are settled. The finding of this study negated the assumption that inheritance in Lesotho is biased in favour of men to the detriment of women and other members of the family. Initially it was assumed that inheritance was mostly concerned with the legal devolution of property, but the study indicated that respondents seem to attach greater value on succession to obligations of the deceased than to inheritance of property. The WLSA regional study (WLSA, 1995) sought to explore the extent of the disparity between the term ‘heir’ as used and applied in the courts and the reality of the disposition of the deceased estate and the taking over of the deceased’s responsibility as carried out in the Southern African region. The WLSA team found that the term ‘heir’ has created problems when used to describe customary inheritance because of the tendency to emphasize inheritance of property as opposed to obligations and status.

My study will interrogate the concept of ‘customary heirship’ in Lesotho. This involves problematising section 14(1) of the Laws of Leretholi. I will start by showing how the codified version of customary law has not captured the customs of the Basotho because of the politics behind its creation. I will use my assumption that the ‘customary heirs’ do not fulfil their responsibilities of maintaining the deceased’s dependants to show that the concept has lost its meaning and relevance. I will also use my findings to prove that the current socio-economic realities of poverty and unemployment dictate that our limited resources be invested in the nuclear family because the heirs dispossess the deceased’s dependants for the benefit of their own nuclear families. In considering how section 18(4) of the Constitution of Lesotho reinforces sex discrimination on the basis of customary law, I will make recommendations that draw on my findings for cognition of widows and daughters inheritance rights in line with international human rights conventions that Lesotho has

ratified. I will conclude by making a plea to the law enforcement agencies to recognize living customary law to develop the law.

### **1.5 Research objectives**

1. To critically consider whether the concept of ‘customary heirship’ is still meaningful and relevant in the lives of the deceased’s dependants.
2. To find out whether the ‘customary heir’ still fulfils his obligation of maintaining the deceased’s dependants.
3. To critically analyze whether the Children’s Protection and Welfare Act No. 7 of 2011 is ever utilized to protect girl’s inheritance rights.
4. To assess whether the application of a plurality of laws presents legal uncertainty in relation to married women’s inheritance rights.
5. To make recommendations that draw from living customary law, current socio-economic realities and recognition of women and girls inheritance rights.

### **1.6 Research assumptions**

1. The concept of ‘customary heirship’ has lost meaning and relevance in the lives of deceased’s dependants.
2. The ‘customary heir’ does not fulfil his obligations of maintaining the deceased’s dependants.
3. The Children’s Protection and Welfare Act No. 7 of 2011 is not utilized to protect girl’s inheritance rights.
4. The application of a plurality of laws presents legal uncertainty in married women’s inheritance rights.
5. There is no need to sustain ‘customary heirship’ based on living custom, current socio-economic realities and the need to recognize women and girls inheritance rights.

### **1.7 Research questions**

1. Has the concept of ‘customary heirship’ lost its meaning and relevance in the lives of deceased’s dependants?
2. Does the ‘customary heir’ fulfil his obligation of maintaining the deceased’s dependants?

3. Is the Children's Protection and Welfare Act of 2011 utilized to protect girl's inheritance rights?
4. Does the application of a plurality of laws present legal uncertainty in married women's inheritance rights?
5. Is there a need to sustain 'customary heirship' based on living custom, current socio-economic realities and the realization of women and girls inheritance rights?

## 1.8 Glossary of Sesotho concepts

- '*Bohali*' means bride wealth.
- '*Lefa lea sebeletsoa*' is a practice according to which parents, during their lifetime, indicate who should inherit based on whether the individual has worked for the right.
- '*Malapa ha a jane*' means that 'families do not eat each other', that is, no family is expected to benefit from another family's estate in a polygynous setting.
- '*Mantsoe a mofuaaheloalesake*' means 'building a kraal around the words of the deceased', i.e., that the wishes of the deceased have to be respected and fulfilled.
- '*Mojalefa o hatakaetengtsantata'e*' means that the heir in Sesotho practice steps into his father's shoes. He assumes responsibility over all the deceased's dependants.
- '*Mojalefa*' means 'the one who eats and pays'. This means that the heir in Sesotho practice does not only enjoy the estate but also assumes the responsibility of maintaining the deceased's dependants.
- '*Nakanatsahokhoesoa ha li khomarelehloho*', means that if you borrow something from somewhere else, and you try to fit into it, it may sit there and appear as if it will change the situation, but it will never become part of you. You will always remain who you are.

## **CHAPTER 2**

### **2.0 THEORETICAL AND CONCEPTUAL FRAMEWORK**

#### **2.1 Introduction**

This chapter will utilise feminist theories to interrogate the concepts relevant to ‘customary heirship’ in Lesotho. The laws and human rights provisions that inform the study will also be analysed in like manner, noting that Lesotho has not been an exception to the history of colonialism that most African countries went through. The general law made up of the imported common law of the European colonizers operating side by side and interactively with the customary laws will be part of the analysis. Pursuant to the dynamic nature of custom, women face challenges as a result of the creation and codification of customary law as well as the application of a plurality of laws. It is in this light that the chapter will introduce ‘living customary law’ which bridges the gap between state codified customary law and social reality. It will show how it creates opportunities for challenging the state version of customary law and providing avenues for fashioning a more egalitarian world view.

#### **2.2 Inheritance**

Inheritance is one of the key ways in which ownership of a deceased person’s estate passes on to their successors. As Banda (2005) points out, ‘property ownership is a route for women to move from dependency to independence’. This is achieved when women are allowed to inherit a deceased person’s property. It ensures that women’s voices are heard within the family, involving them in decision making, elevating them from a subordinate status in which they are seen as ‘the other’ to rightful heirs of a deceased’s estate.

In terms of the customary laws, section 13(1) of the Laws of Lerotoli provides that the heir shall inherit all unallocated property of the deceased’s estate and is obliged to use the estate with the widow and to share with his junior brothers. This has to happen subject to the provisions of section 14 which requires that if a man during his lifetime allots his property or if he leaves written instructions, his wishes must be carried out provided the heir to ‘Basotho custom’ has not been deprived of a greater part of his father’s estate. Customary law excludes widows and daughters from inheriting. The widow is only entitled to use of the property and should be maintained by the ‘customary heir’ together with the deceased’s other dependants.



In terms of the civil law, the Intestate Succession Proclamation No. 2 of 1953 and Administration of Estates Proclamation No. 19 of 1953 provide for the inheritance of widows and daughters as they refer to the spouse and child's share. However, application of these laws excludes most Basotho subject to section 3 of the Administration of Estates Proclamation which is also applicable to the Intestate Succession Proclamation. It provides that these laws shall apply to the estate of an African who has shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life and who has, if married, been married under European law. It is my contention that people do not conduct their affairs with the law in mind, making it impractical to expect a Mosotho to abandon his tribal life if they are married under civil law and lead a modern life. Therefore, such laws were meant to benefit colonialists not the Basotho and the challenge is that they have not been amended.

The law of succession which appears to be so personal, like sexuality, is actually political in that the patriarchal state has an interest in it and uses it to perpetuate patriarchal interests and capitalism. The artificial division between the private and public arena are gendered spheres and gives rise to the feminist slogan '*the personal is political*'. This is artificial in the sense that there while there seems to be a deliberate decision to say the state does not interfere in the private space of the family, it clearly does, upon deeper examination, have a vested interest in it. The state is responsible for the background rules that affect people's domestic behaviour. Because the state is deeply implicated in the formation and functioning of families, neither 'intervention nor non-intervention' is an accurate description of any particular set of policies and the terms obscure, rather than clarify the policy choices that society makes (Oslen, 1995). This has resulted in a misconception that the 'natural family' exists separate from legal regulation and that the hierarchy the state enforces is a natural hierarchy created by God or nature not by the law. Hence, women are not always in a position to recognize the sources of their strategic disadvantages and legal limitations on rights to hold or inherit property. One of my respondents, a practising lawyer (King's Council),<sup>2</sup> agreed with the 'widows and daughters without hope' part of the title of this dissertation when she made the following comment:

---

<sup>2</sup> Currently the Dean of the Faculty of Law at the National University of Lesotho.

‘The reason why widows and daughters are without hope is because they are not yet there, we seem to be advocating for absent voices as they do not see the problem of not having inheritance rights.’

### **2.3 The heir**

The heir in the context of customary practices in Southern Africa seems to have been first used by anthropologists. These were white, mostly male, Europeans who had difficulty finding a single or comprehensive term that described the complex roles of the successor to a deceased’s estate. The term ‘heir’ was adopted and somehow came to subsume all the activities and responsibilities that applied to the person who succeeded a deceased according to custom. No distinction seems to have been drawn between property and status nor was there an examination carried out of the various ways that estates might have been dealt with (Matashane and Letuka, 1995). Empirical research has shown how detached from reality of people’s lives this concept has been. The person appointed successor to the deceased estate was to take over the ceremonial, advisory and support role of the deceased person in the family network. The problem that led to the distorted meaning of the term was that information was obtained from the ruling classes who were mainly men and often, as in the Lesotho case, chiefs and colonial officials. It has been suggested that these men took the opportunity to consolidate their power and to entrench or create male supremacy at the time of political uncertainty (WLSA, 1995:48). These are the people who ended up compiling the customs and practices of the Basotho to make the authoritative version of customary law.

The Laws of Lerotholi provide in section 11(1) that:

‘The heir in Basutoland shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child in the next wife married in succession shall be heir.’

The practice is that if there is no male issue in either house, one of the relatives, who will usually be the brother of the deceased’s husband, is expected to become the heir. As has been shown above, in terms of section 13(1) and 14(1) of the Laws of Lerotholi, the heir is not to be deprived of a greater portion of his deceased’s estate, whether the deceased dies testate or intestate. Actual family practice reveals that in many cases the son plays a nominal role and the widow has *de facto*, or within the family, *de jure*, control of the estate until her

death. Administrators, lower courts and families were responsive to changing economic times and put into effect formal recognition of the widow's rights to occupy the land and property of the deceased that had, seemingly, always been the purpose of custom. Yet until 1993 the Laws of Lerotholi remained unamended on the statute books (WLSA, 1994).

What became evident is that in the codification process customs were transformed into rules, which might not have existed as such in society. The translation of concepts from people's custom and practices into English codification also created misunderstandings of concepts where there was no equivalent to the local term in English.

The research conducted in Lesotho unearthed misconceptions that include showing how the term 'heir' lacks an equivalent in Lesotho practice. According to the codified customary law, section 11 of the Laws of Lerotholi reads, 'the heir shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child in the next wife married in succession shall be heir'. The superior courts went on to hold and maintained that in the legal theory of customary law '... an heir inherits his father's assets and liabilities'. The empirical study showed that there was a distinction between inheritance of property and succession to headship of a family. The 'heir' was the one who succeeds to the status of the deceased. An 'inheritee' was shown to be a person who inherited property. While the Laws of Lerotholi provide that women could not inherit property, the empirical investigation showed that people would allocate their property to a child who was a responsible person, a person that had worked for it '*lefa lea sebeletsoa*' or 'a person who needed it'. In practice, daughters were frequently allocated property on the basis of the latter criteria(WLSA,1994).

It is worth noting that customary law at community and court level often differs from its codified version. Customarily there was no property inheritance by the heir upon death of the father, but responsibility that comes with assuming the status of succeeding the deceased, hence the Sesotho phrase '*mojalefa o hatakaetengtsantata 'e*' or 'the successor to the deceased steps into his father's shoes'.

The concept of heirship is an illustration that the life blood of patriarchy is possession and control of resources. Men have to ensure that resources are passed on to the man and this is done through the heir or the principle of primogeniture to maintain patriarchy. The principles of primogeniture excluded females and all but firstborn sons from inheritance. These are some of the parts of the common law that Lesotho has adopted as a former British

Protectorate. In order to guarantee paternity and legitimacy of passage of property, men control women's sexuality in a patriarchal state. Culture and law maintains monogamy of women without disturbing the polygynous practice of men.

The existentialist feminist theory propounded by Simone Beauvoir of women as the 'other' also serves to explain the position of women with regard to inheritance. This theory provides insights into the relations between men and women that cut across cultures. It explains women's position beyond culture, custom, religion and patriarchy. The core of existentialist feminism is that women are the second sex. They are oppressed because man has declared himself as the 'self' and declared woman 'the other' (Beauvoir, 1946). Within the law of inheritance the 'othering' of women is seen though marriage under customary law. She is without legal status, she is the object and not the subject of the relationship. There seems to be a conceptual linkage with the institution of the marriage where women are married by men or are married into the man's lineage. Upon the death of her husband she is to be maintained together with his children as one of the deceased's dependants, showing that she is not seen but 'othered'.

### ***2.3.1 Male primogeniture***

Male primogeniture refers to the common law right of the firstborn son to inherit the family's estate. The rule is traceable to the feudal system of Medieval Europe. In terms of the practice of male primogeniture the eldest son inherits all the assets of the deceased to the exclusion of all his siblings, irrespective of gender or sex. Under this rule females are totally excluded from inheritance. It seems that while there are similarities between the customary rule and the common law right of primogeniture, the two rules do not necessarily mean the same thing, though the effect is the same in that both exclude women from inheriting (per Dingake, J. in *Mmusi and 3 others v Ramantele*, unreported) and under customary law the elder son inherits and shares with his brothers, to the exclusion of females.

## **2.4 Written instructions**

Section 14(1) of the Laws of Lerotoli permits a man to write instructions regarding the allocation of property during his life time. The section's focus is on men and not women, it is not gender neutral. It works on the assumption that women cannot own property. This coincides with the common law principles of coverture. The married women were essentially

chattels of their husbands, had no separate legal status and could not own property (Morrison, 2000:657). This is the section that provides for the prohibition against the 'customary heir's' disinheritance of a greater portion of the estate. If the testator goes against this restriction, the written instructions are not valid, subject to being challenged in court. This has to be complied with even in cases where the deceased did not have a son. The 'customary heir' will be gotten among the deceased brothers to inherit a greater portion.

This section presents inconsistencies between codified customary law and living customary law. The Basotho were illiterate before the advent of colonialism and the church. It seems likely that 'written instructions' were introduced for the first time as part of the codified version of customary law. It could be argued that colonialists might have equated 'written instructions' to a will which obtained in their legal system (WLSA, 1994).

