

# **WIDOWS AND THE RIGHT TO REMARRIAGE IN LESOTHO: A RIGHT AT THE CROSSROADS**

## **Abstract**

**This dissertation, written by a former Master of the High Court in Lesotho, offers a unique and critical insight into the fearfully confusing legal world inhabited by widows who choose to remarry outside their deceased husband's clan. This is a rare practice which is actively discouraged in most quarters of Lesotho traditional society. Combining her natural sensitivity as a woman, capable of empathising with her own, together with her rich experience as a Master, who is conversant with the multiple, conflicting customary, statutory, local and international human rights laws which impinge upon this internationally recognised human right, the writer lays bare the 'lived realities' of a sample of these often lonely and legally illiterate women. Usually vulnerable and largely forgotten by society, they find themselves in inescapable legal, social, cultural and economic dilemmas simply because their husbands have died and they choose to marry outside of clans in which they have often spent years of discrimination and abuse. The writer reveals their hidden torment through a wide range of data (i.e., law, documentary and interviews with relevant women, men, officials and leaders) which are skilfully collected, analysed and presented using several gender-sensitive interacting methodologies, especially the Grounded and Human Rights Approaches, guided overall by the all-embracing Women's Law Approach. In order to improve the plight of these widows, the writer suggests, among other things, a comprehensive overhaul of the relevant laws in order to remove from them all forms of discrimination against women and widows in accordance with regional and international human rights instruments to which Lesotho has bound itself. She correctly observes that widows will only benefit from such a task and learn to exercise confidently their human right to remarry men of their choice if they are included as active participants throughout the entire legal reform process.**

**BY**

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## DECLARATION

I, Veronica 'Matahleho Matiea, do hereby declare that this dissertation is my original work and that it has not been submitted for examination for the award of a degree at any institution or university.

Signed .....

(Student: Veronica M. Matiea)

Date ...March, 2010.....

## **DEDICATION**

This work is dedicated to my beloved husband Paul, who has at all times been very supportive and has always been looking after our children for the duration of my course in Harare, and to my children, firstly to Khauhelo who sometimes had to act like a mother to the younger siblings, Karabelo, Tšenolo and Tšepo for your understanding, and to my beloved sons Hopolang Matobako and Daniel Jegede.

God bless you all.

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MAITA BASA, TATENDA, MAZVITA.

## **LIST OF CITED CASES**

Magaya vs Magaya 1999 (1) ZLR

Bereng Griffith vs 'Mantšebo Seeiso Griffith 1926-53 H.C.T.L.R 50

Motšoene vs Harding 1954 H.C.T.L.R. 1

Molapo vs Mahooana 1926-53 H.C.T.L.R. 309

## **LIST OF ACRONYMS**

ADRA	Adventist Relief for Development in Africa
AEP	Administration of Estates Proclamation
AIDS	Acquired Immunity Deficiency Syndrome
ARVs	Anti- Retrovirals
AU	African Union
BOS	Bureau of Statistics
BRAC	Bangladesh Rural Advancement Committee
CGPU	Child and Gender Protection Unit
HIV	Human Immuno Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LLB	Bachelor of Laws
NAC	National AIDS Commission
SEWA	Self-employed Women's Association
STIs	Sexually Transmitted Infections
SEARCWL	Southern and Eastern African Regional Centre For Women's Law
TASO	The AIDS Support Organization
UDHR	Universal Declaration of Human Rights
WLSA	Women and Law in Southern Africa

## **DEFINITION OF TERMS**

Levirate marriage has been used interchangeably with wife inheritance  
Lobola/bohali- bride price

## **STATUTES, CONSTITUTIONS AND POLICIES**

Administration of Estates Proclamation No.19 of 1935

Constitution of Lesotho 1993

Constitution of the Republic of Uganda 1995

Constitution of the Republic of Malawi 2004

Constitution of Zimbabwe.

Intestate Succession Proclamation No. 2 Of 1953.

Legal Capacity of Married Persons Act No.9 of 2006.

Lesotho Gender and Development Policy. 2003

Marriage Act No. 10 of 1974.

The Land Act 1979 (as amended).

The Law of Inheritance Act No. 26 of 1873.

## **HUMAN RIGHTS INSTRUMENTS**

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Convention on the Elimination of all forms of Discrimination against Women

African Charter

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa  
(The Women's Protocol)

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## CHAPTER ONE

### 1.0 Introduction

Basotho like any other society within the southern and eastern parts of Africa regard marriage as one of the most important institutions especially for a girl child. Once a girl child is born, the parents are already counting on her fetching a good bride price when she gets married. Although this had dire consequences on a girl child in terms of the manner in which she was brought up, for instance, not taking her to school because she is already on her way out to another family and subjecting her to household chores, nonetheless it is still considered the best institution among the Basotho.

A girl who in the eyes of the society was not getting married or was perceived as having been past by the time to marry attracted a stigma and would sometimes be referred to as a “lefetoa”, meaning that young men by-passed her or her time to marry has long past. Today the position is somewhat different. We hear of people exhorting their girl children not to rush into marriages but to pursue a professional career which will in turn enable them to live a dignified life in future even if they have problems in their marriages. As they put it ‘your education is your husband’. This is to say that whether married or not you will still be able to provide for yourself as earlier the belief and practice was that it was only a man who could provide for a woman or for a family.

The Basotho are a patriarchal society. They also have a dual legal system where the received laws operate simultaneously with statutory law. Besides the law, people’s lives are also regulated by religion, customs and cultures of the Basotho which are basically of a regimentary nature, but in practice are even stronger than the law in certain instances. This work therefore examines the concept of remarriage of widows in Lesotho as a human right. A right, it should be borne in mind, is exercised by its holder at will, provided she is conversant with such a right. However for the widows, the position is slightly different compared to that of a *lefetoa*. A widow is faced with a double stigma. When she chooses to remarry she is regarded as a prostitute, a whore. When she does not exercise her right by choice, she is regarded as an adulteress too. What does the society

expect the widow to do under these circumstances? Why does her choice become a social issue at all? Human rights instruments in support of this right will be used, and in so doing, the state's compliance with such instruments will be examined. An attempt to locate where we are presently in terms of legislation/policy and implementation will be made and a way forward mapped out in order to improve the situation of widows in as far as this right is concerned.

## **1.1 The Problem**

Having served within the Public Service as the Master of the High Court for seven years, I have always been challenged by the fact that widowers seemed to be the only ones who were aware of their right to remarriage as they used to approach the office for their remarriage certificates and sought guidance on other matters incidental thereto. Very few widows seemed to be aware of this right and this gave me the impression that widows are not aware of their right, or, if they are aware, there are some barriers hindering them from enjoying this right should they wish to. These hindrances could either be cultural or religious. This thinking inspired me to investigate the issues that affect this right, including: whether it is acceptable for a widow to remarry, the extent to which widows are aware of this right and the attendant barriers which are at the crossroads of the exercise of this right, widows appear caught up in the middle of these multiple norms which all seek to regulate the manner in which they conduct their affairs. The research has indeed revealed that not only do cultural perceptions present widows with a dilemma in as far as this right is concerned but also unearths conflicting interests of boy children, in particular, who are opposed to the idea of remarriage of their mothers.

## **1.2 Objectives of the Study**

The objectives of this research are as follows:

- 1) To assess the prevalence of widowhood in Lesotho in the light of HIV and AIDS.
- 2) To unearth cultural perceptions on widows' remarriage outside their husbands' clan.
- 3) To investigate the level of legal awareness of widows about their right to remarry.
- 4) To investigate their main reasons for remarriage.
- 5) To analyze the impact of cultural perceptions and practices on the remarriage of widows in Lesotho.
- 6) To propose recommendations aimed at promoting a widows' right to remarriage.

## **1.3 Research Assumptions**

The research assumptions which emanated from the above objectives were as follows:

- 1) There is an increase of widowhood due to HIV and AIDS.
- 2) Remarriage of widows outside their husband's clan is generally not accepted.
- 3) Widows are not legally aware of their right to remarriage.
- 4) Widows do not only remarry because they want to found families, but for economic reasons.
- 5) There are inadequate laws which deal with widows' right to remarriage.

## **1.4 Research Questions**

Research questions flowing from these assumptions and which sought to be answered were:

- 1) What is the prevalence rate of widowhood in Lesotho especially in the advent of HIV and AIDS?
- 2) To what extent is widows' remarriage outside the clan acceptable?
- 3) What is the level of legal awareness of widows on the right to remarriage?
- 4) How do socio-economic factors impact on widows' remarriage?
- 5) How adequate are the laws that deal with widowhood in Lesotho?

## **1.5 Demarcation of the Study**

The research was undertaken within the Maseru urban area covering different places such as Thaba-bosiu, Lithabaneng, Tšosane, Moabite and government offices. People living in Maseru are from different walks of life, various districts within the kingdom, both urban and rural, with different backgrounds and socializations which has enriched this research. The respondents in this research though they stay and work in Maseru are from Botha-bothe, Leribe, Berea, Maseru, Mafeteng, Mohale'shoek and Quthing which are all urban areas. Sometimes Quthing and some parts of Leribe are regarded as rural areas. And will also be regarded as such for purposes of this work.

## **CHAPTER TWO**

### **2.0 Law and Literature Review**

Widowhood is as old as humanity itself. Though it is not a new phenomenon widows continue to suffer injustices as if it was new and unforeseen and therefore not anticipated in African states' laws and policies. It is one area where a lot of research has been carried out. Existing research comprises of themes such as gender, widowhood and ageing, widowhood and inheritance, access to resources by widows and various kinds of cultural rituals undergone by widows after their husbands' death, their implications in terms of widows' human rights to freedom from degrading and inhuman treatment, and how they impact on the health and dignity of the person of the widow in the HIV and AIDS era. The existing literature does not attempt to delve into the right of the widow to remarriage as a human right, but rather discusses extensively the customary practice of widow inheritance or levirate unions which often do not require the widow's consent, but whose practice such great pressure on widows that they find themselves inherited even against their will.

Not much has been said about how difficult or simple it is for a widow to exercise her right to remarry. The literature in this area is sparse, widows finding that they are forgotten in terms of policies and support structures. This is the case world wide with the exception of the west and some African states, for instance, war-torn nations which are rebuilding themselves after armed conflicts which have left most women widowed (UN:2001). Though they remain absent from the statistics of many developing countries, and they are rarely mentioned in the multitude of reports on women's poverty, development, health, or human rights published in the last twenty-five years, they comprise quite a significant proportion of all women ranging from between 7 and 16 per cent of adult women world wide. In many developing countries the exact numbers of widows, their ages, and other social and economic aspects of their lives are unknown (UN: 2001). Owen puts it thus:

There has been very little study of the circumstances that facilitate or inhibit the remarriage of widows in developing countries (India is an exception). This is partly because if widows are studied at all, it is the currently widowed and not the ever-widowed whose lives are examined. Married women's marital history remains invisible to the researcher. Besides, remarriage of widows is a sensitive subject and it is frequently difficult to elicit information about its prevalence or its nature"<sup>1</sup>

Some of the literature does not even attempt to discuss widowhood within the context of human rights.

Though dealing with an area which has already been researched is not a straight forward exercise, this research investigates the factors which enable and hinder widows from exercising this right; assesses the level of legal awareness of the right by the right holders; interrogates why the right to remarriage is or is not exercised by widows; and discusses the prevalence of widowhood and the acceptability of the exercise of this right within a given context. Examples will also be drawn from other jurisdictions in Africa.

## **2.1 The Law**

In Africa, the living customary law has always been that marriage is not dissolved by death. Even with the influence of the colonialists, Africans have remained adamant that their customs and cultures should remain untouched, which is impossible because we live in a changing world and laws are bound to change, as the law is made for the people and not vice versa. African societies are characterized by cultures and customs which are mainly practised by or on women. For instance, it is women who have to strictly observe the mourning cultures, and not men. In the six countries where WLSA carried out its research, it was discovered that levirate unions were rife in some states and less so in others. However, they have one thing in common: the man is the decision maker and he decides what should be done. Another feature is that, customarily, a woman is married to the whole clan and not to that particular individual whom she deems herself married to. This position is very suitable for men to practice wife inheritance since the woman is referred to as 'our wife' even though during the lifetime of the husband the meaning of 'our wife' is not as pronounced as it is as when the woman loses her husband to death.

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<sup>1</sup> See Margaret Owen, *A World of Widows*. (1996) London, Zed Books pg 104.

During the scramble for Africa, most African states received other laws from their colonial masters over and above their own customary laws, customs and cultures which were referred to as the common law. These laws were either Roman-Dutch or English common law depending on the legal system of the colonizer. African nations under the colonial rule were to apply their own laws as long as they were not repugnant to justice. After colonialism the received laws brought about the common law right to remarriage which was never known nor even accepted by the indigenous peoples of Africa. Religion also had its own role to play and none of these imported practices improved the situation of women; instead they ‘inspired’ the cultures and customs to subordinate women even further.

### **2.1.1 Experiences from other countries**

- **Kenya – the Luo**

Kenya has different tribes with different cultures but for purposes of this work only the Luo culture will be looked into...

Among the Luo community of Kenya widows are culturally permitted to have a surrogate husband after their husband’s death. They are not allowed to remarry but such unions are referred to as ‘remarriage’ with the result that widows are not allowed to have any other sexual partner except the surrogate husband who is normally from the late husband’s family. The surrogate husband is known as the *ter* and assumes the role of a guardian to the deceased’s whole family, the widow included. Ironically, the *ter* is never regarded as the husband to the widow as the widow is always regarded as the wife of the deceased.<sup>2</sup>

A Luo widow has to undergo some rigorous cultural rituals to which sexual cleansing is central and mandatory. It is important to note that:

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<sup>2</sup> For all the information under this subheading unless indicated otherwise, see article by Samson O. Gunga entitled Politics of Widowhood and remarriage among the Luo of Kenya published in the Thought and Practice: A Journal of the Philosophical Association of Kenya(PAK) Vol 1 No1,June,2009.paraphrased and modified in some areas.



Whereas widows are subjected to very strenuous widowhood rites among the Luo, widowers are not. They are likely to remarry any woman of their choice as they are not restricted in any manner during their bereavement period.<sup>3</sup>

The Luo, as is recorded by Gunga above, have no intention of remarrying the widow but use this term in order to keep her within the deceased's family so that they can gain free access to the widow's property under the guise of guardianship.

- **Uganda**

Uganda, like Kenya, has different ethnic groups with diverse cultural rituals for women. The severity of these rituals differs from tribe to tribe depending on the understanding of that particular tribe and how they respond to widows' rights.

As evidence that the widow is mourning, a Moganda widow has to wear a topless garment and tie a piece of bark around her waist, sleep on banana leaves the whole period before the funeral but is no longer inherited as the practice is considered outdated. These are however not the only cultural rites which the widows undergo but a few have been chosen to illustrate differences in cultures within the same country.

The Bakiga widows have their private parts rubbed with leaves from a certain plant and this ritual is performed on her by a traditional medicine man. A thorny plant is brushed on the forehead of the widow as part of the last funeral rituals. Wife inheritance is being phased out as it is no longer that common amongst this tribe.

The Iteso still fervently practise wife inheritance. Though it is referred to as remarriage, the widow is bound to remarry within her late husband's clan. If she refuses to be inherited she is chased away and the bride price has to be restored to the dead husband's family by the new husband. During mourning she is not allowed to cut her hair, eat or bathe for the whole period of

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<sup>3</sup> See Gunga page 7

her mourning which is about three days. She is also guarded so that she does not commit suicide due to grief.

The Lugbara widow gets automatically inherited only if she is well behaved and the clan's investigations have not associated her with the death of her husband. This levirate custom is normally considered to be an act of rescuing a destitute widow; it is not referred to as remarriage. It should be noted however that these are only highlights of some of these practices; there are still many others which have not been incorporated into this study.<sup>4</sup> Moslem widows do not perform any of the above rituals in Uganda.

- **Nigeria**

Amongst the Dukawa of Nigeria, the widow is the levir's wife for all intents and purposes but she is not called his wife.<sup>5</sup> Her children belong to the former husband and she stays within the same compound with the levir but in her own hut together with her children (Owen: 1996). Family law discriminates against widows and places them at a disadvantage as it permits certain widowhood practices which are not applicable to women married in accordance with statutory law. Such practices include long incarceration periods during mourning times. When a man dies, his wife is seen as impure and unclean like in any African culture. Further it is believed that "the beauty of a woman is her husband", and as part of mourning rituals, the widow is subjected to practices that undermine her hygiene, is maltreated by the deceased's relatives, chased away if she has no male adult children and is inherited in some states (Women Watch:2001).

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<sup>4</sup> All the information about rituals in Uganda has been gleaned from Leda Hasila Limann's dissertation entitled "Widowhood rites and the rights of women in Africa: The Ugandan experience", submitted at the University of Makerere Uganda, in 2003.

<sup>5</sup> Note the similarities in cultures through which widows are lulled into believing that they have remarried while in actual fact they have not.

- **Bangladesh, Nepal, Pakistan, Afghanistan**

In Bangladesh, the Muslim widow is, in theory, better off than the Indian Hindu widow. The Koran encourages remarriage and the widow cannot be disinherited (UN: 2001). Arranged marriages still occur in the rural areas of Bangladesh and these often result in child widows. Daughters of poor widows are considered to be an economic liability and are as a result likely to be given away into polygamous marriages where the first wives are considered too old for sex or cannot bear children any more (UN : 2001). Sometimes they are handed over to a series of older, frail or disabled men which makes them suffer serial widowhood. Bangladesh and Nepal are alleged to be responsible for trafficking poor widows' daughters (who do not have a male adult to protect them) into the brothels in India.

The differences in interpreting the Islamic law have resulted in untold suffering of Afghanistan widows. The Taliban who espouse a fundamentalist interpretation of the Islamic law forbid women to work outside the home and they cannot go outside the home without a male escort to protect them (UN: 2001). This has even resulted in the loss of food aid for widows who are not permitted to leave their homes unaccompanied by a male relative. It is estimated that there are 40 000 widows in Afghanistan who have been reduced to begging and some even commit suicide due to unwavering application of this rigid interpretation of Islamic law. Widows are regularly disinherited and treated violently in Bangladesh, Pakistan and Afghanistan (Owen: 1996).

- **Tanzania, Botswana, Swaziland and Lesotho**

Widows in these countries are much better off as compared with those in Bangladesh and Pakistan. They still undergo mourning rituals for their husbands but they have a choice whether to remarry even though they fear doing so and prefer to keep lovers who may stay with or visit them without entering into a valid marriage contract with them. Their fear of remarrying is directly related to the property which they might lose if they marry out of the deceased's clan. It is entirely up to them to choose what they want to do, but whatever choice they make it is not free from stigma. The Swahili of Tanzania are also free to remarry or keep men friends. Where

customary laws are applicable, a widow is disinherited. Widow disinheritance is still practised though it is no longer rampant. Muslim widows in Tanzania get one eighth of the deceased's estate and this is applicable regardless of their number in a polygamous union. They share it equally. The male child gets the 'lion's share' of the deceased's inheritance which is similar to the heirship of the southern African inheritance, as discussed in the *Magaya* case of Zimbabwe in 1998. In Bangladesh, Pakistan and Afghanistan widows are often disinherited and violently treated (Owen: 1996).

- **Lesotho**

The Lesotho position is not very different from other countries across the continent as there is a dual legal system as is the case with any other country which was under the protectorate of the colonialists. Wife inheritance which was known as the '*kenela*' custom has fallen into disuse after it was pronounced illegal in the landmark regency case when Queen 'Mantšebo refused to be inherited and wanted to act as the regent until her son (the late King Moshoeshe 11) came of age. It still had the same characteristics of other countries across the African continent where a brother to the late husband acts as the husband to the widow and bears children for the deceased. The widow still stayed in her house together with her children with the late husband's brother acting as husband to the widow and as father to the children.

- **WLSA Research**

WLSA inheritance research for 1994 revealed that the family seems to have significant power to disinherit people who might have considered themselves a member of the family. In like manner, when it comes to widowhood, it is the family again which decides who the widow is in terms of whether or not they (the deceased and the widow) had contracted a valid marriage. The family is therefore seen as the centre and origin of customary law (WLSA: 1994). In Sesotho, marriage is not only between the couple but between the families of the couple also, and is regarded as extending beyond the death of the husband; hence the widow is expected to remain within the family and generally not to remarry. In Lesotho, marriage makes the woman a member of her

husband's family although she does not cut all links with her natal family. Such links are maintained and become important for certain rituals. For instance, a widow is cleansed by her natal family after mourning the death of her husband (WLSA). These links also are very important for resolving disputes between the couple. However, the wife oscillates between the two families even though she belongs to the husband's family. The man on the other hand enjoys full membership of one family (WLSA: 1994). This dual belonging or membership of a married woman is a source of woman's vulnerability in inheritance matters (WLSA: 1994): on the one hand, her natal family gives her away but, on the other, the husband's family does not fully accept her. In other words, she never reaches her final destination or home. In my opinion this is aggravated by the fact that in Sesotho law marriage is a process (WLSA: 1995) and for that matter the woman gets widowed while still in transit from her maiden home to her marital home where she does not seem to be fully accepted. The processual nature of a customary law marriage puts a woman at a disadvantage as some women who consider themselves to be widows may not be regarded as such by the deceased's family (WLSA:1995). By its nature a customary law marriage to a certain extent influences the family's decision as to who the rightful widow should be. For this reason WLSA proposes a more liberal definition of widowhood such that some of the widows are not left outside the definition which negatively impacts on their other rights. Her marital family fears that whatever she has with her husband might be taken by her to her natal home should her husband die, which is why her right of inheritance is often challenged. The natal family on the other hand also fears that if she is given property such as land, it may end up being the property of her marital family.