## **2.5 Plurality of laws**

The existence of plural system of laws in Lesotho creates problems for women. Applicable laws include common law, statutory law, customary law as well as diverse forms of popular practice. Customary law, a form of law derived from a combination of tribal law and colonial views of natives, is notoriously disadvantageous to women (Obiora, 1997). Women's enforceable rights in customary law marriages are few. Practically the legal system of South Africa also operates for companies which recruit migrant labour of men (Gay, 1990). Nearly half of Lesotho adult male labour forces have been migrants in South Africa ever since the 1990s (AFDB, 2005). This affects the legal status of women in Lesotho, especially in view of the fact that South Africa has unlimited freedom of testation as against the position in Lesotho. Most Basotho men enter into relationships while at work and their work policies allow them to change their beneficiaries at any time. Some of these men decide to change wives from the position of beneficiaries and then substitute them with the women they cohabit with in South Africa. Both women expect to benefit from the proceeds of the man either during their lifetime or upon their deaths. Upon her husband's death, a Mosotho woman's inheritance rights will be affected. She will certainly be disinherited, yet left with the deceased's dependants, whom she has to maintain.

Plural legal system raises internal conflict of law concerns when the systems collide. It creates legal uncertainty, leaving women vulnerable to falling between the cracks of the

plural systems and being left without legal protection.<sup>3</sup> Necessity often forces women to make decisions and take action without resources or knowledge about legal rights to support them. In a dual legal system like that of Lesotho, the legality of the marriage entitling women to inherit presents problems, as Banda observes:

‘Often men marry different women under different marriage systems, creating chaos and confusion’ (Banda, 2002).

In *Majara v Majara* CIV/APN/138/89, involving a polygynous marriage, the issue was the legality of the second marriage under civil law while the first was under customary law. The court was to determine the rightful owner of the deceased’s property, depending on which was the legitimate marriage. The second civil marriage was held to be illegal because of the already existing customary marriage. One judge stated, ‘There is always conflict of laws especially with regard to marriage in Lesotho and the victims are always women.’

## **2.6 Exploring the intersections**

### **2.6.1 *Semi autonomous social fields***

Sally Falk Moore’s concept of semi autonomous social fields is a tool that assists in describing the rule-generating and rule-upholding processes which affect the position of women and gender relations, in a situation where a plurality of normative structures inform human interaction. These interactions are influenced by knowledge of a variety of norms ranging from legislation to religious norms (Moore, 1978:56). In a legal dispute within the family, most women in the African context are likely to be situated not only in the intersection between different systems of laws, but also within a plethora of normative orders that influence the choices that she can make as well as the decisions that are reached about her life by others. Complex situations affecting the position of the women emanate from institutions other than state courts such as the family, church and the cultural society at large. Thus the term ‘law’ is broader than the legal centralist’s definition and embraces extra legal forces (Bentzonet *al.*, 1998). The concept provides an analytical framework for examining the interaction between statutory provisions, court determinations and other normative structures and institutions.

---

<sup>3</sup> This has been noted by the CEDAW Committee on various state reports.

### 2.6.2 *Who is a widow?*

In general terms a widow is a person 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. However families can make access to resources difficult if not impossible for a widow if they consider that there has not been compliance with the requisite customary formalities (Aphaneet *al.*, 1995). The issue of whether a woman is regarded as a widow upon the death of her husband is one of the problems outside the formal, legal sphere that widows face. This illustrates semi autonomous social fields that are influenced by family and culture. How the widow is determined and recognised by the family of the deceased person affects not only her social status, but may also affect her *de facto* status. In Lesotho factors that affect their determination are, e.g., whether there was payment of '*bohali*'; whether or not she has mourned her husband;<sup>4</sup> whether her marriage was subject to the approval of her husband's family; and if her husband died subsequent to an illness, whether the wife took care of him, and whether the wife had a good relationship with his relatives. Powers to decide whether a woman is a widow are not given to the family by general law; however, even where the general law is applicable the family will still create a social climate of acceptance or non-acceptance of the widow creating difficulties which prevent her from inheriting from her deceased husband. So, typically, if the family does not recognise a woman as a widow, they deny her the right to bury her husband in order to build a case of neglect against her which in turn gives them the false justification for dispossessing her of the estate's property and claim it for themselves as the deceased's 'customary heirs'.

This situation is also explicable through the lens of relational feminism. Based on her research in developmental psychology in the 'feminine' decision making process, Gilligan identified a 'different voice', a voice grounded in a standard of relationship, an ethic of nurturance, responsibility and care' (Gilligan, 1982). Similarly, Robin West draws a connection between the caring ethic and sense of connectedness that women experience and their biological sex. She holds that 'women (but not men) are actually or potentially connected to other human life' because of pregnancy, nursing, heterosexual intercourse and menstruation (West, 1988). The theory locates itself in the difference theory. It maintains that women's lives are interconnected with the lives of others because of the role they play in

---

<sup>4</sup> That is whether she has gone through the mourning rituals that wives of the deceased husbands go through, and this includes among others wearing the black mourning clothes depending on the practice in the husband's clan.

giving birth. They are referred to as 'giving self'. Sometimes women forgo their right to inherit in order to maintain a good relationship with her husband's family (Armstrong, 1995:161). Yet, ironically, this same family will expel her irrespective of how much she has contributed towards maintaining it during her husband's lifetime. Such women are afraid to ask their husbands to make wills while they are alive. All this results in women investing in relations with members of her husband's family, and later being dispossessed by those same family members who feel that they are entitled to the deceased's property because they are his 'customary heirs'. In other words, once women are examined and understood as relational beings it becomes clear why their knowledge of their formal legal rights does not mean or ensure that they will assert them and why they may be reluctant to claim their entitlements.

## **2.7 Living customary law: Bridging the gap between codified customary law and social reality**

Living customary law is the law which dominates life itself even though it has not been posted in legal propositions. It brings into play the rules according to which people regulate their conduct. Thus to prevent jurisprudential analysis of law from slipping out of social context, Ehrlich suggests that legal science should pay attention to the legal traffic which takes place through harmonious human interaction in various walks of life:

'Only a tiny bit of real life is brought before the courts and other tribunals, and much is excluded from litigation either on principle or a matter of fact. Moreover, the legal relation which is litigated shows distorted features which are quite different from, and foreign to, the same relation when it is in repose. Who would judge our family life or the life of our society by the law suits that arise in the families or in the societies?' (Ehrlich, 1962:495).

On the basis of the challenges brought by the creation and codification of customary law presented by empirical studies, Bennett contends that an authentic customary law is one which exists outside the formal state structure (1981). This 'extra-judicial' system is sometimes known as the 'living customary law' which is described by Rwezaura as:

'The unwritten, irregular and highly negotiable representation of the law governing the actual social life of the people in their day to day lives often changing in response to changing conditions' (Rwezaura in Armstrong, 1993, and Himonga *et al.*, 2000).



Viewing customary law as a living system of law has the potential to advance women's rights. Living customary law is adaptive; it creates room to negotiate and finds opportunities for change as it evolves, as against the codified version of customary law which is inflexible. It is worth noting that courts have started to recognize that customary law may differ from people's day to day practice. In the Tanzanian case of *ChikuLidah v Adam Omari at Singida* (PC) Civil Appeal No. 34 of 1991,<sup>5</sup> Mwalusanya, J. noted:

‘Our customary law is a living law capable of adaptation and development. It is not immutable. The judicial role of recognizing customary law that has by evaluation been modified by society itself is very important. In the past the High Court has not been instrumental in spearheading this crusade. The courts should be courageous enough to recognize and give effect to such changes.’<sup>6</sup>

This approach does not only broaden the definition and understanding of customary law, but it also ‘directs the attention of the law enforcement agents to adopt a more critical attitude towards concepts such as customary law.’ In *Bhe v Magistrate of Khayelisha and Others* 2005 (1) SA, the applicant had approached the court on behalf of her two minor daughters for an order declaring that the rule of male primogeniture is unconstitutional in order to enable the daughters to inherit. The court found that the context in which the rule of male primogeniture operated has changed and stated:

‘Most urban communities and families are structured and organized differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which includes the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.’

Pursuant to its recognition of the social practice of the people on ground, the Court declared the applicant's daughters the sole heirs of their late father's estate. This is a positive development worthy of adoption by Lesotho as it bridges the gap between state codified customary law and social reality. The existence of ‘living customary law’ creates

---

<sup>5</sup> Unreported but reproduced in Peter C.1997.

<sup>6</sup> See also the South African case of *Mabena v Letsoalo* 1998 (2) SA 1068 at 1074H and the Zimbabwean case of *Jengwav Jengwa* 1999 (2) ZLR 120 at 128.

opportunities for challenging the state version of customary law, providing avenues for fashioning a more egalitarian world view (Nyamu- Msembi, 2002 and Stewart, 1997).

## **2.8 Culture as an identity**

The concept of ‘customary heir’ is still upheld by some Basotho people as part of their culture. This has happened despite its historical background or how the codified version of customary law has distorted the true meaning of succeeding to the deceased in responsibility not property. Culture has been described as encompassing each society’s reservoir of the best that has been known and thought in terms of its way of life. It has been associated within the nation state as a combative sense of identity and as a site of social differences and struggles (Said, 1993: xiii).

It is worth noting that legislative reform which is seen as being rooted only in western cultural ideology sends out the message that local culture is under siege and provokes an in defensive reaction (Tsanga, 2013:66). The recognition of widows and daughters inheritance rights which was excluded by what codified customary law maintains as culture is expected to bring discomfort to some Basotho as the codified version has been law since 1900 and it was enforced by the courts and other law enforcement agencies. The Basotho are a society which is culturally conservative and this attitude is reflected in the decisions of its courts. This was demonstrated in the judgment of *Senate GabasheaneMasupha v The Senior Resident Magistrate of Berea and 10 Others* CC No. 5/2010 in which it was observed that ‘our culture is unique and does not need to be distorted by influences from the South African context and the international human rights at large’. This raises the need to address the cultural attitudes of the people at the earliest steps in moves towards legal and constitutional reform. Such an approach will ensure that people will see themselves as being part of a beneficial reform process rather than as victims of changes imposed against their will.

## **2.9 Female discrimination: An outcome of ‘customary heirship’**

Lesotho has ratified international and regional instruments that bind it to ensure equality between women and men in inheritance. The Human Rights Committee (HRC) tasked with monitoring country compliance with the ICCPR, has interpreted ‘equal protection’ as:

‘Not only providing for equality before the law and equal protection, but also a guarantee “to all persons equal and effective protection against discrimination on any of the enumerated grounds” including sex.’

In terms of the customary laws, sections 13(1) and 14(1) of the Laws of Lerotholi ensure that the ‘customary heir’ is not to be deprived of a greater portion of the deceased’s estate and that he shall share property with his junior brother, to the exclusion of widows and daughters. This position of the law is applied by both Lesotho’s lower courts and upper courts. Women are denied the right to inherit regardless of whether they are first born children or the only children of the deceased who dies without sons. In the case of *Lerotholi vLerotholi*, above, the deceased couple had bequeathed all their property to their only daughter. They had no male children who could be their rightful heir under customary law. The uncle contested the will on the basis that he was disinherited of the greater share of the estate. The case was decided in his favour on the ground a woman does not have the right to inherit under the laws of Lesotho. The exclusion of women from inheriting on the grounds of being female amounts to sex discrimination. It promotes customary stereotypes of female inferiority and male superiority. It is a form of discrimination that is entrenched through the old patterns of patriarchy and male domination, incompatible with the guarantee of equal protection against discrimination.

## **2.10 International human rights and the Constitution of Lesotho**

The 1993 Constitution of Lesotho highlights the existence of plural laws and their interaction with human rights norms. It recognizes customary law as part of the formal legal system. Section 18 contains the non-discrimination clause. It contains an exception, however, with regard to personal laws and cases where customary law is applicable. In other words, the Constitution of Lesotho retains the constitutional model of strong cultural relativism. It allows the unfettered application of customary law as illustrated in the case of *Lerotholi vLerotholi*, above. The deceased couple had bequeathed all their property to their only daughter. They had no male children who could be their rightful heir under customary law. The uncle contested the will on the basis that it did not comply with the inheritance laws either under customary or common law. The case was decided in favour of the uncle for the reason that the couple’s only daughter does not have the right to inherit under the laws of Lesotho. The High Court decision was upheld on appeal with one dissenting judge (out of five)who emphasized that the case exposed a need for the reform of inheritance laws.

This is contrary to state party obligations enshrined in article 2 of CEDAW in terms of which Lesotho agrees to take steps to embody the principles of equality of men and women in the Constitution and other legislation in order to ensure their practical realization. It is also contrary to article 16 which ensures the same rights for both spouses in respect of ownership of property. The Constitution allows discrimination based on sex. It reinforces the private and public divide. It excludes discrimination by non state actors even though they are the key perpetrators in the application of personal and customary law. Inheritance rights of widows in Lesotho do not reflect the principles of equal ownership of property acquired during marriage. This contravenes CEDAW and should be abolished (General Recommendation No. 21, para 34 and 35).

Article 5 of CEDAW binds Lesotho to modify social and cultural patterns to achieve the elimination of prejudice and the customary idea of inferiority and superiority of either sex. Therefore, discriminatory customary laws on inheritance have to be modified in order to ensure the practical realization of equality. The Concluding Observations of the CEDAW Committee on Lesotho in 2011 raised concerns about the persistence of discriminatory customary laws and practices, especially with regard to inheritance, necessitating constitutional reform of section 18(4). The Beijing Platform of Action assists in the implementation of CEDAW. (Area F: Women and the economy, Strategic Objective F.1 Promote women's economic rights and independence through control over economic resources. Action (e) government has to undertake legislative and administrative reforms to give women equal rights with men to economic resources including access to ownership and control of land and inheritance.)

The African Women's Rights Protocol Article 20(b) provides that a widow shall automatically become the guardian of her children after the death of her husband. Article 21(1) requires state parties ensure that the widow has a right to an equitable share in the inheritance of the husband's property. She should also have a right to continue to live in the matrimonial house. This is contrary to inheritance by the heir, who is to be given the bigger portion of the deceased estates as the customary laws of Lesotho require. With regard to daughters, article 21(2) provides that women and men shall have the right to inherit in equitable shares of their parent's property. Emphasizing the importance of property

ownership to women, the African Commission has also required states to report on women's access to property including by inheritance (Murray, 2000).