As regards remarriage of widows, it is unknown to Sesotho law but was provided for in the form of a levirate custom known as *ho kenela*, and during the WLSA research, no widow was found to have remarried as the majority of those interviewed had expressed the view that they would not freely remarry and advanced a number of reasons including age. WLSA argues that remarriage under custom is very complex taking into account that the death of a husband does not dissolve the marriage, and the fact that the levirate custom was meant to continue the ties between the two families. Payment of *bohali* or lobola further complicated the issue of widow remarriage due to the fact that it raised questions such as who would be entitled to receive *bohali* for the remarrying widow. WLSA notes, and correctly so, that the conservative view that a widow may

not remarry had been watered down by progressive decisions such as the one in Motšoene v Harding.<sup>6</sup> This case laid down the principle that a widow could not remarry when her husband died because she remained part of the family of the deceased. She could only remarry after obtaining a divorce from the Native Court<sup>7</sup> which could grant her a divorce if satisfied with her reasons for divorce and order restoration of *bohali* to the deceased's husband's people. Though the decision was thought to have been progressive, as it had introduced a new dimension to Sesotho law, namely, divorce under customary union, which never existed before this decision, it still remained awkward in my opinion for the widow to have to go through divorce litigation in order to sever ties between herself and the deceased husband's family when the marriage had already been terminated by death.

In a later case of Bereng Griffith v 'Mantšebo Seeiso Griffith<sup>8</sup>, a contrary view was expressed. This case laid down a different principle: that a widow could remarry without having to divorce the late husband's family, and if the children remained within the husband's family, no *bohali* was supposed to be returned. This is still the law even today though it was not known. Restoration of *bohali* also fell into disuse as the *bohali* cattle or money would ordinarily have been long used at the time the widow remarried. It is presently up to the widow to either leave the children with the husband's family or go with them into the new marriage when she remarries. However her decision may not be without opposition by the in-laws.

The question as to whether *bohali* should be restored before contracting a valid marriage was further discussed in the case of Molapo v Mahooana<sup>9</sup> in which the court answered this question in the affirmative. This case attracted a lot of criticism as to why should *bohali* be restored when a widow divorces while it is not a requirement when divorce takes place during the life time of the husband (WLSA: 1994).

Presently, it would seem there is no record of recent case law on remarriage of the widow as most decisions are unreported and therefore makes it difficult to access such decisions, except

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<sup>6</sup> 1954. H.C.T.L.R. 1.

<sup>7</sup> Presently known as the Basotho Courts which are Local and Central courts, whose jurisdiction is to determine cases in accordance with the Sesotho law only.

<sup>8</sup> 1926-1953 H.C.T.L.R. 50

<sup>9</sup> Ibid ,309.

for inheritance cases where the widow's right to bury the deceased husband and her rights to inherit are invariably challenged almost on a daily basis as it is incorrectly understood that the right to bury gives rise to the right to inherit. Most litigation in this area is based on the conflict that exists between customary law and statutory provisions as to which legal regime should be applicable to the administration of the deceased's estate.

Wife inheritance was and still remains the main issue of some African customs which deny widows their right to remarriage. The manner in which it was practised shows that men instinctively understood that widows were free to remarry but were determined to ensure that they lulled them into the false belief of remarriage within the clan which gave such widows a sense of acceptability and belonging within that particular clan.

It appears that despite all these diabolic practices, women across the African continent are very aware of the health hazards inherent in practices such as wife inheritance in the context of HIV and AIDS, and many other inhuman and degrading rituals to which they are subjected. Women's organizations are therefore working extremely hard to ensure that women understand and fight for their rights and are integrated into a society in which they are respected and treated with dignity. Such organizations include the TASO of Uganda, SEWA in India and BRAC in Bangladesh. However, Lesotho has no special programme designed to meet the needs of widows.

Despite the existence of the right to remarriage at common law, the colonial rule promulgated a proclamation in 1935 known as the Administration of Estates Proclamation (AEP) which was meant to govern the administration of estates within the then Basutoland, of people who were found to have abandoned the customary way of life and had adopted in its place the European mode of life. All other estates not falling within the ambit of this provision were left to be administered customarily.<sup>10</sup> Section 56 thereof provides for protection of inheritances of minor children whose parents intended to remarry. The main thrust of the provision is that every widow or widower who has minor children and intends to remarry shall have the property of the previous marriage secured through the Office of the Master of the High Court if such property is worth an amount of two hundred Maloti /Rands or above. As proof that the property has been

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<sup>10</sup> Section 3(b) of the AEP no. 19 of 1935.

secured, the Master has to issue a certificate of remarriage to the remarrying widow/er which enables any marriage officer within the country to allow her/him to remarry. This law is still applicable today. Prior to 1935, another law was already in place known as the Law of Inheritance Act.<sup>11</sup> This Act provides for freedom of testation in that it makes it clear that any will executed by a competent person shall not be rendered invalid or set aside because the testator/testatrix has disinherited or omitted to mention any child, parent, relative or descendant, and that such disinheritance or omission can be done without having to give any reason for it. Section 6 of the Law of Inheritance provides:

Nothing in this Part contained shall affect or alter the laws of inheritance *ab intestato* at present in force in Basutoland.

In section 7 the same law provides that this Act shall not be construed in any way as extending to or altering or affecting other laws applicable to community of property between spouses in Basutoland when not excluded by antenuptial contract. Read together with the AEP and the Intestate Succession Proclamation<sup>12</sup> the discrimination becomes even clearer. Section 3 of the Intestate Succession Proclamation provides thus:

This proclamation shall not apply to succession to any African unless the estate of such African is required to be administered in accordance with the provisions of the Administration of Estates Proclamation by virtue of the proviso to paragraph (b) of section three of that Proclamation.

All the above provisions from these three different laws revolve around the discriminatory proviso 3(b) of the AEP which divides people according to the manner in which they conduct their affairs as to whether such people fit within the description of leading a European mode of life or whether they are purely living in accordance with the customs of the Basotho. As has been rightfully identified by the CEDAW Committee that most of the problems of the women emanate from the family or family law where worst subordination takes place, the legal provisions in the areas of marriage and inheritance reinforce the discrimination of section 3(b) of the AEP. According to this section, no person who is considered not to have abandoned

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<sup>11</sup> Act 23 of 1873.

<sup>12</sup> Proclamation no. 2 of 1953.



customary way of life and has adopted in its place a European mode of life has a right to execute a will or to have his /her estate administered by the office of the Master of the High Court.

In 1974, eight years after Lesotho became an independent state it enacted through its Parliament, the Marriage Act<sup>13</sup> which provides under section 24 that:

No banns shall be published and no special license issued under any of the provisions of this Act with respect to or for the marriage of any widower or widow having minor children of a former marriage, unless a certificate shall be produced signed by the Master of the High court or an officer in the public service authorized thereto by him to the effect that the inheritances which have devolved upon such minors have been settled by payment to the Master, or secured by the common law bond or obligation commonly called **kinderbewys** duly registered at the Deeds Registry, or to the effect that the value of such inheritances was less than two hundred rand:

Provided that the provisions of this section shall not apply to the marriage of any widower or widow having minor children of a former marriage whose rights of inheritances are regulated according to Sesotho law and custom.

At the time of the promulgation and enactment of the above laws very few people were considered to have abandoned the customary mode of life. This therefore means that most people were unprotected as they were left outside the application of these laws. Later, churches and employers demanded marriage certificates from their members and employees respectively and this was erroneously interpreted to mean that a customary law marriage was superceded by a civil rites one. As a result the majority of customary law marriages were solemnized and this solemnization has been interpreted by the courts as converting a Sesotho marriage into a civil rites one. That is why WLSA discovered during its inheritance research that about 95% of marriages in Lesotho were in community of property. Community of property is not a Sesotho law feature but a foreign one. The type of marriage being one of the strongest determining factors as to whether one lives in accordance with custom or not made it imperative for the remarrying couples who had minor children to seek remarriage certificates from the Master's office. Further, remarriage in itself is not a customary law concept, so it may be inferred that such couples are therefore not governed by customary law as there is no such a requirement

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<sup>13</sup>Ac t no. 10 of 1974

under custom. All they could do would be to enter into levirate unions where widows remarried within the late husband's clan.

### **The Land Act of 1979 (as amended) and the Land Bill 2001**

The Land Act of 1979 was amended in 1992 to provide for widows' usufructuary rights to land after the death of her husband. This was meant to ensure protection of the widow with regard to her use of land after the death of her husband because it was believed that the death of the head of the family entitled the heir or the deceased's brothers to take over such land thus leaving the widow destitute. The same provision is still proposed in the Land Bill of 2001. However it will be noted that the Act and the Bill do not have any intention of conferring full rights of an allottee to the widow so that she deal with the land in a manner she deems fit. Her user right falls away when she remarries. This is yet another influence of patriarchy where the right of inheritance follows the male line. While widowers and male children can own land without any limitations, widows' use and title to land is not without limitations. This goes back to the fact that males are seen as permanent members of their families while women, whether married or not, are regarded as people belonging to another clan. The more inadequate the marriage and inheritance laws, the more discrimination suffered by women, in particular, widows.

This discussion will be expanded in chapter four. Suffice to say that the link between the laws governing marriage and inheritance are as interrelated as the rights to marriage and inheritance because one gives rise to the other as is the legal position presently and therefore the widows' right to remarriage cannot be discussed in isolation.