The international community noted the suffering endured by African women after the death of their husbands. The UN Declaration on Gender and Equality in Africa 2004 emphasized that states have a duty to actively promote the implementation of legislation to guarantee women's land, property and inheritance rights. The reporting guidelines to CEDAW also required states to address rights and obligations of widows and daughters. This included their ability to inherit land, whether the rights and obligations are the same for husbands and brothers.<sup>7</sup>

Concerning the application of human rights instruments to daughters, article 2 of the Convention on the Rights of a Child binds Lesotho to ensure that there is no discrimination on the basis of birth or the child's parents and article 3 ensures conformity with the principle of the best interests of the child and both provisions are reiterated in articles 3 and 4, respectively, of the African Charter on the Rights and Welfare of the Child. According to section 19 of the Children's Protection and Welfare Act, 'A child has rights to property of his parents, but where the child is born out of wedlock, the child has a right to the property of his biological mother irrespective of the mother's marital status'. This section effectively discriminates against children born out of wedlock. While such may inherit from their mother (irrespective of her marital status), this section absolves the biological father of his responsibility and, therefore, it discriminates against the child on the basis of their birth and the marital status of their parents. This violates the spirit of both the CRC and the ACRWA.

## **2.11 Conclusion**

In this chapter, I used feminist theories to interrogate the concept of 'customary heirship' as provided for in the laws of Lesotho. I unearthed the challenges arising from the application of Lesotho's dual legal system in the light of local and international human rights standards. I made a case for the recognition of 'living customary law' which bridges the gap between the codified version of customary law and the social reality in which customary law actually lives and operates. In other words, I have suggested developing the law in such a way as to avoid the application of the discriminatory concept and principles which have grown up and around

---

<sup>7</sup> UN Commonwealth Secretariat and IWRAW, 2000 and HRC General Comment No 28 para 26.

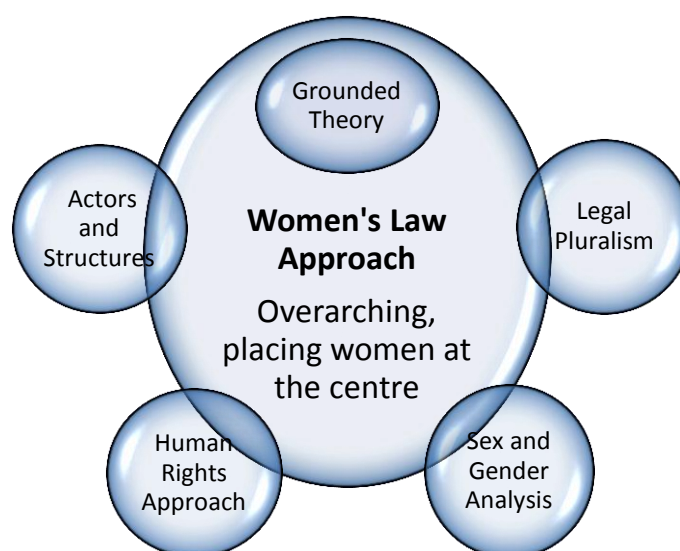
‘customary heirship’ which has for decades excludes females from inheritance and has left them without protection, vulnerable to abuse and without hope.

## CHAPTER 3

### 3.0 METHODOLOGY OF THE STUDY

#### 3.1 Introduction

In this chapter I discuss the various methodologies, sources of data and methods of data collection that I employed to investigate the research problem. My intention throughout was to unearth the challenges that widows and daughters face as a result of the application of the concept of 'customary heir' in order to make recommendations that draw on the current customary practices of the people and their socio-economic realities.



**Figure 1: Diagram representing the methodological choices made within the overarching women's law approach during the research journey**

Figure 1 (above) shows various methodological choices employed with the women's law approach as the overarching methodology that acts as a basket embracing all the other methodologies linked to it. This resonates with my study as it places women at the centre, taking women's actual lived realities and life situations as a starting point of the research.

#### 3.2 Methodological framework

My inquest began in a Women, Family, Social Realities and the Law class in which we had a discussion about the creation of customary law. For the first time some of the questions I had about the authenticity of the Laws of Lerotholi and its inconsistencies with the customary

practices of the Basotho were answered. The Gender, Law and Sexuality class gave me an insight into how historical events help one's understanding of current realities. I learned that the life blood of patriarchy is possession and control of resources. The domination of male power through their control of resources is important in patriarchy. Men have to ensure that resources are passed on to each other and this is done through their heir or the principle of male primogeniture which excludes females and all but firstborn sons from inheritance. These are some areas of Lesotho law which were adopted while it was as a former British protectorate and which, despite the country's Independence, still remain part of its law.

This discovery then inspired me to research more about the customary laws of Lesotho and in particular the concept of 'customary heirship'. I realized there was a need to talk to the people, to find out their understanding of the concept in order to assess whether the practice of the people is reflected in what is contained in the Laws of Lerotholi. This was also to investigate whether the concept is still relevant in the country's current socio-economic conditions.

The women's law approach was employed as a methodology that places women at the centre of the research. It was useful in analyzing the position of women in law and in society using data gathered on the research question, 'Does the 'customary heir' fulfil his obligation of maintaining the deceased's dependants as expected by the law?' If not, as my assumption stands, what then are the causes of the problem that could help me come up with possible solutions? This methodology relies on empirical data collected on the ground, taking women's actual lived realities and life situations as a starting point for the analysis of the position of women in law and society (Dahl, 1987:13). I held focus group discussions and conversations with the women and men in rural, urban and peri-urban areas of Lesotho. This included boys and girls from two high schools and one primary school in Maseru who shared their experiences with regard to the heir's role. I also attended a funeral in the district of Leribe, Levi's Nek where the deceased was the father who was survived by his wife and a son. I was able to gather what is expected of the son who is the 'heir' from the mouths of the uncles.

In utilizing the women's law approach, I engaged in conversations with women. Feminist theories that explain the challenges that women face in accessing their inheritance rights became obvious. I discovered from a study of relational feminism, for example, that one



challenge is the fear of divorce on women, even when the relationship is broken down, causes them to remain in the marriage and sustain their relationship with their husband's family. Some of these women knew the position under the law. Despite this and in the event of their husband predeceasing them, these women fell into the trap of allowing themselves to be exposed to the danger of being maintained by their husband's heir even though they knew they could have avoided this risk. This is when I realized that women's knowledge of their position under the law is not enough to help them assert their rights. There are a lot of issues that they take into consideration before making crucial decisions about their lives. Sadly, the husband's family that women seek to preserve relationships with, them when they feel like it, irrespective of the sacrifices that the women go through.

Initially I had thought that the position of the 'heir' in the Laws of Lerotholi was the actual practice of the Basotho even before colonialism. However, through the use of the women's law approach, which invokes grounded theory as a tool to the approach, I embarked on my research with an open mind in order to learn from the women themselves. It emerged from old women whose ages ranged from seventy to ninety, in Botha-Bothe district, Maloseng that what is codified as an authentic version of Basotho custom did not capture the practices of the people on ground. I gathered that the successor to the deceased would not inherit property; rather, he will administer the deceased's property on behalf of the deceased's dependants. What he succeeded to was the responsibility that comes with assuming the deceased's position. Hence, a Sesotho phrase '*o hatakaetengtsantata'e*' (meaning, 'he stepped into his father's shoes'). The widow will not be disregarded by the heir upon death of her husband. This resonates with Dahl (1987: 13) who maintains that:

'The existence of biological, social and cultural differences between men and women are not regarded as the main problem in women's lives, but rather law and society's systematic undervaluation of female activities, values and characteristics are seen as the main source of women's subordination.'

The women's law approach informed me as to how to analyze and interpret my data. I realized the importance of including the historical background of creation of customary law in Lesotho, which is part of the problem why women and daughters are currently subordinated, though they used to be recognized prior to colonialism. The interpretation I arrived at concerning the emerging issue informed my recommendations for the formal

recognition of women and girls inheritance rights, and making a case for constitutional reform, because the problem is reinforced by section 18(4) which exempts customary laws from the non-discrimination clause, yet those very same customary laws have not captured Basotho custom.

In pursuit of my third research question ('Whether the Children's Protection and Welfare Act is utilized to protect girl's inheritance rights') I interviewed men and women as well as boys and girls to assess whether the Act is utilized and whether they even know about such an Act. This is where I engaged in action or legal literacy, because most people I interviewed did not know about the Act. The sex and gender analysis became useful in examining how gender roles impact on girl's inheritance rights. To my surprise, I realized that there was a willingness on the part of men to give their daughters inheritance rights, while women were not as predisposed pursuant to the anticipated marriage for the girls. It became obvious that inequalities are a product of gender which is socially constructed, and can be deconstructed to achieve equality.

During the research I found it important to triangulate research methods. Triangulation of research methods is necessary in researching real life contexts because of the multiple causes that account for human behaviour. Relying on a few methods may bring into question the trustworthiness of the data, if such methods leave open other interpretations of the data. The triangulation is not intended to bring closure to an issue, but to assess whether, after the introduction of additional variables, the data still points towards a dominant inference or towards new explanations for the phenomenon in question (Tsanga, 2003:45). Pursuant to the willingness that was emerging from the focus group discussions for recognition of inheritance rights for widows and daughters, I followed up on the issue this willingness using other methods to see if this could make a case for the constitutional reform of section 18(4) based on what the Basotho want. This data corroborated the data I gathered through an interview I had with the Principal Gender Officer at the Ministry of Gender, Youth, Sports and Recreation ('the MGYSR'). He confirmed that there is willingness among the Basotho to recognize inheritance rights of their girl children, because girls usually take care of their parents. I received triangulating data confirming the same willingness from the report of CEDAW consultative meetings, which were held by the MGYSR with different communities in the country on inheritance of women and girls. The CEDAW Committee in the country's

2011 Concluding Observations raised concern about the constitutional exception to customary law on non-discrimination, affecting inheritance of women and girls.

Other research questions also pointed me in the direction of law enforcement officers as they interact with the women and girls who are actors in their quest for inheritance rights. The approach allowed me to examine the interaction between actors and structures in order to realize an opportunity of women and girls to act as agents of change rather than passive observers or victims as they negotiate their spaces (Bentzon *et al.*, 1998:101). It emerged that the courts miss the opportunity of using living customary law to develop the law. Insensitivity and lack of proactiveness also emerged from other law enforcement agencies that implement inheritance laws.

The application of a plurality of laws in Lesotho guided me towards employing the legal pluralism approach. This approach became handy in examining legal, social and cultural norms and values that women and girls engage with regarding inheritance. This brought about an understanding of widows' and daughters' perspectives of gender, and legal change in society. It emerged that there are semi autonomous social fields created by society apart from the law. I found that the absence of the payment of '*bohali*' can make it difficult or impossible for widows to inherit. This then ensures that the 'customary heir' dispossesses the widow. The determination of who is a widow makes it obvious that that, the family has assumed that role by reinforcing cultural formalities like payment of '*bohali*' even if the marriage is under civil law to pursue their interests.

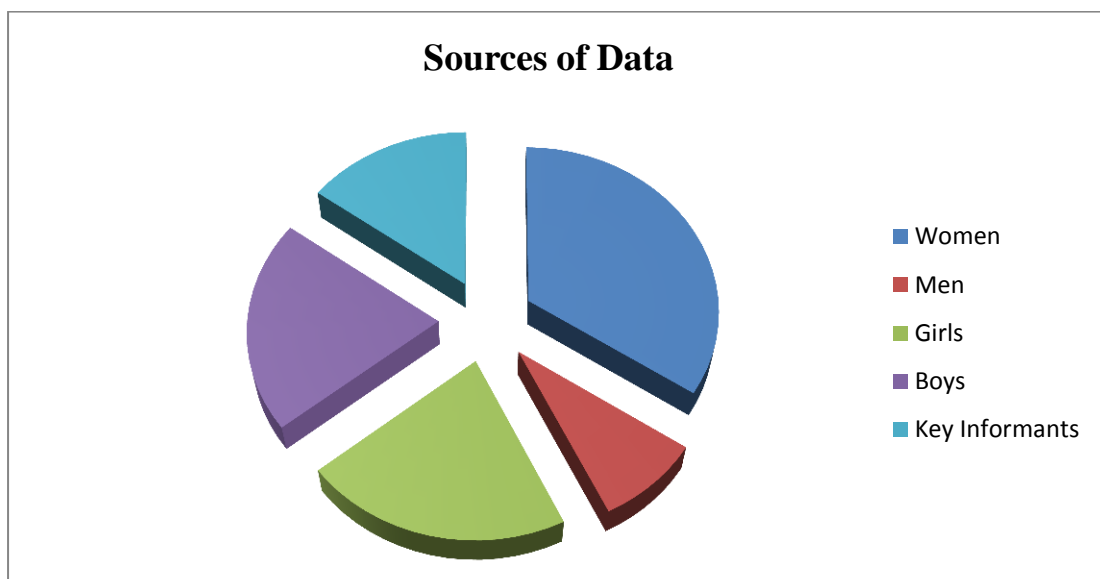
The legal pluralism approach revealed inconsistencies between the codified version of customary law and the practice of the people as well as exclusion from inheritance as a result of the application of the 'mode of life' test. I then discovered through library research and reviewing literature that living customary law can be used to bridge the gap between state law and social reality and thereby creating an opportunity to develop the law.

The human rights approach was also employed based on the fact that Lesotho is signatory to international conventions on the rights of women and girls relating to inheritance rights. Despite criticisms that have been levelled against it, the approach does provide, based on the universality of international human rights (Banda, 2005:53), the minimum standards of rights and treatment that women and girls are entitled to enjoy and the correlating obligations on the

state to ensure their implementation in order to bring about the attainment of substantive equality. The rights discourse remains important as it forces states to ensure they fulfil their role in realising the rights to which they have bound themselves through ratification. This geared my research towards interviewing government officials in order to assess their awareness of the human rights of women and girls. I was therefore able to establish what they are doing to ensure their realization of such rights. The awareness of the women and girls about their rights to inheritance was also assessed as it is important for them to demand that the state comply with its obligations.

This approach became valuable in realizing that Lesotho has not domesticated its ratified international conventions. Lesotho ratified CEDAW in 1995 but to date the state's Constitution still permits the unfettered application of customary law. I will make recommendations based on this fact as well as the other findings of this study that draw from living customary law and socio-economic realities in order to build a case for justifying the recognition of women and girl's inheritance rights in Lesotho.