## **2.2 Human rights instruments**

There is no doubt from the foregoing that widows' rights are not being respected by various cultures in Africa. This happens despite human rights standards to which state parties have made a commitment to fulfil. The Women's Protocol provides for the right to remarriage thus:

States parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

a) that widows are not subjected to inhuman, humiliating or degrading treatment;

b) A widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and welfare of the children;

c) A widow shall have the right to remarry, and in that event, to remarry the person of her choice.<sup>14</sup>

In Lesotho marriage is regulated by statutory law and customary law. Statutory law on marriage has incorporated to a large extent principles of common law. It is this law that does not clearly provide for remarriage but only addresses it in an attempt to protect minor children's inheritances whose parents choose to remarry. Remarriage of widows is therefore governed by both systems of the law although there is much ignorance as regards the abolition of the levirate custom. Most people do not know that it was abolished a long time ago and they still believe that it can be practised. However, there is no evidence that levirate custom is still being practised in Lesotho nor is there evidence that it is not being practised either. If practised, it is very minimal because no one throughout this research was found to be in such a union, even from my experience I have not come across such a union save to say that custodians of custom continue to echo its memories as if it is the living law at present. However, there were two cases of widows who reported being forced into levirate unions by their husband's brothers, and they were the only two cases reported to the CGPU Police Mohale'shoek within a period of six years. The Lesotho Constitution has no provision on either the rights of women or widows.

Some states have gone a step further by amending their constitutions to include the rights of the widows in their supreme laws. Such member states include Uganda and Malawi whose Constitutions clearly provide for women and widows' rights. The Constitution of the Republic of Uganda provides for the development and incorporation in aspects of Ugandan life cultural and customary values which are consistent with fundamental rights and freedoms, human dignity,

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<sup>14</sup> Article 20.

democracy and with the Constitution as part of its objectives.<sup>15</sup> It goes further to provide for the minimum marriageable age for both men and women which is eighteen years, and provides for equal rights at and in marriage, during marriage and at its dissolution. Sub-article 2 thereof provides in particular for widows' inheritance and parental rights thus:

Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.

Sub-article 3 provides for free consent of the man and woman who intend to marry.<sup>16</sup> Article 33 (1) specifically provides for full and equal dignity that must be accorded women as is accorded to men.

The above provisions are in conformity with CEDAW and the Women's Protocol (i.e., the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa) which amounts at least to a de jure equality. In this way, the Constitution of Uganda provides a basis upon which international instruments can be invoked even if the Parliament has not enacted appropriate laws. Other states have not made the necessary amendments in their Constitutions to include the rights of women and those of widows as a distinct category within the main group of women. Such include Lesotho despite her ratification of most of the international and regional instruments.

Although there is a move towards amending obsolete laws which were gendered in nature (for instance, the Deeds Registry Act of 1967), and legislating in the new areas which did not exist in the outdated laws, this is done in a rather haphazard way. The Constitution of Lesotho being the supreme law of the nation rendering any other law inconsistent with it void to the extent of its inconsistency, coupled with the reluctance within the judiciary to adopt a progressive interpretation of the law, such provisions, if challenged, are likely to fall away. A typical example of such a scenario would be where the relatively new Legal Capacity of Married Persons Act<sup>17</sup> is being challenged based on the minority status of women which it has removed

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<sup>15</sup> Objective XXIV of the 1995 constitution.

<sup>16</sup> Ibid. Article 31 sub-articles (1)(a) and(b), (2) and (3).

<sup>17</sup> No. 9 of 2006

but still remains in the supreme law of the land, the Constitution. The Lesotho Constitution like the Constitutions of Zimbabwe and Zambia sanctions discrimination against women in that it preserves in tact the practice of customary law even if it discriminates against women. In her report to the AU pursuant to Solemn Declaration on Gender Equality in Africa, Lesotho had this to say:

Discrimination in any form is illegal and the Constitution makes no discrimination guarantee for laws with discriminatory provisions with the exception of customary law, and the private law of persons e.g. marriage and inheritance *Section 18 4 (c)*. This implies that any discriminatory cultural laws and practices will be protected and condoned by the Constitution.<sup>18</sup> (My underlining)

This is a contradiction in as far as the government claims commitment to equality and non-discrimination principle because this area which is deliberately being exempted from non-discrimination is the core of women's subordination in inheritance matters and attendant mourning rituals, and all other types of ill-treatment meted against women and widows with their root in the so-called private family law. The report continues thus:

The Bill of Rights in The Constitution secures certain rights and freedoms, particularly the right to equality before the law. Despite the discriminatory clause in Section 18 4(c), laws and policies promoting equality can be enacted and developed.

This is strange. The government is prepared to breach the Constitution rather than having it amended. It shows that there is no commitment on the part of the government to 'walk its talk'.

One of the objectives of the Gender and Development Policy is:

To ensure that gender-sensitive laws exist and are enforced.

These laws may exist but it may not be easy to implement them especially if there is a dispute which may end up making a mockery of women's rights. Contrary to the recommendations made in 2000 by the Land Policy Review Commission that, among other things, the Constitution must be amended, there is an obvious lack of political will. Some of the commission's recommendations are reproduced herein below:

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<sup>18</sup> Page 11 of the report.

- Section 18 (4) (c ) of the Constitution of Lesotho must be amended and deleted forthwith to the extent that it justifies discrimination against women under the guise of customary law.
- All laws, whether customary or legislative, preferring male heirs over women in so far as access to land or land property is concerned must be repealed or abolished forthwith. These include Sections 7 (5), 7 (6), 11, 12, 13, and 14 of the Laws of Lerotholi.

The right to be free from any form of discrimination is provided for under article 1 of CEDAW, the preamble to the UDHR, ICCPR, ICESCR, the Protocol to the African Charter and many others, and Lesotho is a party to all of them. In its preamble, the UDHR provides:

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

CEDAW defines discrimination under Article 1 as follows:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>19</sup>

From the experiences of women in different countries, it is evident that there is a lot of discrimination, violence, harmful practices and inhuman and degrading practices undergone only by widows. These happen on the basis of the distinction made between men and women which is in direct conflict with the above article, and amounts to non-compliance with international human rights standards. Furthermore, culture also places a number of restrictions on widows. All these practices come into play once the male spouse dies. The death of one's husband renders the surviving spouse a social outcast due to negative perceptions associated with the death of a male spouse and mourning practices. Once her husband dies, a widow is considered to be carrier of bad luck. Widowers do not suffer the same stigma. Unlike a widower, a widow has to wear special mourning attire to alert everyone that she is actually a bad or dangerous woman.

Despite the fact that most states are failing to:

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<sup>19</sup> Article I of CEDAW

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all practices which are based on the idea of the inferiority and or the superiority of either of the sexes or on stereotyped roles for men and women,<sup>20</sup>

remarriage remains a widow's right in terms of the Women's Protocol. It is not an ordinary right but it embodies other rights such as the right of the widow to freedom of choice of a partner in marriage and freedom of conscience. Compliance with this provision would also impact on compliance with the provision for contracting a valid marriage which requires the free and full consent of the woman to such a marriage.<sup>21</sup> Widows' rights are being infringed upon with impunity and widows continue to be excluded and treated like property as if they have no rights at all.

The right to self-determination is pertinent to a widow's remarriage as she is the one who has to make her own choice whether to remarry or not, and how to conduct her own affairs. Although Basotho widows were forced to undergo rituals that undermined their freedom of choice to remarry or remain single/widowed and not to undergo cultural rituals, Christianity has always opposed such practices and they could have used it beneficially. They were not allowed to determine their lives and the remnants of those human rights infringements are still felt even today. Born again Christians do not perform cultural rituals. Though not taking part in these customs is often accompanied by abusive comments, it also has another dimension to it; it raises suspicions of having played a role in the husband's death. All these happen in order to make life miserable for the widow. Widows who were bold enough to assert their rights, first by not partaking in the traditional rites and later remarrying had and still have strained relationships with the former husbands' relatives. To this, one widow had this to say:

I later discovered that my late husband's family was unhappy because I had remarried, claiming that I had remarried too soon after their son's death. They ended up not talking to me whenever we could meet.

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<sup>20</sup> CEDAW article 5 (a).

<sup>21</sup> This is provided for under article 16 of CEDAW.

### 2.2.1 The invisibility of widows

The UN Women Watch publication of 2001 known as 'Women 2000' recorded that not only are women invisible in the national planning of most of African states but that widows were also forgotten during the 1995 Beijing Platform for Action. Not even a mention of them was made in all the strategies devised to advance the course of women world wide. This shows how invisible these women are in the legal systems and within other programmes designed for women though this might have been a genuine mistake. Other scholars speculate that perhaps the widows' omission was attributable to the fact that in the substantive provisions of the Women's Convention, marriage is provide for towards the end and is likely to be discussed when a short time remains for the discussions during UN meetings. Another argument advanced for this omission is that this provision is purely legalistic which could be another factor discouraging its thorough discussion. Widows also feel and are aware of the exclusions they suffer. This was evidenced by a widow's prayer when I had a group discussion with them during the research thus:

Lord, we thank you because today we have been remembered. We wonder what wrong we have committed either against you or even against the society as a whole. In churches when they make altar calls for people to receive blessings they call married couples, the youth, members of mothers unions and other people except us the widows. We really wonder whether it is our fault that we are widows....

Widows suffer multiple exclusions. They are marginalized as members of a bigger group of women, that is, they suffer exclusions and other types of infringements of their rights by virtue of being women. As widows, the suffering increases and is aggravated by the status of being a widow as there are other exclusions and infringements of their rights directed specifically to a widow.

Human rights instruments have countless provisions on the protection of various women's rights and they are the last resort we look to for solving widows' problems. If member states are determined not to comply with their international obligations as duty bearers to fulfill, protect and promote the rights of their female citizens and only act when certain amount of pressures is put on them, then there is still a long way to go in terms of achieving de facto gender equality which is often quoted under the millennium development goals.



### 2.2.2 Christianity

About 90% of the population in Lesotho is Christian (Lesotho Profile: undated). Differences in religious beliefs range from Pentecostalism, Evangelical, Roman Catholicism, Seventh Day Adventist, Anglican and many others. These variations also represent different interpretations of the Bible which is the basis of the Christian faith. With regard to remarriage of widows, the Bible has always been clear that a widow can remarry as she is free from the previous marriage by virtue of the death of her spouse<sup>22</sup>. The differences again are manifested when it comes to the number of women a man can marry as some churches base their argument about polygamy on the Old Testament while others espouse monogamy provided for in the New Testament. Whether a woman can divorce and remarry while her ex-husband is still alive is also an issue in Christianity.

In the book of 1Timothy 5:1-9, Apostle Paul encourages young widows to remarry while those aged sixty years and above should be taken care of by the church if they have no children to assist them and have been a wife to one man. If they have children, their children should look after them. The verses of the scripture in the book of Romans 7 are amplified by the provisions in 1 Corinthians 7:39 that a widow can remarry a man of her choice (only in the Lord).

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<sup>22</sup> Romans 1:1-3

\* All Bible verses from New King James Version.

## **CHAPTER THREE**

### **3.0 Methodologies and Methods**

There were methodologies and methods used to collect data in this research, and women's law was one of them.

#### **Methodologies**

##### **3.1 Women's Law Approach**

This approach is a legal discipline used in women's law research. It takes women as a starting point but it is flexible and enables one to explore the manner in which things happen and why they happen in a particular way, whom they affect and how. Through this approach one can explore from different perspectives whatever topic that is at hand. In this manner widows and their life experiences were explored which enabled interrogation of the law (Bentzon et al: 1998) as it applies to widows and widowers in relation to remarriage.

Since I sought to understand whether widows knew about their right and whether they were exercising their right to remarriage, it therefore became obvious that women's law was the ideal methodology to use in order to analyse the legal and social position of women. I adopted a holistic approach which encompassed both grounded and empirical research in order to examine widow's experiences with regard to exercising their right to remarry a person of their own choice.

Taking the widows as a starting point I was able to get first hand information from the widows allowing them to talk freely despite being co-workers with some of them. Some of the widows work with me within the Ministry of Law and Constitutional Affairs and we know each other very well, so not only did I think that being a co-worker with them would affect to a certain extent my interviews with them but also being senior to them, but they were able to reveal intimate practices such as masturbation, giving details of which finger they use and why. The fact

that my research also was done on a woman to woman basis made it easier for me to get the information I needed from the widows to investigate why widows were not remarrying while the right to remarriage was implied in the statutory law and has always been a common law right only exercised to a certain extent by men.

As a result I was able to come up with methods which were apt for data collection from the widows and widowers, and men and women through in-depth interviews and group discussions, observations and referrals though some of the referrals did not yield much in as much as I had intended to interview more widows who had remarried.

As I was collecting the data I paid attention to the manner in which widows were being treated and perceived by the society when they became widowed. I looked at how they regarded themselves, their understanding of the right up to the point where they make a decision whether or not to remarry. I would hear their different voices on how they perceive remarriage, why they were not remarrying and what influenced their decisions in relation to this right. It was only by talking to the women that one would understand why besides the laws that provide for remarriage, widows are sometimes not exercising their legal right as provided for in the law.

Other methodologies used in this work are:

### **3.2 Grounded Theory Approach**

This is an iterative process in which data and theory, lived reality and perceptions about norms are constantly engaged with each other thus helping the researcher to decide what data to collect and how to interpret it (Bentzon et al: 1998). Using the grounded theory approach constant interaction takes place between developing theories and methodology as preliminary assumptions direct the data collection process and the collected data when analyzed, indicates new sources of data.

This approach is also used to achieve an holistic understanding of an area of research. The aim in using the grounded approach is to engage empirical knowledge about gender relations and local

practices and procedures in a constant dialogue with theoretical generalization and concept building (Bentzon et al: 1998). When using grounded theory, continuous dialogue and interaction is maintained and the research proceeds between the initial theory and the empirical data collected, thus enabling adjustments between the initial theoretical assumptions and the empirical data collected in the parallel process of data collection and analysis (Bentzon et al: 1998).

Applying this approach, I therefore interacted with different people throughout the research. I needed information from various actors and structures and social fields such as the families due to the nature of my assumptions, so this methodology became pertinent in as far as the assumptions, objectives and questions this study sought to address were concerned. I was as a result able to get insights on the extent to which widows' remarriage outside their late husband's clan is acceptable, the role and influence of the actors and structures in widow's remarriage and the impact of socio-economic factors on widows' remarriage. Through proper analysis this information yielded much in terms of recommendations for improving and promoting widow's right to remarriage.

### **3.3 Legal pluralism**

Legal pluralism refers to a situation where multiple laws operate together and are recognized as such. These multiple laws are customs, cultures, statutes and other regulatory norms which control people's lives. I assumed that widows' remarriage is not generally acceptable outside the husbands' clan and that there are cultural perceptions which impact negatively on the widow's right to remarriage and that customary practices, cultures and other norms are likely to clash with the human rights instruments and or the statutory provisions with the widow being caught in the middle of the crossroads of all these. This approach has enabled me to examine the interplay between customary, legal norms and values to establish if there are any hindrances or negative perceptions about the right such that widows refrain from exercising it. Linked closely to this approach are semi-autonomous social fields which are other rule-generating and rule-enforcing bodies which impact on the choices made by individuals as regards their right to remarry a person

of their choice. It has as a result been useful in unearthing societal attitudes and beliefs, and the likely exercise or non-exercise of one's right to remarriage.

### **3.4 Actors and Structures**

This approach enabled analysis of how different actors interact with different structures, in this case men and women, churches and families. I was able to examine the influence of structures on actors and structures as some choices are sometimes affected by legal, economic and even the social structures. This methodology was relevant but it had its own limitations as some structures did not deal directly with the widows such that their influence could not be effectively examined. However, families proved to be more influential on the widows' exercise of their right to remarry than any other structure because of the nature of the relationship that exists between them and the widows.

### **3.5 Human Rights Approach**

The human rights approach was used to gauge the extent to which Lesotho as a state party has complied with its international obligations as expressed in international instruments. Since one of my assumptions is about inadequacy of the law, it was important to use this approach so as to be able to suggest both legal and non-legal interventions.

### **3.6 Sex and Gender Analysis**

Being either a man or a woman influences the manner in which the law applies to either of them regardless of the provisions entrenched in the Constitutions on equality before the law. Even within the society, the roles played by men and women are different or are expected to be different. This approach was used to investigate whether one's sex operates as an inhibiting factor to exercise one's right to remarry.

## **Data Collection Methods**

The primary sources of data used in this research were in-depth interviews on a one to one basis with widows, widowers, family members, the church, marriage officer, police and an NGO although there were focus group discussions and observations, with both elements of qualitative and quantitative embodied in these methods. Without the use of the referrals I was not going to be able to locate any remarried widows and widowers as informants in this work. I used the following variables to compare the widows' understanding of the right to remarriage and how economic factors impacted on their choice to remarry, namely; age, educational background, urban and rural dichotomies although these were very limited as less than three widows were from the rural areas. Care was therefore taken not to make sweeping generalizations by taking their position as a complete picture representing the rural areas, while at the same time bearing in mind that in women's law emphasis is not on numbers as such.

Quthing and some parts of Leribe were regarded as the rural areas for purposes of this research. The age groups were divided thus: 18-35 years representing young widows. 36-50 years representing middle aged and 51 years and above as the old.

### **3.7 In-depth Interviews**

These involved interviewing widows, widowers and women. They were helpful because the interviews were not restricted to certain answers or questions such that they enabled discussions and I was able to get more of the widows and widowers experiences after losing their spouses, such as the story narrated by a widower of his experience as to how evil was being planned against him by his neighbour who suspected that he had an affair with his wife.

Further I would not have been able to understand how cultural perceptions affect both widows and widowers were it not for these open-ended interviews. In this manner it was easy to obtain

this information which did not challenge my assumptions as such but went further to explain and clarify the reality on the ground. I was as a result able to interview eighteen widows out of which two had remarried and one widower who had also remarried. A full sample of respondents is reproduced herein below setting out the number of interviewees and their employment status where relevant.

<b>Serial Number</b>	<b>Name</b>	<b>Female</b>	<b>Male</b>	<b>Employment status where applicable</b>
1.	Motšelisi Matela	Widow-71 yrs		Nurse assistant
2.	‘Mamok’hondo Letlatsa	Widow-38yrs		Factory worker
3.	‘Mapapali Tebelo	Widow-29yrs		Lawyer
4.	‘Mantoa Sejake	Widow -42yrs -(family)		Social worker
5.	‘Matieho Makhasane	Widow-45yrs		Personal secretary
6.	Nowazamo Vundakubi	Widow-36yrs		Office assistant
7.	‘Matokelo Pitso	Widow-35yrs		Office assistant
8.	‘Malisema Makhasane	Widow-47yrs		Personal secretary
9.	‘Makhubelu Raletšela	Widow-39yrs		Factory worker
10.	‘Makonosoang Molapo	Widow-33yrs		Factory worker
11.	Tsietso Beoana	Widow-33yrs		Copy typist
12.	‘Malebohang Mothoana	Remarried-43yrs		Executive officer
13.	‘Maluka Ramolahloane	Remarried 40-50yrs		Self employed
14.	‘Makhotso Nthako	Widow-31yrs		Executive officer
15.	‘Mataelo Lehana	Widow-59 yrs		Switch board operator
16.	Moroesi Mothibeli	Widow-50yrs		Accountant
17.	‘Manapo Sefuthi	Widow-42yrs		Office assistant
18.	‘Mamakutselane Ntoi	Widow-47yrs		Personal secretary
19..	Tefo Kopeli		CGPU Police-30yrs	
20.	Tšilo Lesia		Remarried-54yrs- (family)	retrenched
21.	Pastor Pentecostal church			

22.	Tsebang Putsoane		Attorney General's office	
23.	Masoleng		Marriage officer	
24.	Gender Ministry	1	Legal officer	
25.	FIDA	1	President	
26.	Priest- Roman Catholic Church		1	
27.	Priest –Anglican church		1	
			<b>Total one to one interviews = 27. 2 of the respondents also represented families</b>	

### 3.8 Observations

I used these to obtain information on how the treatment offered to a widow differs from that accorded to a widower. This method was used in all the discussions and interviews as a way of supplementing the data collected. Through non-verbal cues and bodily gestures expressions emotional feelings of respondents about their experiences after their husbands' death and about the whole notion of widows' remarriage were discovered. I however had an opportunity to observe the conduct of two funerals which I attended. In one funeral a man had died survived by a 31 year old widow with a 9 year old daughter while in another a 42 year old woman had died leaving behind a widower with seven children respectively. In both of these I was a passive observer in these funerals. Where a man had died, the widows elder brother when it was his time to console or comfort her sister, he made it clear that his sister should not regard herself as being young and therefore as qualified to remarry, but she should stay with her in-laws as they remain her parents even after the death of her husband.

After a few days I followed up the widow to find out what was really going on, and in fact I was surprised to find her in black mourning attire as I took note of the church services that she was a born again and therefore not subject to that practice. The widow started crying as she narrated her story. She disclosed that she was forced to wear those black clothes. She recounted her experiences on how she did not observe that culture for her biological mother and her first born when they died, but this time around she has been forced to wear it for her husband. The reason



for her wearing the attire was that there was a lot of rumour-mongering that if she did not observe that culture (of wearing of the mourning attire) for her husband, the in-laws were already planning to chase her back to her maiden home, so there was nowhere she could stay if chased away. However the church remained silent on the issue of remarriage.

With the widower, the services were still held by a born-again church though it was different from the previous one. All the people delivering their condolences speeches together with the representatives of the church did not say anything to the widower concerning remarriage; perhaps because it was assumed that he, unlike the widow, already knew what to do now that his wife had died survived by so many children who needed care, with the youngest daughter aged only three years.