### 3.3 Sources of data



**Figure 2: A pie chart representing the sources of data for the research**

### **3.4 Data collection methods**

#### **3.4.1 *Experiential data***

My experiential data became valuable in identifying the problem. It gave me insights into the problem in order to formulate assumptions and research questions. This experiential data included my being raised and growing up in Lesotho and my work as a Programme Legal Officer at WLSA (Lesotho). Among my duties at WLSA I offered legal advice to clients who were predominantly women. I also engaged with communities conducting legal education campaigns and gained insights into the lived realities of women and how they relate to the laws on inheritance.

#### **3.4.2 *Key informant interviews***

I conducted key informant interviews in order to capture and understand their perceptions about the concept of ‘customary heirship’. This was to find out whether, according to the cases they handle, the ‘customary heir’ still fulfils his obligation of maintaining the deceased’s dependants. These interviews were also aimed at learning from the key informants the challenges that widows and daughters face regarding inheritance and whether or not the developments in the law are bringing about change. I used purposive sampling to select my interviewees in conjunction with my experiential data as a legal officer at WLSA (Lesotho) to help identify the key stakeholders on matters involving inheritance of women and girls. Purposive sampling enhanced my ability to identify emerging issues, as I interviewed the key informants with an open mind using open-ended semi structured questions to probe issues.

Based on my previous experience when conducting research for my undergraduate degree, I was not looking forward to interviewing key informants for fear that they would be tired of being researched and would not make the time or effort to participate meaningfully in the research process. When I commenced the interviews, however, I was shocked to realize just how interested they were in the issues I discussed with them.

It was actually during an interview with a High Court judge that I realised that respondents get bored when researchers use questionnaires. I found that what worked was the fact that I spoke to them in conversation and made use of a voice recorder so that I could maintain eye contact with them which ensured that my interviewees and I enjoyed smooth and interactive discussions. My key informants included officers from the office the office of the Master of

the High Court, the High Court, and Local Court, Land Court, Ministry of Gender, Social Development, Law Reform Commission, Land Administration Authority, civil society organizations, private lawyers and the Chief. The data I managed to collect together with the reports I received at this stage were important for purposes of triangulation. I merged it with the data I got from the actors and compared it with provisions of the law for analysis purposes and in order to make recommendations.

**Table 1: Showing key informants interviewed**

Location/ Institution	Designation	Sex
FIDA	President of FIDA	F
High Court	Judge	F
Land Administration Authority	Land Mediator	F
Law Reform Commission	Director of Research	F
Lawgic Chambers	Practising lawyer	F
Leqele Community	Area Chief	M
Leqele Primary School	Principal	F
Lesotho Save the Children	Child Helpline Coordinator	F
LNFOOD	Human Rights Officer	M
M. Ntabe Chambers	Practising lawyer	F
Magistrate Court	Land Court Prosecutor	M
Master of the High Court	Assistant Master of the H.C.	M
Matala Local Court	Court President	F
Ministry of Gender (MGYSR)	Minister of Gender	M
Ministry of Gender, Maseru	Principal Gender Officer	M
Ministry of Gender-Botha-Bothe	Principal Gender Officer	F
Ministry of Social Development	National OVC Coordinator	M
National University of Lesotho	Dean of the Faculty of Law	M
WLSA	Programme Officer Gender	F
WLSA	Litigation Officer	F
WLSA	National Co-ordinator	F

### **3.4.3 Focus group discussions**

I held focus group discussions with women, men, boys and girls through the use of semi structured questions. My intention was to allow them to share their experiences as actors who engage with the law and the law enforcement agencies. During the focus group discussion I conducted with old women aged between seventy to ninety years it emerged that there are inconsistencies between the codified version of customary law and the living practice of the Basotho and that these originated during the codification period. This made me realize the need to research deeper into the historical background of the creation and codification of

customary laws which took place during the colonial period. This investigation became useful during the analysis stage of my findings as they support my recommendations in which I emphasise the importance of giving recognition to the reality of living customary law which bridges the gap between codified customary law and the social reality of the people on ground.

During focus group discussions my experiential data in conducting research at WLSA Lesotho became useful. I always separated women from men during research. I had noted in previous research I had conducted that women are not usually comfortable talking in the presence of men. Further, most communities in Lesotho comprise people who are related to each other through interlinked extended families. It was therefore important for me to separate the women from the men when discussing the challenges that women face in response to the conduct of their male counterparts who assume the position of heirship.

My professional background came in handy at this stage because my age and the fact that I was not married worked against me. Married people, especially adults, are conservative about matters involving family and marriage and do not like to discuss them with young people who have never been married. However, when I introduced myself as a lawyer people felt safe about confidentiality and sometimes they even received free legal advice, as the research was interactive.

**Table 2: Showing details of the focus group discussions conducted**

Respondents	Number	Location	District
Girls	10	Adventville High School	Maseru
Boys	10	Adventville High School	Maseru
Boys	9	Leqele High School	Maseru
Girls	10	Leqele High School	Maseru
Women and men	9 (5+4)	Leqele Primary School	Maseru
Girls	10	Leqele Primary School	Maseru
Boys	10	Leqele Primary School	Maseru
Women	11	Maloseng	Botha- Bothe
Men	8	Qalo	Botha- Bothe
Women	10	Qalo	Botha- Bothe
Women	10	Tayatayaneng	Berea
Women	4	Teyatayaneng	Berea

#### **3.4.4 Conversations**

Conversations were valuable for the grounded research as my intention was to learn from the people. They were supported by the use of a voice recorder which gave me the freedom to engage in interactive dialogue with my respondents, keep eye contact with them and also study their body language. Conversations provided time for my respondents to engage in deeper self reflection and an opportunity to share personal stories that could not be shared in a group. This allowed a number of women to remember even those cases that they decided to give up on and they still felt hurt when they reflected on those moments. For some this was a form of therapy as they were able to tell me stories that they had never shared with anyone as they confessed.

**Table 3: Showing conversations conducted**

Sex	Location	District
F	Ha Ts'epo	Mohale'shoek
F	Khubetsoana	Maseru
F	Matala-Local Court- Litigants	Maseru
F	Motse - Mocha	Mohale'shoek
F	Motse- Mocha	Mohale'shoek
F	Motse- Mocha	Mohale'shoek
F	Motse - Mocha	Mohale'shoek
F	Qalakheng	Mohale'shoek

#### **3.4.5 Legal literacy**

During my interaction with the women, men, boys and girls in the focus group discussion and the individual conversations, I found the need to engage in legal literacy/action research. This was informed by the respondents' lack of awareness of the law reforms, particularly the Children's Protection and Welfare Act. They also did not know the provisions of other civil laws on inheritance. The legal formalities of contracting a civil or customary marriage were not clear though inheritance rights flow from a legally valid marriage. Utilizing this tool I realized the need to 'take the law to the people' upon its promulgation as one of my recommendations because in its absence people do not benefit from reforms made to the law.

#### **3.4.6 Legal advice**

I utilized offering free legal advice in various settings as a research method. The interviews reminded some respondents of unsettled matters and pending legal issues that they still needed to follow up. Other matters were pending because the respondent did not know which



route to follow, while for some it was that they lacked funds to pay for legal advice. I did not only ask the respondents questions, but had interactive sessions with them that gave them an opportunity to ask about any legal issues they had about inheritance. In this way they also benefited and did not feel used by the process. This is where I emphasised the need for women to understand the position of their marriages in law, because it is material in determining whether they inherit from the deceased estate, irrespective of the time they had spent together with the deceased. This technique has been valuable in unearthing the nature of women's problems as it was employed in combination with open-ended interviews. It assisted in gaining knowledge and understanding about women's values and life experiences (Hellum, 1990; Himonga, 1990; Molokomme, 1990).

### ***3.4.7 Library research***

As a secondary source of data collection, library research became helpful for reviewing literature which exists on the subject. This allowed me to make linkages with other studies conducted in Lesotho and the Southern African region on the subject in order to identify my contribution to scholarship. It also provided an opportunity to make wider connections on the subject using information from other disciplines such as feminism, human rights, history and cultural studies.

### ***3.4.8 Ethical considerations approaching respondents***

When carrying out feminist research there is a likelihood of a power imbalance developing between the researcher and their respondents. I had to remain conscious that they did not become objects of the research, but rather its subjects. There was a need to prioritize the prevention of the growth or breaking down of any power imbalance in order to get the information required for the study. I ensured that we engaged in a dialogue so that my respondents also benefited from me. My offering free legal advice became valuable in ensuring that my respondents received the advice they required on matters of inheritance.

This was an effective method of ensuring the best way of capturing experiences from widows, especially those I had met at the courts as litigants in property dispossession cases. By this time they had lost hope, feeling that no one cared about them as the family that they had invested so much in had turned against them. Engaging in a conversation with them and using open-ended questions made them feel that there were people who still cared for them. They were able to share their experiences comfortably without feeling 'researched'.

### **3.5 Limitations of the study**

At the beginning of the research in the field it became apparent that my research questions were too broad as my title was initially, ‘Widows and daughters without hope’: Inheritance in Lesotho. My main research question was to identify the challenges that widows and daughters face regarding inheritance in Lesotho. Pursuant to the several challenges that they face, a lot of crucial issues emerged on the ground, some of which I did not have time to thoroughly follow up on and analyse. This then necessitated narrowing down my research to interrogating the concept of ‘customary heirship’ on the basis of one of my assumptions which is that widows and daughters currently face challenges because the ‘customary heir’ does not fulfil his obligations as a result of prevailing socio-economic circumstances. Issues that I did not manage to address that could be considered for further research include the challenges that children born out of wedlock face regarding inheritance as a result of the fact that, in Lesotho, inheritance rights flow from a legal marriage. There are challenges for girls over the age of eighteen and unmarried face as a result of the fact that our laws are silent on their inheritance rights. Lastly, there is ignorance of section 24 of the Marriage Act of 1974 which provides for the issue of a certificate to remarry by the office of the Master in order to safeguard the inheritance rights of children born to the parties intending to remarry.

### **3.6 Conclusion**

In this chapter, I presented various methodological choices used in conducting the research. Sources of data and data collection methods used to engage with the research questions to make recommendations have been discussed. Lastly, limitations of the study have been addressed to bring out crucial issues that could be considered for prospective studies in this area.

## **CHAPTER 4**

### **4.0 FINDINGS AND ANALYSIS: CHALLENGES FACED BY DECEASED'S DEPENDANTS**

#### **4.1 Introduction**

This chapter seeks to answer the main research question whether the concept of 'customary heirship' is still relevant in the current socio-economic realities. The basis for this will be drawn from the findings on whether the heir maintains the deceased's dependants as expected by the law. The challenges that women and daughters face stemming from their exclusion from inheritance will be addressed as shared by the women and girls during the research. An exploration of intersectionalities that widows find themselves in regarding inheritance will also be discussed. This will be done in the light of plurality of laws which brings into play semi autonomous social fields created by society apart from the law but which are material to women's decision making processes.

#### **4.2 Are the deceased's dependants maintained?**

The laws of Lerotholi are silent as to what maintaining the deceased's dependants mean or imply. However, emphasis is placed on the fact that he inherits a greater share of the deceased's estate. The least that could be expected is to ensure that the deceased's dependants have the basic necessities for survival, including shelter.

In the case of Mathato, whose story sets the scene in chapter one, where the deceased left nothing for the 'customary heir' to inherit, except the land on which the matrimonial home was located, she stated:

'The children are currently staying in a shack. During winter it is very cold as it normally snows and the winter season is long. When it rains the water penetrates the shelter and the floor becomes moist. Nonetheless, my eldest brother who is the 'customary heir' decided to sell a portion of land near the shack. This was so that he buys a car for his public transport business. We have nothing and the children are still suffering without a home though we could have at least built a single room with that money. My brother has refused to attend meetings when called by the family. The Chief summoned him but he refused to attend.'

The 'customary heirs' seem to abuse their position since the Laws of Lerotholi place greater emphasis on the inheritance of property. They inherit property for their personal benefit and that of their nuclear family to the detriment of the deceased's dependants.

Apart from selling the deceased's property for the benefit of their nuclear families, 'customary heirs' make decisions without regard to the deceased's widows. During an interview with a High Court judge, she narrated a case of a widow who came to court because her matrimonial home was sold without her consent by the 'customary heir'. She only realised that her house was sold when the buyer had come to measure a window of the house after having finalised its purchase from the 'customary heir'. The widow was in the house when all this was taking place, though she was neither informed nor warned about the sale. The Land Court Prosecutor confirmed this when he said:

'The reason why we have a lot of cases where the deceased dependants demand the court's intervention to order the 'customary heirs' to fulfil their obligations is enough evidence that they do not abide by the law.'

I found further that irrespective of all the contributions that the widow would have made to her husband's family during his lifetime, 'customary heirs' still expel them, or they, the heirs, would be used by other family members to expel the widows from the matrimonial home upon their husband's death. This often happens in cases where the couple has lived on inherited land, which the family feel still belongs to them, hence the need to expel the widow and retain their property. They do not consider the widow part of the family.

During the research, I interviewed a 42 (forty-two) year old widow, whose late husband had assumed the role of the 'customary heir'. The couple had lived at the husband's home, which came into his possession by virtue of his being the heir. I met her at the local court to which she had been summoned in order to show cause why she should not be evicted. She said:

'Today his family whose welfare I was taking care of is expelling me from the house which I renovated. I had assumed the responsibility of their brother as he never worked. I remember how I used to sell clothes and search for work everywhere to make sure that there is bread on the table for all of us. My husband always said 'he does not have money' and I always made sure, I

catered for all that was needed. He never bothered looking for a job, so he can help me in fulfilling his responsibility. Nonetheless, after his death his family is expelling me, despite all the time and resources that I spent.’

Widows are not only expelled or their matrimonial homes sold by the ‘customary heir’, they are also dispossessed of even their household property. A women’s rights activist from FIDA told me of a case where she had been consulted by a widow who had been expelled by the husband’s family upon his death. They took everything including the blankets she slept on. Nonetheless they sat her down *‘homoroesathapo’* to make sure that she wore mourning clothes for her deceased husband.

It can therefore be noted that the concept of ‘customary heirship’ as is currently practised has lost its meaning and relevance. This resonates with a High Court judge’s analysis of the cases that she has handled concerning the role of the ‘customary heir’. She said:

*‘Bojalefahaesalenthō e teng.Mojalefakengoanaeabotsoa, a  
sabatlenghoetsalethohobane o oatsebahorelinthoketsahae’.*

(Meaning, ‘The concept of heirship is no more existent. The ‘customary heir’ seems to be a lazy child, who does not want to do anything because he knows that everything is his. Currently they do not fulfil their responsibility as they wait for the father to die and then kick out everybody. They do not know what it means to be the ‘customary heir’. This is common and varies from what used to happen. Heirship was a burden that no one wanted to assume.’)