### **3.9 Focus Group Discussions**

There were six focus group discussions throughout the whole research made up as follows: one big group of 14 widows at Ha Tšosane, another one for 40 chiefs at Thaba-bosiu, two more groups made up of two widows each in the government offices, one for eight men and one for two widowers. The two widows' group discussion were not by design, but the widows happened to be working together. These yielded much in as much as my research was concerned especially a group discussion which was conducted with the widows. The discussions were not only beneficial to the research but to the widows as well as some were ignorant of this right. The discussions were to some extent in the form of awareness raising. This group of widows has formed a support group which takes care of those infected and affected by HIV and AIDS within their community. For some of the widows it was their first time to be in the midst of other widows and they confessed that the discussion had been beneficial to them and they have realized that as widows, there was no place to be alone but they needed to be with others to share experiences and encourage one another. This group was very lively and no one hogged the discussion. Even those who were shy made their contributions because the atmosphere was a very conducive one. However, big group discussions were taxing because I had to make sure that I directed the discussions in the right direction to keep in line with the subject being studied. The widows' group is shown herein below with the researcher and the supervisor.

Motimposo Ha Nthaba, Ha Tšosane 10<sup>th</sup> Nov. 2009



The meetings with the two main groups, the widows and the chiefs were scheduled targeting their monthly sittings. The widows dedicated that time for the discussion and deferred their meeting to another date while the chiefs did not. My experiences were different with these two groups, the widows being the rights holders on one hand and the chiefs being the traditional leaders and upholders of custom and culture on the other.

The chiefs were in a hurry so that they could catch up with their own schedule for that day as they had several items on their agenda. Very unfortunately for me, my group discussion followed their discussion of a Land Bill which had raised their tempers and was strongly opposed. I brought another controversial issue; the human right of widows to remarry. The situation nearly got out of hand when one chief started to show how displeased he was with this topic and how these educated people like me bring problems within the country, and that as for them, they do not want to hear any more about the whole issue of human rights as they want to use their own customs and get rid of the laws enacted by the Parliament. It is at this point that the skills for

managing such a big group came into play. Assisted by the older and Acting Principal chief, the situation was brought under control and the discussions continued smoothly even though the time was very short considering the size of the group. There were only five female chiefs in this group of which older ones believed that remarriage was a right only available for men. The chiefs' picture is shown below with the researcher at the far left.

Thaba-bosiu Ha Ratau 6<sup>th</sup> Nov, 2009.



### **3.10 Records and Reports**

Reports from the Bureau of statistics have been used in this research and reliance has been made on them especially as regards assumption one. However there were no relevant officers to explain the reports and this has had a negative impact on the effective use of the information in such reports especially the charts. Other records perused as a way of triangulation of data I had already obtained were the Registrar General's marriage registers. The information from the registers and reports was used to assess the rate of widowhood and to compare the rate of remarriage between the widows and the widowers.

### **3.11 Referrals**

My initial plan was to meet the widows at the Master's office where they normally obtain letters which enable them access funds from their late husband's banking accounts and close such accounts. I could not talk to the widows at this place as the space was insufficient and newly appointed staff had no offices to occupy. I had to go and look for the interviewees in the villages and elsewhere. Referrals therefore were used to locate widows and widowers, and those who had remarried amongst them. However there were limitations on their use because they depended on the knowledge of the one referring me.

Gaining access to any of my research sites was not a problem and I did not have to make use of my official letters of introduction.

### **3.12 Desk Research**

In order to understand the magnitude and the nature of the problem, the following were reviewed as secondary sources of data, namely, dissertations, books, policy, laws, reports and internet documents.

### **3.13 Limitations of the study**

- **Difficulties in obtaining statistical data**

I was not able to ascertain what the mortality rate of men in Lesotho was, and the extent to which the number had increased due to HIV and AIDS, especially in the light of the fact that Lesotho ranks number three in the whole world as one of those developing countries mostly affected by this pandemic within the sub-Saharan region. First of all, it was not easy to meet the officials working for the Bureau of Statistics (BOS) which is the main data bank of the country. Efforts to get such information from the Registrar of Births and Deaths were also futile as I was referred back to BOS this time around with the name of a particular person who would be in a position to assist me. My hopes were shattered after I was made to wait until after the 10<sup>th</sup> of December,

2009 when the 2006 Population Census report would have been officially disseminated after launch by the relevant cabinet Minister. At this time of the year most officers go for holidays so I had to wait for their return in January, 2010. In January even scheduled appointments were not honoured until I made it my duty to report at those offices early in the morning almost every week until one day I was told that that particular individual had gone to further her studies somewhere outside the country.

I started all over again to other offices which could have that type of information which were the National AIDS Commission from there to the Department of Statistics within the Ministry of Health and Social Welfare-AIDS Directorate, from there to ADRA, but all in vain. My findings on the prevalence are based on the reports which were made available to me at BOS and the Ministry of Health.

A study undertaken by the aids directorate of the Ministry of Health which was likely to shed some light on the mortality rates of men was incomplete and data collection was to continue in Feb. 2010 while I would already be in Harare.

- **Problems with locating remarried widows**

Knowing who the remarried widows were was not a problem as I already knew some of the widows who had already married men of their choices. Locating them was problematic as some of them were no longer staying where it was originally shown in their files in the Master's office. Though they were not many, they were scattered within the neighbouring countries to fend for their families, for instance they were in Botswana and South Africa. For this category of widows I had to rely on referrals which did not yield much because they were dependent upon the knowledge of the one referring me.

## **CHAPTER FOUR**

### **4.0 Findings and analysis**

This chapter is a discussion of the research findings and analysis, and it attempts to answer the research questions in line with the assumptions underlying this study.

#### **4.1 Widowhood prevalence in Lesotho in the light of HIV and AIDS**

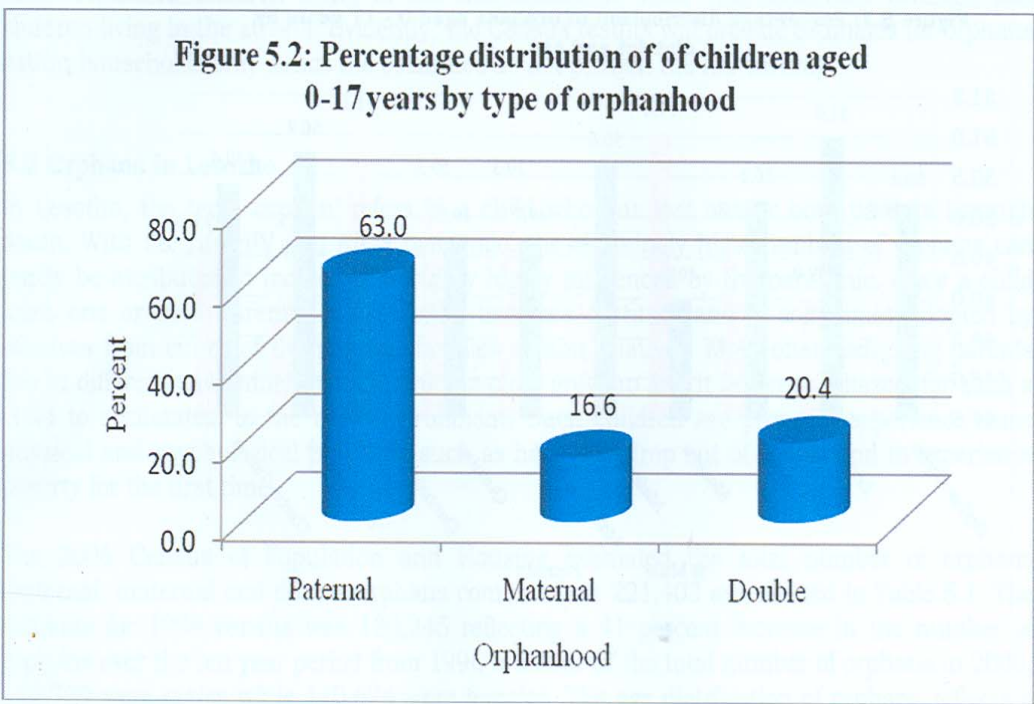
I assumed that there are more widows than widowers in Lesotho because of the scourge of HIV and AIDS. Therefore the research question to be answered is: what is the prevalence of widowhood in Lesotho?

Statistics throughout the world point to the fact that there are more women than men in the world. Though more boys than girls are born, most boys die during infancy as a result of low cardiopulmonary systems (Verbrugge as in Carr and Bodnar-Deren: 2009:705). Those who make it to adulthood are also surrounded by a myriad of risky behaviour such as smoking, alcohol consumption and physically strenuous work in adulthood (Carr and Deren: 2009). Over and above these, it has been established that men avoid health centers even when they are ill (Lesotho 2006 Population Census Report). This applies to all types of diseases compounded with their concealment of STIs and indulgence in unsafe sex worsens the situation. As a result there is a gender gap in mortality rates between males and females which accounts for the gendered global ageing with women being in the majority. As a result, female life expectancy is higher than male life expectancy in nearly every nation although this varies from nation to nation across the regions (Carr and Bodnar-Deren).

In Lesotho, life expectancy for females decreased from 60.2 years in 1996 census to 56.3 years, while in males it decreased from 58.6 to 48.7 years in the same census (HIV Setinel Report: 2007: 9-10). These have been influenced by HIV infections which stand at 23.2% of the total population which is about 1.8 million (BOS: 2009). The estimates of mortality rates between men

and women had not been worked out clearly as the census report had its own objectives and I had to look for other reports which could shed some light on the mortality rates for both men and women, and these are illustrated in the charts inserted herein below.

Amongst the HIV and AIDS orphans aged between 0-17 years in Lesotho the highest number of orphans who have lost one parent are paternal orphans who are estimated at 63%. Maternal orphanhood is estimated at 16.8% while double orphans are about 20.4 %.