The concept of ‘customary heirship’ seems to be different from successor to the deceased in Sesotho custom. The successor is responsible for maintaining all the deceased’s dependants, including the extended family. A 73 (seventy-three) year old woman interviewed in Botha-Bothe district, Maloseng community stated:

*‘Lefakebathobakaharalelapa,hobahlokomela. Lefahasethepahobathepa e  
saletsehophelisabana le mofumahalioamofu.’*

(Meaning, ‘Inheritance is maintenance of the people in the family of the deceased. It does not refer to the property of the deceased. The property is to ensure survival of the dependants.’)

The Laws of Lerotholi speak of the maintenance of the nuclear family which refers to the widow, or widows, minor brothers and minor sisters. With the successor to the deceased

according to custom emphasis is on the status that he assumes and the responsibility that comes with it and not necessarily property inheritance, hence the term used is ‘*mojalefa*’ (‘one who eats and pays’). If there was anything left he will not only enjoy the estate while administering it but will also ‘pay’ which connotes the responsibility that comes with assuming the status of successor to the deceased. He was said to be stepping into his father’s shoes, ‘*mojalefa o hatakaetengsantata’e*’. This implies that he takes over the maintenance role that the father had over all his dependants. It involved providing ‘*bohali*’ (bride wealth) for the unmarried males in the family. He would also receive and preserve the bride wealth received on the marriage of female members of the family. These obligations were to be fulfilled whether there were resources in the estate to meet such or not (Matashane and Letuka, 1995:52). None of these roles is covered by the ‘customary heir’ concept in the Laws of Lerotholi as it is understood as a legal concept. The ‘customary heir’ seems to be the successor to the deceased’s property but not necessarily to the deceased’s status as the head of the family who is responsible for maintaining it.

### **4.3 Reasons for not maintaining the deceased’s dependants**

#### **4.3.1 Socio-economic constraints**

The ‘customary heir’ was entrusted to maintain the deceased’s dependants. He had to use the property for the benefit of everyone not his personal use. The circumstances prevailing at the time when almost everyone resided in one communal location enabled such arrangements to run smoothly. This was illustrated in *Bhe v Magistrate of Khayelisha and Others* 2005 (1) SA 580. The applicant sought an order declaring that the rule of male primogeniture is unconstitutional in order to enable the daughters to inherit. The court found that the context in which the rule of male primogeniture operated has changed. It stated:

‘Most urban communities and families are structured and organized differently and no longer purely along traditional lines. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family, which includes the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased’s responsibilities.’

Pursuant to the recognition of the social practices of people on ground, the Court declared the applicant’s daughters the sole heirs of their late father’s estate. It is my contention that, due to

the transition away from the traditional extended family to nuclear family settings and the money economy, circumstances today do not permit the heir to provide for all the deceased's dependants welfare. The situation is exacerbated by the depletion of land for agricultural production which used to be the source of survival. Alarming rates of poverty and unemployment also add to the problem. The number of people living below the poverty datum line is estimated around sixty percent (60%) of the population of Lesotho (AFDB, 2005). Unemployment in 2009 was estimated at 29.4 % because of the global economic crisis (Lesotho Labour Force Survey 2008 and Continuous Multipurpose Survey 2009). This has also been fuelled by retrenchments in the fragile garments sector in Lesotho and the shrinking mining sector in neighbouring South Africa (ILO, 2012).

The current economic situation is characterized by desperation for money where people are looking for any opportunity to enrich themselves. Heirs sell matrimonial homes to the disadvantage of the deceased's dependants in order to make money for their personal benefit and that of their nuclear families. One of my respondents, a High Court judge, said:

‘There seem to be current trends of desperation for money which are worse in the urban areas where the only means of survival is money for agriculture is no more relied on, hence the practice is that of selling the deceased's matrimonial house even when the deceased is survived by the widow.’

Under current socio-economic conditions, inheritance under custom which places greater emphasis on the obligation to maintain the deceased's dependants, presents problems given the limitations brought by the money economy and the shift from extended families to nuclear families where families no longer stay in one joint communal place. A 65 (sixty-five) year old woman interviewed in Mphahle'sHoek district stated:

‘In the olden days, the most valuable property to be inherited were the fields which had to be ploughed to ensure that there was food for the deceased's dependants. The agricultural proceeds will be sold to get money for educating the deceased dependants and addressing other issues that required money. Currently things have changed, agriculture is no more sustainable and the ‘customary heirs’ of this generations do not consider fields as valuable for agricultural purposes, hence they resort to selling those fields.’

This therefore paves the way for the recognition of inheritance rights of widows and daughters in that no one is expected to maintain them unless the daughters are still minors, in which case, the responsibility always rests with their mothers provided, of course, they are still alive.

#### ***4.3.2 Migration and lack of knowledge of heirship responsibility***

Over the past decades more Basotho men have migrated to escape rural poverty in search of employment in the South African mines. Since the 1990s and long afterwards, nearly half of the Lesotho male labour force was employed in the mines of the South Africa as migrants (Gay, 1990; AFDB, 2005). Many men who migrate from the rural areas leave women, children and other relatives behind to cope with added the responsibility and workload. These men include 'customary heirs' who leave their responsibility of maintaining the deceased's dependants with those that remain behind.

Migration from the country to urban centres and the consequent growth of large cities also has dramatic and instant effects on traditional family life (Helen, 1994). Lesotho has experienced an annual growth of seven percent (7 %) of rural to urban migration during the last decade (AFDB, 2005). Migration affects many aspects of family life which thrive when family members live in close proximity to each other and offer support and stability for the family which is weakened when members separate. Migration can result in more freedom for young women and men living away from the watchful eye, expectations and values of parents and relatives and close community relations become easy to erode. The traditional authority of older family members over the youth diminishes. A seventy six (76) year old woman interviewed in Berea district stated:

'Extended family members no more stay together as it used to happen. The younger generation migrates to the cities. Consequently no elders ensure that responsibility of the 'customary heir' is adhered to accordingly. Such elderly used to act as overseers that the heir was responsible to.'

The move to urban areas is accompanied by new ways of living where some heirs genuinely do not know their responsibility as no family elders are close by to ensure that the family values and customs are adhered to. Nonetheless, other heirs decide to take advantage of migration and violate the expectations and values of the family for selfish reasons.



## 4.4 Challenges faced by widows

### 4.4.1 *Semi autonomous social fields*

Complex situations affecting the position of the widow emanate from institutions other than the state courts such as the family, church and the culture of society at large. In this context legal pluralism recognizes that there are regulatory or normative systems other than the formal law that affect and control people's lives and are not to be ignored in analysis lived realities of people. The issue of whether a woman is regarded as a widow upon the death of her husband is one of the problems outside the formal, legal sphere that widows face. This can make it difficult or impossible for a widow to inherit. This is where the husband's relatives who consider themselves having the right to the deceased estate, as 'customary heirs' dispossess the widow. Family and culture are of crucial importance in this regard. One of my respondents, a women's rights activist from FIDA, stated:

'The fact that our marriages as Basotho revolve around the approval of the parents sometimes complicates inheritance rights of married women. There are circumstances where the woman is married but the husband's family refrains from ensuring that the formalities of a legal marriage are conducted. In other cases the woman's family make things difficult in that they insist on full payment of *'bohali'* even when there is nothing to pay, though in Sesotho *'monyalakapeli o nyaloahae'* (meaning, 'even with two cattle one marries'). Full payment is not necessary but part payment is enough for legalising a customary marriage.'

When *'bohali'* is not paid the family of the husband says, *'Hasemosalioarona, ha rea monyala'* (meaning, 'She is not our wife, we have not married her.'). This was stated by one of my respondents a practising lawyer (King's Counsel) showing how family can make the life of a widow complicated when it comes to inheritance. A 47 (forty seven) year old widow interviewed at the Magistrates Court in Maseru districtsaid:

'I have been married for eighteen years and not for a moment have I thought that my husband's family members would say I was never married to their brother. It was only upon my husband's death when they took all property that we acquired during his life, that I saw the reality of that. I was married under civil law, and never thought non-payment of *'bohali'* could be an issue for my marriage. No one ever raised it as an issue while my husband was still alive.'

Such issues emanate upon the husband's demise. Irrespective of the type of marriage, where no '*bohali*' has been paid the husband's family does not recognize the marriage as far as the widow's right to inherit is concerned. This stance is taken to ensure that one of the family members can assume the status of the 'customary heir' in order to inherit the property of the deceased instead of the widow.

The question, 'Who is a widow?' is so crucial that widows are even denied the right to bury their husbands if the family feels that they cannot recognise her as such. Having denied the widow the right to bury her deceased husband, the family then makes a case to dispossess her. The Chief of Ha Leqele in the district of Maseru confirmed this by pointing out that he had dealt with several cases where the family of the husband had denied the widow the right to bury him and he had to intervene as a Chief to assist the widow. Sadly, when cases of this nature are lodged in court, the court normally deals with the urgent matter, which is that of the duty to bury the deceased and they fail to determine the issue of the widow's inheritance which is an equally important matter. The challenge that remains is that the same widow might not be able to afford the legal fees to secure a lawyer for her inheritance case that is due to follow after the burial of her husband.

Religion is one of the institutions that brings into play semi autonomous social fields. It creates normative orders that influence women in decision making. During the study it emerged that some Christian churches insist that married women solemnize their marriages in church in order for them to qualify to conduct certain important roles in church. This takes place irrespective of whether or not their customary marriages are legally recognized. When this solemnization takes place their marriages are no longer governed according to customary law but rather by civil law. In cases where the woman is a subsequent wife to an already existing marriage in which the parties have deserted each other but have not yet obtained a divorce order, the consequences are that the woman can lose her inheritance rights subject to the fact that her marriage is *null and void* subject to the already existing customary marriage. Customary law recognises polygyny while civil law does not.

## 4.5 Challenges faced by daughters

### 4.5.1 *Being homeless as a pathway to early marriage*

As a consequence of ‘customary heirs’ taking over property, daughters complain of destitution. Besides destitution, females are expelled from their residential homes upon the death of their parents. They are rendered homeless, and such hardships push them into early marriages for purposes of survival.

Traditionally, family expectations of children were that sons remain in the family to perpetuate the lineage. Daughters were expected to marry and move in with their husbands’ families. The birth of a female child evoked different expectations of their social/gender role. Traditionally she is supposed grow up and help her parents with domestic chores until she is old enough to marry. She was never seen as a permanent member of the maiden family. She seems to have been brought up in preparation for marriage (Letukaet *al.*, 1994: 154).

As a result of the current trend of ‘customary heirs’ dispossessing the deceased’s dependant’s home in order to sell it, daughters are left homeless. Upon the death of their parents, daughters lose both their parents and their home. In an interview with a 22 (twenty-two) year old daughter of a deceased single parent, she said:

‘In 2010 upon my mother’s death, my only brother who is the ‘customary heir’ decided to move together with his family from his house to our home where I used to stay with my mother. I had thought their stay will be for a while. However they stayed there for almost two years. After obtaining my first degree, I got a job. With the proceeds of my job I decided to build flats at a portion of land near our house. Upon telling my brother about the plan, I was shocked at his response that, ‘I should not even think about it.’ He told me that he did not even want to see me there ‘my home’, as I was already renting a place to stay away from home. He promised to kill me should he see me around the place. I still cannot believe that my brother could do that to me. I was advised to check with the Land Administration Authority<sup>8</sup> whether he had not transferred ownership of the place into his own name. Unbelievably again I found that my brother has registered the land in his name and that of his wife, rendering me homeless.’

A 24 (twenty-four) year old woman interviewed in Berea district states:

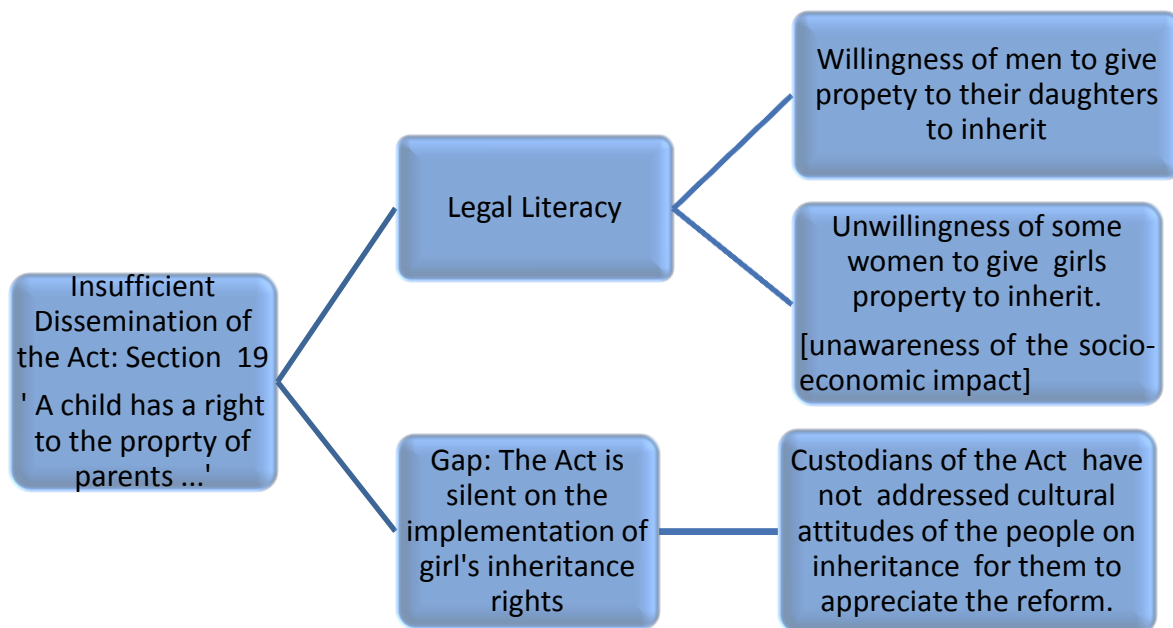
---

<sup>8</sup> Land Administration Authority (LAA) is an authority responsible for registration of land in order to give title of or real rights in land to eligible people.

‘When my parents died and the ‘customary heir’ took over, we knew exactly that as girls we have no stake. It seemed as if everything belonged to our brother including ‘our’ home. He made rules and kept reminding us that we have to get married.’

The reality is that marriages are no longer sustainable. A girl who learns that she no longer has a home is pushed into marriage. One of my respondents at Leqele High School, a 17 (seventeen) year old boy said that even if his sisters came back home after marrying he would send them back. The fact that a daughter is never regarded as a permanent member of her maiden family prevails even when the circumstances are such that they do not allow her to remain in the marriage. This resonates with what Matashane and Letuka (1995) noted regarding the role of the heir in practice: that in Lesotho female siblings of heirs who take over property complain bitterly of destitution as their brothers have taken over their parents’ property but fail to provide for them. In some cases evictions at the instance of successors who have taken over the residential land were the cause of homelessness and other hardships.

#### 4.6 Is the CPWA utilized to protect girl’s inheritance rights?



**Figure 3: Findings on the utilization of the CPWA to protect girl’s inheritance rights**

Figure 3 is a presentation of findings on the assumption that the Children's Protection and Welfare Act (CPWA) is not utilized to protect girl's inheritance rights. The word 'child' is interpreted to include the girl child.

It could reasonably have been expected that this Act would rescue the girl child from the challenges she faces as a result of being excluded from inheriting. However, my assumption held up while in the field. I had to engage in action research or legal literacy during the data collection process because most people that I interviewed did not know about the Act, let alone know that it contains section 19 that contradicts the customary law position, recognizing the inheritance rights of the girl child. I found that the Act is not utilized to protect girl's inheritance rights.

After enlightening the respondents about section 19, I was surprised to realize that most men that I interviewed were willing to recognize inheritance rights of their daughters. A sixty-three (63) year old man interviewed in Botha- Bothe district state:

'It is good that the law has provided for inheritance of girls as they seem to suffer because of the expectation that they be maintained by the 'customary heirs'. As a father, if I give my daughter property, that is her gift irrespective of whether she gets married or not.'

Nonetheless, some women were still unwilling to recognize girl's inheritance rights on the basis that girls are supposed to be married and are to be maintained by their prospective husbands. A fifty-four (54) year old woman said:

'I still do not see the reason to recognize girl's inheritance rights yet they are to be married. The problem is that upon marriage the inherited property will go to the family where the girl is married.'

It then became obvious that their responses were as a result of their unawareness of the socio-economic impact of that on the girls. Reality has shown that marriages are no longer sustainable and this in turn compromises the welfare of the girls into the future.

During an interview with the Assistant Master of the High Court, it merged that the CPWA is silent on the implementation of girl's inheritance rights, making it difficult for the law

enforcement agencies to ensure the protection of such rights. It also became apparent that the custodians of the Act did not address the prevailing cultural attitudes of the people on the inheritance of the girl child, as the Basotho are culturally conservative. This makes it difficult for people to appreciate the reform in order to benefit from the change. The current position is that the law reform seems to be ahead of the people in that the inheritance rights of the girl remain on paper, whilst on ground the concept of 'customary heirship' still prevails to their detriment.

#### **4.7 Conclusion**

In this chapter, I managed to answer the main research question which is whether the concept of 'customary heirship' is still relevant in the current socio-economic circumstances. I found that the 'customary heirs' no longer fulfil their obligations and this makes the deceased's dependants vulnerable. Widows are dispossessed by the 'customary heir' as a result of semi-autonomous social fields stemming from the application of a plurality of laws. Lastly, the CPWA is not utilized to protect girl's inheritance rights as expected.

## **CHAPTER 5**

### **5.0 A CASE FOR THE RECOGNITION OF WIDOWS' AND DAUGHTERS' INHERITANCE RIGHTS**

#### **5.1 Introduction**

In this chapter I make a case for the recognition of widows' and daughters' inheritance rights based on living customary law that reveals opportunities for them to inherit. Living customary law recognizes human interactions in actual social life, often changing in response to changing conditions ensuring that currently applicable law stays in touch with realities. Consideration will also be had to the developments in law and precedent that have created spaces for widows and daughters to inherit interrogating whether such reforms are known by the people for them to benefit from such. Lastly, I will make a case for legal and constitutional reform based on what the Basotho want as it emerged during the study aligning myself with the international human rights instruments that Lesotho has ratified.

#### **5.2 Opportunities created for daughters to inherit**

##### ***5.2.1 Utilizing written instructions: Response of the courts***

It is surprising to have a provision for 'written instructions' in the laws of Lerotholi since the Basotho were illiterate before the advent of colonialism and the church. It seems obvious that they were introduced by colonial rule and imported into the laws of Lerotholi from their foreign legal system where they are equated to wills (WLSA, 1994). The Basotho used to have a phrase '*mantsoe a mofuaaheloalesaka*' which means 'building a kraal around the words of the deceased'. The wishes of the deceased had to be respected and fulfilled.

As the written instructions became part of the laws of Lesotho, some Basotho, as in the case of *Lerotholi v. Lerotholi*, above, made written instructions giving property to their daughters to inherit. Although written instructions could reasonably be expected to give the testator unlimited freedom of testation, those introduced in the laws of Lerotholi have restrictions that serve patriarchy. The testator is not supposed to dispossess the 'customary heir' of a greater portion of property.

In *Lerotholi v. Lerotholi*, above, the deceased couple from the chieftainship family had bequeathed all property to their only daughter. They had no son who could be the rightful heir under the customary laws. The uncle contested the will on the basis that it did not comply with the inheritance laws either under customary or common law. The case was decided in favour of the uncle because girls do not have the right to inherit under the laws of Lesotho. The High Court decision was upheld on appeal with one dissenting judge out of five emphasizing the need for the reform of inheritance laws.

This illustrates that official customary law is static and rigid. It does not recognize the evolving nature of custom. It is rarely reviewed. Even when legislation granting recognition to custom in the regulation and determination of certain issues is, seemingly, open to the introduction of empirical evidence on changing custom and practices, the superior courts tend to exclude the actual custom and practice of the people which is continually evolving outside the formal courts (WLSA Zimbabwe, 1994; Stewart, 1992).

The negative response of the courts to wills resulted in people no longer choosing to write wills as it appeared to be risky. During interviews with the Assistant Master of the High Court I found that between 200 (two hundred) and 300 (three hundred) wills are registered in Lesotho annually. Though the Basotho generally do not write wills, families which have girl children only resorted to them as a mechanism to avoid the application of 'customary heirship'. This change in society was one to which the courts had to be alive in order to develop the law in such a way that that it related to social realities.

### ***5.2.2 Willingness to recognise daughters' inheritance rights***

Contrary to the provisions of the Laws of Lerotholi, there is a Basotho practice in which parents during their lifetime indicate who should inherit based on whether the individual has worked for the right to inherit '*lefa lea sebeletsoa*'. The property is dealt with on the basis of merit. The question of who has worked for and earned the right to inherit comes with the level of responsibility that the child would have shown and this is subjectively decided by the parents. Often girls proved to be responsible and they inherited. In some instances this has created animosity between the children as some first born sons regard this move as depriving them of their traditional rights while for female children this is a development towards recognition of their inheritance rights.



A 70 (seventy year) old woman interviewed in Mohale'shoek district, Motse-Mocha, made a statement that relates to what a 65 (sixty five) year old man interviewed in of Botha-Bothe district, Qalo community said:

*'Ngoanangoananaleha a kaba a nyaloa a keke a o lebala, ebileleha o kulakeenaeatla o oka.'*

(Meaning, 'Even if a daughter is married, she never forgets her parents. She takes care of them till death. When parents are ill she is the one who ensures that they are well taken care of.')

To my surprise there were dissenting views from women on this issue. Some women and boys as compared to men showed unwillingness to recognize girls' inheritance rights, because of anticipated marriage. This results from perpetuating patriarchy and unawareness of the socio-economic impact of the fact that marriage is no more sustainable.

The countrywide CEDAW consultative meetings that were conducted by the Ministry of Gender, Youth, Sports and Recreation still prove the existence of the willingness. The consultations were conducted pursuant to the countries' 2011 Concluding Observations on the position of women in inheritance. CEDAW Committee raised concerns about discriminatory laws on inheritance though Lesotho ratified CEDAW in 1995. The data from the consultations confirm the willingness to give inheritance rights to daughters, on the basis of their contribution in the family responsibilities that they would have shown during the lifetime of their parents.

While the Laws of Lerotholi exclude girls from inheriting, empirical data shows that people allocate property to a responsible child. My 2014 data coincides with the findings of WLSA research conducted in 1994 confirming that this is still the practice to date. This proves differences between the Laws of Lerotholi and living custom of Basotho.

### ***5.2.3 Development of the law: Children's Protection and Welfare Act, No. 7 of 2011***

The willingness to recognize girl inheritance rights, cases showing that the 'customary heirs' dispossess the deceased's dependants property and the influence of international human rights instruments to which Lesotho is signatory have resulted in the government of Lesotho promulgating the Children's Protection and Welfare Act. Section 19 provides that 'a child has

a right to the property of the parents...’ The word ‘child’ is interpreted to include the girl child. The Act contrasts with the customary laws which exclude girls from inheriting.

Despite this positive step, there is insufficient dissemination of the Act. People do not know about the Act and are therefore not in a position use it for to their benefit. This raises the need to take law to the people. Monitoring and evaluation procedures need to be put in place to assess the impact of the law on the people. It will allow the custodians of the Act to evaluate whether the law reforms answer the needs of the people. It will also present the need to amend it when necessary to ensure that it serves the purpose.

### **5.3 Opportunities for the recognition of widows’ inheritance rights**

#### **5.3.1 Definition of inheritance by old women**

An 89 (eighty nine) year old woman interviewed in Botha-Bothe district, Maloseng stated:

‘Inheritance is not the fields, houses and other property of the deceased. It is the responsibility of maintaining the deceased’s dependants inclusive of the extended family. The heir has to respect and consult the widow in everything that he does. The younger generation seems to concentrate on ownership of property and disregarding the widow.’

This explanation makes it clear that, under customary law, if the deceased is survived by his widow, she is still respected. No decisions are taken by the heir without the knowledge of the widow. It seems that the heir has a minimal role to play while the widow is still alive. It is only when the widow has died that the heir plays the key role of maintaining the deceased’s dependants and not inheriting property for his personal use.

#### **5.3.2 The customary concept of ‘malapa ha a jane’**

‘*Malapa ha a jane*’ means ‘families do not eat each other’. No family is expected to benefit from another family’s estate in a polygynous setting. The concept ensures that in a polygynous union subsequent wives build their own matrimonial home to ensure that upon their husband’s death they are not expelled from their matrimonial home following a dispute over property. This prevents the occurrence of cases where children of the first wife claim inheritance rights over the property of subsequent wives by virtue having the same father.

### 5.3.3 *Judicial precedent: Ramootsi and Others v Ramootsi C of A (CIV) No. 14/08*

In terms of the laws of Lesotho, inheritance rights flow from a valid marriage. The reality is that in cases where the ‘customary heirs’ claim title over the deceased estate, especially where the deceased had monetary benefits from his work place, they can only be claimed by the widow or the rightful heir to the deceased. Some widows were disinherited for failure to prove the legality of their marriages with the deceased husbands. Nonetheless, where property is administered solely in terms of customary law, the widow is excluded from inheriting. Some widows have been married for years but no legal formalities were performed upon marriage.<sup>9</sup> For others there is no documentation proving the legality of their marriages, especially if it was a customary marriage which is not registered. This happens irrespective of the fact that both families have consented to the marriage. ‘*Bohali*’ is normally the issue irrespective of whether or not the marriage was contracted under civil law which does not require payment of such.

In *Ramootsi v Ramootsi* the issue was whether the non-payment of ‘*bohali*’ is fatal to the validity of a customary law marriage in all cases. The applicants had taken the property of a widow upon her husband’s death in her exclusion because they felt there was no marriage between her and the deceased husband as no ‘*bohali*’ was paid. Ramodibedi J. made reference to Patrick Duncan: Sotho Laws and Custom, where he says:

‘Marriages take place with the payment of cattle or sometimes without, but it depends on the wishes of the parents of the girl...’

Interestingly he was able to relate the law to the socio-economic realities on ground. He prevented the ‘customary heirs’ from taking advantage of the challenges presented by the law to disinherit the widow. He utilized the living custom of the people as they respond to the realities to develop the law. He continues:

‘Crucially, the Basotho have always recognized the reality that some people may lack the means to pay ‘*bohali*’ hence they coined the expression ‘*monyalakapeli o nyalaoahae*’, loosely translated as, ‘even two beasts are

---

<sup>9</sup> Formalities for a customary marriage include consent from the parties to the marriage and consent from their parents, part payment or all of the ‘*bohali*’ (section 34, the Laws of Lerotholi). Civil marriage formalities include consent from the parties to the marriage, but no parental consent. The marriage is solemnized before the marriage officer in the presence of two witnesses (Marriage Act).

sufficient to constitute a marriage.’ In a poor country like Lesotho it is indeed not hard to imagine that many people do not have the means to pay ‘*bohali*’. It would be a sad day if they were denied marriage merely because of their failure to raise ‘*bohali*’.

What he stated to be of fundamental importance is the agreement by the respective parties to create a validly binding customary law marriage regardless of ‘*bohali*’. He made a ruling that the court a quo was justified in concluding that there was a customary law marriage in existence between the respondent and the deceased. This finding prevented the family members claiming title over the deceased estate as ‘customary heirs’ from disinheriting the widow on the basis of non-payment of ‘*bohali*’.

#### **5.3.4 Development of the Law: Land Act, No.8 of 2010**

The Land Act makes provision for a widow’s inheritance of land. Section 10 of the Land Act uses the basis of the presumption of joint title in marriage which means that when spouses are married under a customary or civil marriage they are presumed to be married in community of property. It provides that title to immovable property allocated to or acquired by anyone of them shall be deemed to be allocated to or acquired by both and any title to such property shall be held jointly by both. The same section applies in the same manner to cases of polygynous marriages as if each household were a monogamous marriage.