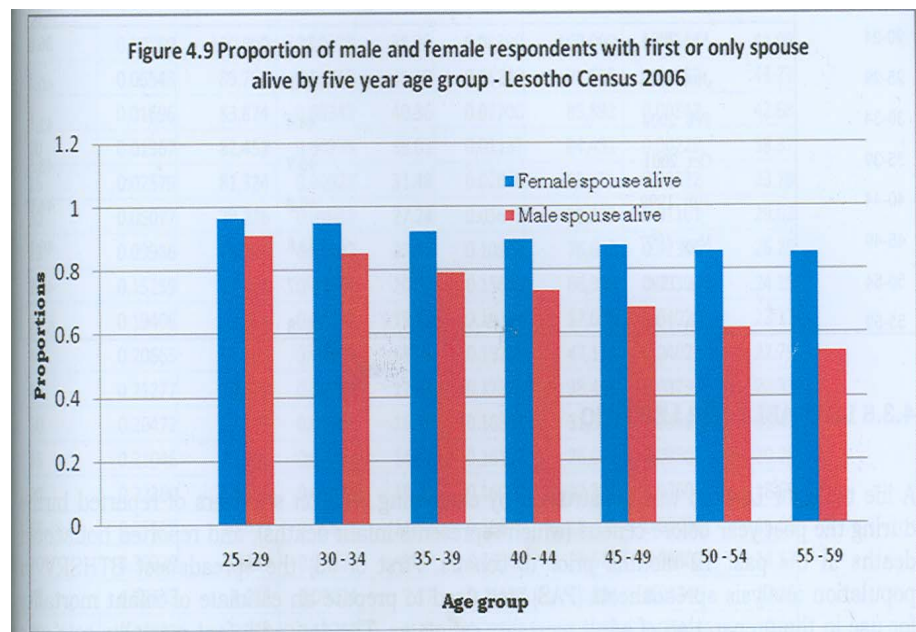
Source: 2006 Lesotho Population and Housing census Volume 111A: Population Dynamics. December 2009, BOS.

The implication from the above figures is that men die more than women. If men die more than women, widows are bound to be more than widowers.

In developed countries widowhood has increasingly become older women's issue while in developing ones especially in sub-Saharan Africa it is for both young and old due to HIV and AIDS (Carr: 2009) (emphasis added). In Lesotho it is mostly men who still have spouses between the ages 45 and 59 years, while most women between those years have already lost spouses.

From ages 20 to 44 years, the differences between the mortality rates of both sexes is not as visible as in the older age groups where women are the ones losing spouses more than men (BOS: 2006). This could be attributable to the fact that men marry women younger than them such that they die earlier and leave them widowed (Carr: 2009). Even if their spouses die, men unlike women remarry soon after their spouses' death which is why most men are not widowers (Owen: 1995).

From the foregoing, there is ample evidence that widowhood is more prevalent among women than men and the following chart confirms that widowhood amongst women increases with age.



The available data does not show what the rate of widowhood was prior to the advent of HIV and AIDS, and the extent to which HIV has contributed to widowhood in Lesotho. Though the figures are not straightforward as to the prevalence of widowhood in Lesotho, what comes out clearly from the findings is that widows far outnumbered the widowers in 2006 and preceding years.

The 2007 HIV and AIDS Sentinel Report however reveals a new trend altogether. Estimates in 2007 revealed that there were about 108,000 orphans in Lesotho, 46,000 being dual AIDS orphans while 73,000 were paternal orphans and 77,000 maternal orphans. This is a new turn of



events. Though women die more than men, this should not be interpreted to mean that there are more men than women because these numbers do not reflect the whole statistics of men and women in Lesotho. This is however a subject for further research as projections from the same report point out that from January 2009 and 2010 death rates for women would begin to increase as indicated in the following table:

Cumulative AIDS deaths

<b>YEAR</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
TOTAL	169,607	185,453	200,545
MALES	84,816	92,116	98,996
FEMALES	84,791	93,337	101,550

SOURCE: HIV and AIDS Setinel report 2007.

From 2002 - 2008 it has been the men who had been leading in deaths. The figures started to change slightly in 2008 as indicated above with a difference being only 25 between the numbers for dieing women and men.

The reason for this sudden change is partly attributable to the fact that HIV and other STIs prevalence were recently found to be very high amongst women with the highest rate being for the widows due to the fact that they might be interacting with different partners (HIV Sentinel report: 2007). This reasoning is however not convincing because even in marriages couples still interact with multiple partners outside their marriages hence the slogans “keep the promise”, “Be faithful”. This area needs thorough research in order to find out what it is that is happening presently that has not been happening earlier which brought about these changes.

#### **4.2 Acceptability of widows' remarriage outside the clan: unearthing cultural perceptions**

Though remarriage of widows is a right under the Women's Protocol and other instruments, I assumed that it was not acceptable if exercised outside the late husband's clan. This assumption was informed by the knowledge I had of the customs of the Basotho. The question to be answered in this part is: to what extent is widows' remarriage outside the clan acceptable?

Ordinarily there is no remarriage within the clan. The term 'remarriage' suggests getting married again. Within the African context, remarriage has begun to be slowly accepted as for a long time it has been substituted by levirate unions or wife inheritance which while put in proper perspective have never been considered as another marriage as is implied by the term 'remarriage' or marrying again. The widow who was inherited remained the widow of her husband, even the children whom she had with the levir belonged to the deceased husband. This was to show that wife inheritance could not properly be regarded as remarriage except for furtherance of hidden agendas known to the clan of the deceased husband.

The research revealed the following findings as the stand point on acceptability of widows' remarriage; however I must clarify that there are different views on this topic influenced by different levels of understanding and differences in perceptions. Among other considerations the differences of opinions are based on whether one is an old or a young widow. Secondly, on individual understanding which to a certain extent depends on or is influenced by educational background, life experiences and of course cultural perceptions.

The variations in opinions are set out in the findings herein below:

- Remarriage of a widow regardless of her age is generally a taboo and is perceived as adultery;
- The widow is perceived as her husband's family property.
- The society accepts unconditionally remarriage of a young widow who has no children.
- A young widow who has children has to stay within the husband's clan and bring up her children with or without the assistance of her in-laws.

- Some widows acknowledge their right to remarriage while others do not. This is the position regardless of educational background.
- Widows' remarriage is more acceptable to members of society who are more educated and to those who have been widowers.

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Widows' remarriage is directly linked to how marriage is understood amongst the Basotho. In Lesotho like in other African countries, traditionally the wife belonged to the clan and it was unheard of for a woman to remarry out of her late husband's clan. It was a taboo. A woman became the property of the clan by virtue of the bride price lobola or bohali that was paid for her when she got into the marriage. Presently it is still regarded as a taboo and for some people it amounts to adultery. For the people who believe remarriage of a widow to be a taboo, they base their argument on culture that although it is right to accord women their right to remarry there is no reason for her to remarry outside the clan when men are still there in that clan. This argument reveals how primitive the Basotho were and still are. It however became difficult for those who argued in favour of culture to explain the positiveness and goodness of such a culture. Again they could not think of alternatives to levirate custom respect women's rights other than lamenting the crumbling down of their culture. The adultery which the widows are usually associated with I would personally associate it with their being forced to snatch other women's husbands through levirate unions when such men had no intention of entering into polygamous unions, rather than labelling widows as adulterers simply because their husbands have died and it is therefore believed they are ready to accept any man. The levirate custom was the one which made widows adulterers and not vice versa. None of the respondents I met had any knowledge of widows being referred to as adulterers except the widows themselves because that is a lived reality to them. They recounted their experiences and said that they are seen as adulterers whether or not they remarry. They are not expected to talk to anyone, especially men as they are believed to be after men all the time. They had this to say:

Once you become widowed you become a social outcast and are looked down upon even by very young women simply because their husbands are alive. You are not expected to talk to any man; it does not matter whether you are exchanging greetings, giving him direction to a particular place or whether it's your relative. This is not only the negative perception by the society but it exists even amongst us as widows. We betray others and look at other widows as adulterers.

They said that whenever a widow is well dressed, some of the people and other widows themselves believe that there is a man that the well- dressed widow is beautifying herself for, and they make comments such as the following:

You look so beautiful that it appears there is a man in your life, who is he?

Perceiving remarriage as a taboo has now lost its power even though it persists to haunt the minds of the people. It has turned into a legend that is being passed from one generation to the next but without the shameful sanction that it used to carry namely; restoration of lobola or having it paid to the late husband's family by the new husband. This was mostly defended by men, both young and old, including those who ordinarily would not enter into a levirate union even when presented with such an opportunity. Practically the stigma attached to remarriage by the society is slowly phasing out, and men are taking the defensive side simply because they believe themselves to be custodians of custom. Educated men and those who are widowed (those who lost their wives) or who were once widowed accept that a widow should remarry. The overall picture is that men and women perceive the right to remarriage differently, while widows and widowers share the same view that every one of them should be free to remarry. Most widows understand and embrace more of their rights by virtue of the knowledge imparted to them through legal rights education even though some of them went as far as primary education (that is, primary 7). They therefore can make decisions based on their freewill.

Of all the widows, a group of widows from Ha Tšosane seemed to be the most knowledgeable in their rights though they do not hold high (or any) academic qualifications.

As mentioned earlier, perceptions vary in as far as acceptability of this right is concerned. Some of the widows very few though, believe that they have to stay in their husband's family or keep spiritual ties with them. One widow who worked as a personal secretary within the Ministry of Law had this to say:

My socialization tells me that I belong to my late husband's family and I believe I have to continue with life from where my husband stopped.

The actual phrase she used was *'ke abetsoe'* which carries a lot of weight in terms of its meaning. It is more or less the same word which is also used for distribution of property (of an estate for instance). This ideology cuts across all ages regardless of educational levels, and out of the 32 widows I interacted with throughout the research, seven of them shared this view while the rest consider themselves to be free individuals after their husbands' deaths, who can now make decisions for themselves and their own families without any interference by the late husband's family. Another widow from the same Ministry of Law who also holds the same position of personal secretary and who is almost the same age as the first one said:

These people who always make nasty comments about the widows should be educated on other people's rights such that they might learn how to respect other people and to mind their own business. We should be free to exercise our rights in a manner that we deem fit without anyone pointing fingers at us.

Further, widows who are young and have no children are free to remarry but have to leave all their matrimonial property within the marital family. This raises concerns such as who should receive lobola when she gets married. There is no hard and fast rule as to how to go about remarriage. It depends on what is being agreed upon between the remarrying widow, her former in-laws to whom it is said she has become a daughter since her husband has died and her natal family. Above all, the widow's decision is the one that determines what should be done because if she chooses not to involve and inform her marital family about her plan to remarry that may be the end of her relationship with her late husband's family as they may be unhappy with her. If she involves or even requests them as other widows would prefer, they will together agree on what to do. It is worth noting that an agreement becomes important in the event that the relationship between the widow and the in-laws is good. The story below illustrates this point.

### **'Malebohang's story**

'Malebohang is a remarried widow aged 43years. She was first married in 1988. She had a daughter with her husband who was aged about two years when her husband died from a motor accident. After the death of her husband, 'Malebohang did not wear the mourning attire on grounds of religion and the relationship with her in-laws deteriorated. She took her child and all

the house hold property they had with the deceased and went back to her natal home. She remarried within a period of two years of her husband's death and lobola was paid to her natal family. She later discovered that the late husband's parents were again unhappy about her remarriage because they were of the opinion that she had remarried too soon after the husband's death. 'Malebohang is now happy in the new marriage; her daughter is presently in college, together with the two children of her new spouse. Her decision has determined her destiny, and subsequent decisions followed her design.