### **5.4 A case for legal and constitutional reform**

#### **5.4.1 Legal reform**

##### **5.4.1.1 Unlimited freedom of testation**

Based on the true meaning of freedom of testation, the testator is not expected to be restricted in property allocation and the finding that the ‘customary heir’ does not fulfil his obligations. The current situation raises the need to appreciate the importance of the Sesotho phrase ‘*mantsoe a mofuaaheloalesaka*’, meaning that the deceased’s wishes should be respected and implemented accordingly. No restrictions should be attached to testators when allocating their property. During an interview with the Honourable Minister of Gender, Youth Sports and Recreation, he pointed out:

‘It is not fair that Basotho do not have unlimited freedom, but are rather forced to appoint the first male issue as the heir, and even give him a greater share of property. This means that I am forced to appoint him irrespective of whether

he respected me and my wife during our lifetime. This denies Basotho to give their greater portion property for charity if they so wish.’

The women’s rights activist from FIDA pointed out that the ‘customary heir’ is no longer fulfilling his obligations and until the laws are taken with the seriousness that they deserve, we are stuck in the lacuna that hinders development. Married women built their parents’ houses and those developments become the property of the ‘customary heir’ upon death of their parents.

#### **5.4.1.2 Repealing the ‘mode of life’ test**

The ‘mode of life test’ served the colonialists, and does not benefit the Basotho. It prohibits the Basotho from writing wills so that their estate can be administered according to the civil laws on inheritance. Civil laws recognize the widow and the child’s share irrespective of sex. Reality has shown that people do not conduct their affairs with the law in mind and it is impractical to expect a Basotho to abandon their customary way of life even if they are married under civil law. Abolishing the ‘mode of life test’ will prevent the courts from concentrating on minute issues when wills are challenged.

#### **5.4.2 Constitutional reform**

It is against the background of the Constitutional Court decision in *Senate Gabasheane Masupha v The Senior Resident Magistrate of Berea and 10 Others* CC No. 5/2010 that I consider that there is a need for Constitutional reform in Lesotho. Though the case was on chieftainship, it challenged the Constitutional provision that affects inheritance, which is section 18(4) which exempts customary law from the application of the non-discrimination clause. The court was of the view that:

‘Our customary law is unique as it has similar cultural values. It need not be distorted by the foreign influence from South Africa through its cited cases because of its diversified multicultural society.’

From the comments of the court it is clear that they are culturally conservative. They disregard the influence of international human rights instruments and developments in the region regarding the Constitution and discriminatory customary laws. It seems that even with the harmonization and codification of inheritance laws in which the Law Reform Commission is currently engaged, if the Constitution still retains the claw back clause only

very little change will be achieved for women and girl's inheritance rights. My findings reveal the need for Constitutional reform based on the willingness emerging from the people to recognize inheritance rights of widows and daughters. It is worth noting the possible influence that the jurisdictions of South African and Botswana are capable of exerting over Lesotho as customary law is part of their laws although it is also subject to their Bill of Rights.

In *Bhe v Magistrate of Khayelisha and Others*, above, the applicant sought an order declaring that the rule of male primogeniture is unconstitutional in order to enable her daughters to inherit. The applicant's daughters were born between herself and their deceased father, who had died intestate. The Magistrates Court appointed the father of the deceased as the sole heir of his estate. This was done in accordance with section 23 of the Black Administration Act. The deceased's father indicated that he intended to sell the deceased's immovable property on which the applicant and the minor children lived so that he could pay for the funeral expenses for the deceased. The issue was whether section 23 of the Black Administration Act was consistent with the Constitution. The court held that the section was discriminatory and inconsistent with the equality provision under the Constitution to the extent that the primogeniture rule prevents all female children from inheriting. Deputy Justice Langa pointed out that:

‘The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old patterns of patriarchy and male domination incompatible with the guarantee of equality under the constitutional order’.<sup>10</sup>

It is important that Lesotho adopts the Constitutional Court's recognition that the manner in which customary law operates must be seen in context. This was to prevent the court losing sight of the prevailing socio-economic circumstances in which living custom operates. It found that the context in which the rule of male primogeniture operated has changed and stated:

---

<sup>10</sup> Para 91.

‘Most urban communities and families are structured and organized differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which includes the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased’s responsibilities.’

Pursuant to the recognition of social practice of people on the ground, the Court declared the applicant’s daughters the sole heirs of their late father’s estate. However, though these are good practices to replicate from South Africa, in using South Africa’s position to influence change in Lesotho, it is crucial to note that the Constitutional positions of the two systems are different. While the Lesotho Constitution specifically provides that discrimination through the application of customary law is applicable, the South African Constitution has no such provision. In this regard a comparative perspective can be obtained from Botswana. Botswana shares the same position as that of Lesotho. Section 15(4) of the Botswana Constitution is a claw-back clause similar to section 18(4) in Lesotho’s Constitution.

In the Botswana case of *Mmusi and 3 Others v Ramantele* 2010 (unreported) the first applicant was ordered to vacate the home of her deceased parents within thirty days of the order. This order was issued pursuant to a Ngwaketse cultural practice which forms their customary law and provides that ‘if an inheritance is distributed, the family home is given to the last born son’. The issue to be determined in the case was whether the Ngwaketse customary practice to the extent that it denies applicants the right to inherit the family residence intestate, solely on the basis of their sex, violates their constitutional right to equality under section 3(a) of the Constitution of Botswana.

The decision of this case was made on the basis of influences from different jurisdictions, equality and human rights principles as well as the current socio-economic context. It was held that the Ngwaketse customary laws rule is unjustifiably discriminatory and does not pass constitutional scrutiny. It is ultra vires section 3 of the Constitution in that it violates the applicants’ rights to equal protection of the law. Interestingly, Dingake, J. stated:

‘I wish to point out that there is an urgent need for parliament to scrap/abolish all laws inconsistent with section 3(a) so that the right to equality ceases to be an illusion or a mirage, but where parliament is slow to effect the promise of the Constitution, this Court, being the foundation of justice and the guardian of the Constitution, would not hesitate to perform its constitutional duty when called for to do so.’

It is on this basis that Lesotho’s Constitution has to conform to the international human rights standard. Section 18(4) of the Constitution law has to be abolished. Customary law has to be maintained as part of our laws, but be applied cautiously. It is worth adopting the South African position, where section 211(3) of the Constitution of South Africa provides that the court must apply customary law where it is applicable, subject to the Constitution and any other legislation that deals with customary law. Further, section 39(2) provides that:

‘When interpreting any legislation, and when developing the common law or customary, every court, tribunal or forum must promote the spirit and object of the Bill of Rights.’

This will ensure the recognition of living custom as customary law is not static, but evolves depending on the socio-economic circumstances in which it operates, ensuring that the law keeps touch with reality. Once the law is detached from the realities of the people it ceases to be relevant to their lives.

The same position is also retained by Kenya in that article 2(4) of its 2010 Constitution provides that customary law should only be applicable as long as it does not contradict any of the provisions of the Constitution. In view of the fact that Lesotho takes time to domesticate the conventions and treaties it has ratified, there is a need to adopt the Kenyan position set out in article 2(6) of its Constitution which provides that treaties and conventions ratified by the country shall form part of the laws of the state without domestication.

Constitutional reform is not easy to achieve although it is certainly a solution to the problems that the country is facing regarding discriminatory inheritance laws. This demands a concerted effort by everyone and also political will.



## 5.5 Role of the court in promoting gender justice

Irrespective of the fact that the Constitution of Lesotho discriminates against females, it is the duty of the court to protect the rights of litigants. One of my respondents, a High Court judge stated:

‘There is not enough sensitivity both in the lower bench and the higher bench. We seem to be confining to the rule and the law in its strict sense, disregarding the reality of the people onground, at the end of the day people suffer.’

I, therefore, find it crucial to remind the courts of its role when Parliament seems to be slow in fulfilling its mandate of passing legislation. The courts are in the position to ensure that the country moves towards being a constitutional democracy. In *Mmusi and 3 Others v Ramantele*, above, Dingake, J pointed out that a large number of the people in the country may not be conscious of their rights. Those who are conscious may lack resources to litigate. If it so happens that they have the fortune to approach the court, and their complaint has merit, then it is the sacred duty of the court to protect their rights at all costs.

In *Attorney General v Dow 1992 BLR 119*, Uguda, JA stated as follows:

‘The courts must continue to breathe life into the Constitution from time to time as the occasion may arise to ensure the healthy growth and development of the state through it ... We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the demands of the society of a certain age, such construction may not meet those of later age. To hold otherwise would be to stultify the living constitution in its growth.’

On the same note, Horwitz, J in the same case, above, maintains that he does not think that he would be losing sight of his functions or exceeding them as a High Court judge, if he said that the time when women were treated as chattels of their husbands has long past and that it would be offensive in the modern thinking to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex.

In the Kenyan case, *Re Wachokire* Succession Cause No. 192 of 2000,<sup>11</sup> the court had occasion to deal with a customary law rule denying women inheritance rights due to the expectation that they would eventually get married. The Court rejected this justification and it was held that, denying women equal rights of inheritance under Kikuyu customary law violated section 82(1) of the Kenyan Constitution which prohibited discrimination on the basis of sex and Article 15(3) of CEDAW.

In the words of Dingake, 'the time has come for the justices of the courts to assume the role of the judicial midwives and assist in giving birth to a new Lesotho struggling to be born, a Lesotho where equality between men and women prevails as envisaged by the framers of the Constitution.'

## **5.6 Addressing cultural attitudes: Bridging the gap between cultural conservativeness and law reform**

The findings of this study have shown that there is growing willingness among the Basotho to recognize inheritance rights of widows and daughters. The study has also highlighted developments in the law and precedent moving towards the same recognition. These positive aspects shed hope of inheritance of widows and daughters. However I also found that the Basotho are culturally conservative. One of my respondents, a practising lawyer (King's Counsel) affirmed this when he pointed out:

'Lesotho operates a dual legal system and a majority of laws that have attempted to make improvement draw its sources from international influences. However there is a Sesotho phrase that says, '*nakanatsahokhoesoa ha li khomarelehlooho*' which means that if you borrow something from somewhere else and you try to fit it in, it may sit there and appear as if it will change the situation, but it will never become part of you. You will always remain who you are.'

This phrase resonates with the abovementioned judgment in *Senate Masupha's* case. This was a Constitutional case challenging chieftainship in which the court mentioned that while it was aware of the international instruments to which the applicant's lawyer referred,<sup>12</sup> but it still did not want to distort 'our customs'. The Basotho have very conservative attitudes toward

---

<sup>11</sup> Discussed in the Role of the Judiciary in Promoting Gender Justice in Africa (UNDP, 2008).

<sup>12</sup> The key informant quoted above represented the applicant in the matter.

their culture. The same respondent continued to share with me the interviews that he had while preparing for the *Senate Masupha's* case in order to get the views of other people on the matter that affected culture. He said:

‘Unfortunately women are part of the people who are still inclined to culture. In the research that I did asking women their views if a female can succeed to chieftainship, to my dismay women were against that, maintaining that, ‘they may have gone to Beijing in the quest for women’s rights but Beijing is one thing and Lesotho is another’. This then shows us, that ‘*nakanatsahokhoesoa ha li khomarelehlooho*’ (see above for translation).

He concluded by highlighting that while the Basotho may lobby on important issues, when serious thought is needed in order to user in change, they go back to culture. This also affects the interpretation of the law. Laws are interpreted in line with culture so that it is not distorted. They interpret the law in order that it does not jettison the old laws with cultural implications. People tend to pay lip service to the issue of reform to the point that one soon realises that they are to be educated a great deal.

It is at this point that my analysis moves towards law and constitutional reform, realising all the time that there is a need to bridge the gap between law reform and the culturally conservative attitudes of the people. There is a need to address the cultural attitudes of the people towards inheritance. The aim should be to raise their awareness about the problems created by sex discrimination and male supremacy in our context. This will ensure that reforms are not made ahead of the people’s consent to them. If reforms are brought in without their consent they will not be able to appreciate the importance of such reforms and how they will benefit from them if they are implemented.

## **5.7 Conclusion**

In this chapter, I have made a case for the recognition of widows and daughters inheritance rights based on opportunities created by ‘living custom’. I further highlighted the development of the law and judicial precedent that point to the same recognition bringing hope for widows and daughters. I also made a case for legal and constitutional reform based on what the Basotho want as this emerged during the process of grounded research. Moreover, I emphasized the role of the courts in promoting gender justice. Lastly, I unearthed the need to address the cultural attitudes of the Basotho in order to bridge the gap between

their cultural conservativeness and law reform so that the new laws may benefit the people they serve.

## CHAPTER 6

### 6.0 CONCLUSION AND RECOMMENDATIONS

In this chapter I present the conclusion and recommendations that draw on living customary law, current socio-economic realities and the recognition of inheritance rights of widows and girlsstemming from the findings of this study.

#### 6.1 Conclusion

‘Widows and daughters without hope’starts with an interrogation of the concept of ‘customary heirship’ in Lesotho by examining the applicable laws which are those that were brought in under colonial rule and later reinforced by an independent Lesotho through its Constitution. These laws have not been amended so as to benefit the Basotho. The Constitution still allows the unfettered application of customary law against the spirit of international human rights instruments that Lesotho has ratified. As a result as at 2014 Lesotho’s widows and daughters’ inheritance rights are still suppressed even though the country ratified CEDAW in 1995.

Section 14(1) of the Laws of Lerotholi recognizes the heir’s inheritance of a greater portion of a deceased’s estate and prohibits widows and girls from inheriting. The findings have shown that this provision does not reflect the Basotho custom of succeeding to the deceased’s responsibilities. Basotho custom placed more emphasis on succeeding to the deceased’s responsibilities as opposed to property inheritance as reflected in the Laws of Lerotholi. As people respond to the realization that ‘customary heirs’ do not maintain the deceased dependants, the courts still feel inclined to comply with the rules irrespective of the prevailing realities. The case of *Lerotholi vLerotholi*2010 LLR has revealed a situation in which the courts could have seized an opportunity to recognize living customary law in order to develop the laws of inheritance.

Application of a plurality of laws presents legal uncertainties to married women’s inheritance rights. This is complicated by the application of semi autonomous social norms to which women defer when making decisions. These are as a result of the importance of culture and family in Basotho marriage arrangements. The Children’s Protection and Welfare Act is not

utilized to protect girl's inheritance rights and the law is silent on the implementation of such rights. The cultural conservativeness of the nation and insufficient dissemination of the laws also stand as challenges.

Interestingly, despite the challenges there appears to be a transition from where we began when the codified version of customary law became effective to date. Hope emerges from the realization that the 'customary heirs' do not fulfil their obligations. Socio-economic realities lead to change through living law. Reality shows the unsustainability of marriages for girls. The Basotho realize the need for Constitutional reform because of the need to recognize inheritance rights of widows and girls. Moreover, there are positive aspects that bring hope to the possibility of recognising widows' and daughters' inheritance rights. Between them, the development of the law, the Land Act No. 8 of 2010, the Children's Protection and Welfare Act No. 7 of 2011 and judicial precedents, such as *Ramootsi v Ramootsi* C of A (CIV) No. 14/08, are steps in the right direction for widows and girls. Lastly, the harmonization and codification of inheritance laws that is currently being conducted by the Law Reform Commissions is expected to add to this hope.

## **6.2 Recommendations**

The basis of the recommendations is my assumption that there is no need to sustain 'customary heirship' because of the current socio-economic realities and the need to recognize widows' and daughters' inheritance rights. My findings have proven that the current situation calls for the rethinking of our inheritance laws and to allow for the recognition of widows and daughters inheritance rights. Prevailing circumstances not only necessitate legal reform but also measures to ensure the awareness and proper implementation of the reforms. Regard is to be had to the minimum standards set by the international human rights convention that Lesotho has ratified. Of crucial importance is the need to appreciate and adopt positive customary law principles from the living practice of the Basotho as their culture evolves in order to accommodate changes taking place within current socio-economic conditions.

In order to achieve substantive equality in the laws of customary inheritance, I identified, based on the findings of the study, that there were missing links that need to be addressed before proceeding. Bridging the gap will ensure that the reforms that are suggested are not

made without the consent of the people when they take effect. If reforms are made ‘ahead’ of the people, they will not appreciate them or benefit from the changes that they introduce. It is against this background that I make a plea for the recognition of ‘living customary law’ as a reflection of the lived realities of the people. This will ensure that laws address the needs of the people in the light of current socio-economic circumstances. The Basotho are also a culturally conservative nation which gives rise to the need to address cultural attitudes for people to realize the problem and appreciate the need for reforms.

Recommendations that draw from my findings include the need for legal reform of inheritance laws. The Basotho want to have unlimited freedom of testation, to address the challenges brought about by the application of section 14(1) of the Laws of Leretholi. ‘*Mantsoe a mofuaaheloalesaka*’. Further there is a need to abolish the ‘mode of life test’ as its application prevents most Basotho from enjoying the positive effects of civil laws on inheritance, as people do not conduct their affairs with the law in mind. There is also a need to abolish section 18(4) of the Constitution and make customary law subject to the Bill of Rights. International conventions need to be automatically made part of the laws of the country upon ratification as our Parliament is slow to domesticate them. Law enforcement agencies need to be sensitised to the promotion of gender justice and law reforms need to be disseminated so that people may benefit from them. Most importantly this struggle demands a concerted effort by everyone and political will.

Figure 4 on the next page presents my conclusions and recommendations in figurative form. The diagram has been formulated on the basis of my findings that show a transition from the time when customary laws took effect to current data on inheritance of widows and daughters. It starts with widows and daughters without hope, moves through the transition phased (based on the study’s findings of lived realities, especially current socio-economic circumstances and attitudes of the Basotho) which in turn and logically moves towards the identification of missing links. From the missing link there is an arrow pointing to what has to be done to bridge the gap. Further, positive aspects are identified which I realized reveal some hope and point to the way forward.



# BRIDGING THE GAP: Living Customary Law, Address Cultural Attitudes & Disseminate Law Reforms

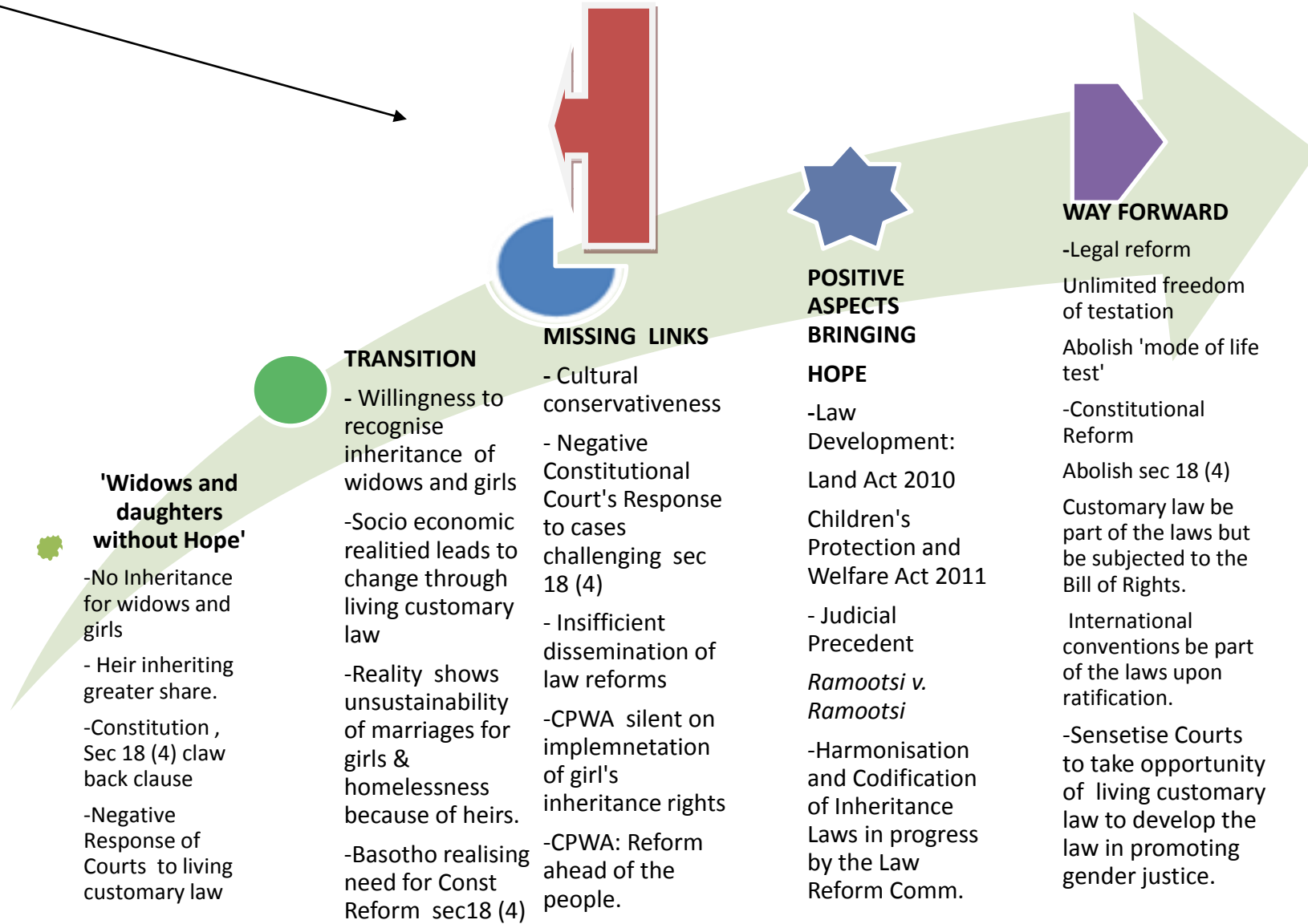


Figure 4: Summary of analysis of findings



## **Bibliography**

African Development Bank. (2005) 'Lesotho Multi - Sector Country Gender Profile'.

Available at:

<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/adb-bd-if-2005-270-en-lesotho-multi-sector-country-gender-profile.pdf> Accessed 31/03/2014.

Aphane, D.*et al.* (1995) 'Widow: Status or Description?' *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa*. Ncube, W. and Stewart, J. (eds). *Women and Law in Southern Africa Research Project*. Jongwe Printers, Harare, Zimbabwe.

Armstrong, A.*et al.* (1993) 'Uncovering Reality: Excavating Women's Rights in the African Family' Vol. 7, *International Journal of Law, Policy and the Family*.

Armstrong, A. (1995) 'Law, Marriage, the Family and Widowhood: Tying the Treads'.

Banda, F. (2002) 'Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe' in a Bainham (ed) *International Survey of Family Law*. Bristol, Jordan Publishing. 471.

Banda, F. (2005) 'Women, Law and Human Rights: An African Perspective'. Oxford-Portland Oregon. Hart Publishing.

Beauvoir S. de (1949, reprinted 1997) 'The second sex'. Vintage, London.

Bennett, T. W. (1981) 'Conflict of Laws: The Application of Customary Law in Zimbabwe', *International and Comparative Law Quarterly*.

Bennett, T. W. (1985) 'Application of Customary Law in Southern Africa'. Cape Town: Juta.

Bentzon, A.W.*et al.* (1998) 'Pursuing Grounded Theory in Law, South-North Experiences in Developing Women's Law'. AiTEnger AS, Otta, Norway.

Chanock, M. (1980) 'Neo – Traditional and the Customary Law in Malawi' in M. Hay and M. Wright (eds) *African Women and the Law: Historical Perspectives*, Boston, Boston University Press.

Chanock, M. (1985) 'Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia'. Cambridge: Cambridge University Press.

Chanock, M. (1989) 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform'. Vol. 3, *International Journal of Law and Family*.

Dahl, T.S. (1987) 'Women's Law. An introduction to Feminist Jurisprudence'. Oslo: Norwegian University Press.

Ehrlich, E. (1962) *Fundamental Principles of the Sociology of Law*. New York: Russel&Russel Inc.

Fraser, A. (1999) 'Becoming Human: The Origins and Development of Women's Human Rights', *Human Rights Quarterly*.

Gay, J.S. (1990) 'Who Needs This? Who Will Benefit From It?', *The Legal Situation of Women in Southern Africa. Women and Law in Southern Africa (WLSA)*, Vol. II. University of Zimbabwe Publications. Harare.

Gilligan, C. (1982) 'In a Different Voice'. 1 *Berkeley Women's Law Journal*.

Hellen, O. (1994) 'Women and the Family, Family or Families', Zed Books Ltd, London and New Jersey.

Hellum, A. (1990) 'Legal Advice as Research Method: The Case of Women in Norway and Its Relevance for Women and Law in Southern Africa Research Trust Project', in Armstrong, A. (ed) *Perspectives on Research Methodology*. Harare: WLSA Working Paper No. 2.

Himonga, C. (1990) 'The Legal Position of Women in Zambia, Research Methodologies and Their Application', in Armstrong, A. (ed) *Perspectives on Research Methodology*. Harare: WLSA Working Paper No. 2.

Himonga, C and Bosch, C. (2000) 'The Application of Customary Law under the Constitution of South Africa: Problem Solved or Just Beginning:' Vol. 17, South African Law Journal.

Lesotho Concluding Observations of the Committee on the Elimination of All Forms Discrimination of against Women, 15th Session Geneva 3-21 October 2011. United Nations.

Lesotho (2009) 'Labour Force Survey 2008 and Continuous Multipurpose Survey.' Bureau of Statistics.

Letuka, P. *et al.* (1994) 'Inheritance in Lesotho'. Women and Law in Southern Africa Research Projects (WLSA). Epic Printers. Lesotho.

Mackinnon, C. (1989) 'Towards a Feminist Theory of the State'. Cambridge, Harvard University Press.

Matashane, K. and Letuka, P. (1995) 'The Role and Concept of Heir: A Case of Confusion', Widowhood, Inheritance Laws, Customs and Practices In Southern Africa. Ncube, W. and Stewart, J. (eds). Women and Law in Southern Africa Research Project (WLSA). Jongwe Printers, Harare, Zimbabwe.

Molokomme, A. (1990) 'Methodological Issues in Women's Law' in Armstrong, A. (ed) Perspectives on Research Methodology. Harare: WLSA Working Paper No. 2.

Moore, S.F (1978) 'Law as Process. An Anthropological Approach'. London: Routledge and Kegan Paul.

Morrison, M. (2000) 'Family Law' in Routledge 'International Encyclopedia of Women: Global Women's Issues and knowledge Vol. 2'; (Gen. Eds). Charis Kramarae and Dale Spender, New York - London.

Ministry of Labour and Employment, Workers and Employer's Organization in Lesotho and the International Labour Organization. (2012) 'Making Decent Work a Reality in

Lesotho'.Lesotho Decent Work Country Programme. Phase II 2012-2017 (12 February, 2012). Available at:

<http://www.ilo.org/public/english/bureau/program/dwcp/download/lesotho.pdf> Accessed 31/03/14.

Nyamu-Musembi, C. (2002) 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights' in An Naim (ed) Cultural Transformation and Human Rights in Africa. London, Zed Press.

Oslen, E. F. (1995) 'The myth of State intervention in the family'.Feminist Legal Theory. Vol. II. New York, University Press, Washington.

Peter, C. (1997) Human Rights in Tanzania: Selected Cases and Materials, Cologne, RudigerKoppeVerlag.

Pruitt, R. L. (1994) 'A Survey of Feminist Jurisprudence'.University of California, Davis. Available at: <http://www.bepress.californiapruitt/14> Accessed 31/03/2014.

Said, E. (1994) 'Culture and Imperialism', Vintage, London.

Stewart, J. (1997) 'Why I Can't Teach Customary Law', Paper presented at the International Society of Family Law: 9th World Conference Durban South Africa. 27-31 July.

Stewart. J. (1992) 'Untying the Gordian Knot! Murisa v. Murisa 41-92. A little more than a case note in Legal Forum', Vol. 4 No. 3. Harare: The Legal Research Foundation.

Tsanga, A.S. (2003) 'Taking the Law to the people: Gender, law reform and community education in Zimbabwe', Weaver Press, Harare.

United Nations.(1994) General Recommendation No. 21.'Equality in Marriage and Family Relations'.UN Committee on the Elimination of Discrimination against Women.13th Session, 1994. Available at: <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> Accessed 31/03/2013.

United Nations Commonwealth Secretariat and IWRAW. (2000) 'Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women' London, Commonwealth Secretariat.

West, R. (1988) 'Jurisprudence and Gender'. University of Chicago Law Review.

WLSA Zimbabwe (1994) 'Inheritance in Zimbabwe Law, Custom and Practice'. Harare: Women and Law in Southern Africa Research Project Report.

Woodman, G. (1988) 'How State Courts Created Customary Law in Ghana and Nigeria, In Morse, B.W. Woodman (eds) Indigenous Law and the State. Dordrecht: Foris Publication.