For widows who have children the society again wants to dictate that they should stay and take care of their children with or without the assistance from her in-laws as if the widows children will not be taken good care of in the new marriage. The cultural perception is so blind that it fails to take into consideration the decline in agricultural farming which people depended on, crumbling of the extended family system and poverty in general which renders widows without sustainable and lucrative jobs to beggars because the same clan that wants to keep them fails to assist them as they may be seen as liabilities.

In the early 1980s when women's organizations started awareness campaigns on women's rights in Lesotho there was a lot of resistance. In contrast, the resistance is no longer as strong as it used to be because all the resistance was basically based on the monster practice known as culture which up to now is slowly disintegrating and no one is able to explain what it exactly is, except that it is based on certain myths which instill a great amount of fear with the resultant forced observance of the culture by women. The power behind these myths is usually amazing because people do not want to experience ill-luck while they have been warned beforehand and could have averted it by performing cultural rites.

The main feature of marriage within the Basotho society is payment of bohali/lobola which men refer to as purchase price paid for the woman being married. Amongst the purposes served by payment of lobola is to relegate a married woman into nothing but property of the man. They put it thus:

A married woman is her husband's family property because she has been purchased.<sup>23</sup>

The fact that a woman is not only regarded as property to her husband but to the whole clan is the root of all the problems of a married woman when her husband dies. With this understanding at the back of their minds, some widows believe they are spiritually tied to their husbands' family. However this type of attitude towards women has to change because even though it is never publicly announced that lobola is the purchase price, it actually is, hence the inferior status of a woman in marriage.

Marriage and inheritance are closely related because the right to inherit is dependant upon validity of a marriage. Evil practices such as dispossessing the widow of her matrimonial property emanate from unacceptability of the widow's right to remarriage. However, none of the respondents in this research had undergone property grabbing. Widows were confident as they narrated their stories that none of their in-laws dared to touch their property because they together stood their ground from the time burials of their husbands were being arranged. As it were, it was the husbands' family which was to take lead of all the arrangements and decisions including the time and place of burial. This does not however imply that their journey had been a smooth one, which is why they needed encouragement and emotional support from one another and countered property grabbing by keeping some of their property at other widows' places whenever they suspected some dubious behaviour on the part of the in-laws. Though their property was not taken away from them, 'Makhotso experienced the modest kind of property grabbing. She said:

When my husband died my in-laws and their sons and daughters started reclaiming some of the garden tools that I knew very well that they had given to us. Those were a spade, a digging fork and they went as far as taking even the teaspoons under the guise that those had been lend to us.

Some traditional leaders such as chiefs strongly oppose the right of the widow to remarry after her husband has died. This is the case especially with chiefs who are often illiterate or semi-literate. Illiteracy blurs one's vision to the extent that they deny issues which have been decided upon long ago by the courts of law. The levirate custom was outlawed as far back as the 1940's.

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<sup>23</sup> Field notes recorded in Thaba-bosiu ha Ratau on 6/112009.

During the group discussion there was a chief who was adamant that they (Basotho) still practice levirate custom at a very high rate but at the same time failed to mention a single person who is in that type of a union. In the same breadth, a high-ranking official sought to bring in an issue of returning of the lobola when a widow remarried. When following this matter up I discovered that lobola would only be reclaimed customarily if the woman had either deserted or divorced which is somewhat of a contradiction because under custom a woman was to endure the worst of the hardship or abuse she received from either her husband or in-laws as she could not divorce. She had no *locus standi* in *judicio* as she was a minor and obviously her husband would not assist her to institute an action against himself or either of his family members. It was again interesting during triangulation of this data to discover that not all men knew about the issue of restoration of the lobola as it is a very old practice which has since fallen away. Thanks to the elderly chief who was also acting on behalf of the principal chief of Thaba-bosiu for the manner in which he was able to call his subject (the adamant chief) to order and explained to the whole group that levirate custom was outlawed in 1940 in Lesotho.

Another chief came out very clearly that the main reason for resisting this right is fear that if the widow remarries any person of her choice, she is likely to take with her the property of the previous marriage into the new marriage while this property belongs to the late husband's family. Further discussions revealed that the resistance is not a matter of ignorance per se but an expression of some undisclosed fears which even relate to the welfare of the children of the previous marriage, which is ironic because issues of welfare of children are not central to the grabbing of the so-called 'our late son's or brother's property' as they are chased away or left destitute with their mother, the widow. It would seem men have a tendency to revive and perpetuate by word of mouth practices which have long died, and use same to continuously instill fear in the widows. They referred to old stories which they also do not even know just to ensure that widows do not exercise their rights. They are the ones who benefit from all these outdated customs that is why they are determined to use anything that is likely to assist them in order to defend these outdated practices.



Restoration of lobola in Lesotho was practiced as far back as the 1920s and there are very few cases on this topic because levirate custom was an order of the day in those days and not many widows would try and venture into a desertion or divorce and become a disgrace to her parents by having lobola restored to her late husband's parents because she did not surrender to a levirate union. The effect of these customs has been to deter widows from expressing their opinions, exercising their freedom of choice and free conscience. A cumulative effect of this series of denials has been to ensure further control of women by men through the institution of marriage. As Ncube and Stewart rightly put it, marriage is just another way of ensuring women's control by men (Ncube and Stewart: 1995). That is to say that marriage institution provides a very conducive environment for men to continue their subordination on women. The most unfortunate part is that advocates of custom regard it as rigid and unchanging, cast in stone and cement. Even when they are fully aware that new customs which are in line with the modern times are evolving, they decide to turn a blind eye to such new customs such that one wonders as to who the proponents of custom should be in order for it to be accepted, and how long should it be in use for it to constitute an accepted custom?

Though it is considered a taboo for a widow to remarry, following the falling away of the levirate custom the society got into a dilemma of what to do with the widows now that they have become deviant. They ended up being referred to prostitutes. The main strategy being to keep them within the deceased's family to ensure clan's continued enjoyment of sex with them and access to her matrimonial property.

These cultural woes on remarriage of widows are slowly dying. Even the families' perceptions differ on this subject, such that the issue of remarriage largely depends on individual understanding and choice.

#### **4.3 Awareness of the right by widows: possible exercise and non-exercise of the right**

Exercise of the right to remarriage depends on whether widows are legally aware of their right and what they understand about the right to remarriage so that they may be in a position to make informed choices. I had assumed that widows are generally not aware of their right to remarriage

and further that their ignorance of the right accounts for their not exercising the right which turned out to be both correct and incorrect. The question to answer is: What is the level of legal awareness of widows on the right to remarriage? Below are the responses of the widows as regards their awareness of the right to remarriage:

Response 1: I know that one can remarry after her husband's death. I have seen other people (widows and widowers) remarrying.

Response 2: I know that remarriage is a right, I heard from FIDA members one day on the media.

Response 3: I know from the teachings of the scriptures that one is free to remarry if she is widowed.

Response 4: I was told by my husband on his death bed that I could remarry after his death but I wanted to remain faithful to him.

Response 5: I did not know that I could remarry because I did not have any interest as my husband died while we had already separated.

Response 6: I knew about remarriage but I thought it would offend God and my clan.

Response 7: I knew about remarriage but I know that I have been given away to my husband's clan and had to continue with life from where he had stopped.

Response 8: When my husband died I cried and mourned and I was in too much pain and grief, but after that I decided that life had to continue, so I remarried.

Response 9: Me! Remarry? What about my children? Which surname will they use, what will happen to them? Will I be a relative to different families/clans? Where will we stay thereafter? Should I bring that man to stay in my house or should I leave my house at my age?

Response 10: I did not know that even a HIV positive widow could remarry.

The above responses represent the views of widows in group discussions and interviews held at different times. From their responses most widows are aware of their right to remarriage regardless of how they came to know about this right. Very few were not aware and not interested in knowing about their right to remarrying men of their choices. Even when they knew, they thought it was a right available for others not to them.

By and large, widows are aware of their right; whether or not they exercise it is a different debate, although it can be an indicator as to where more efforts should be channelled in terms of legal literacy programmes. Their appreciation of this right is clouded by their concerns as to what will happen after they remarry, what form will the new residence arrangement take and how their children will be affected by the whole process of remarriage. Remarriage as a right of widows it would seem has always been in the minds of widows even though they could not freely express their opinion due to fear of being dispossessed of their property and children. They could not speak out as it would cause them problems if they clearly expressed their dissatisfaction with certain cultures. According to Makoa younger widows used to abscond to the Republic of South Africa either to look for jobs or to remarry. As a way of discouraging them the Basotho society dubbed them as prostitutes or *matekatse* (Makoa: 1977). This was a sign of protest that the widow wanted to exercise her right but could not freely do so if she was still in the husband's home, and the fact that society frowns at remarriage of widows while it fully accepts widowers' remarriage with a few exceptions of those who are considered to have remarried 'too soon'.

This leads us into examining the next subject which is why are the widows not exercising their right now that they are to a large extent legally aware of it?

#### **4.3.1 Reasons for and against remarriage**

There are various reasons for remarriage ranging from loneliness, needing a shoulder to lean on, gratification of sexual desire and having a male figure in order to command some degree of

respect within the society and having a helping hand financially. All these are reasons advanced by the widows for remarriage. They only advance reasons for remarriage as the reasons why they “would” as opposed to why they “will” remarry. Though some express the desire to remarry, and despite their reduced economic status they are not desperate to remarry and are taking their time to look for the right partners.

The purpose of this investigation is not to try and force widows into remarriages but is simply to investigate if there are any hindrances inhibiting them to exercise this right should they want to remarry. Even though they advance a number of reasons for remarriage they are passive players in this game and have already devised some coping mechanisms in respect of all those areas they mention as reasons why they would remarry. They are waiting for the right man to propose love to them as it is a disgrace for them to initiate a relationship leading to a marriage. This is how gendered a marriage relationship is. Not only is that, even with sex, a woman is not supposed to express her sexual desire even in a marriage union.

For those who wish to remarry, their dreams may not come true because they are merely waiting without playing any active role to find a good husband. Some do not only want a good husband but they want a man who (says ‘Maliteboho):

...is able to put an egg and a head of cabbage on the table, not for me to take it away from my child and give it to him.

In other words they do not want to be burdened with men who are not industrious regardless of how good that man may be. Few widowers interviewed are aware that they have to be able to ‘put ahead of cabbage on the table’. They say that women are no longer looking for love alone but for ‘love plus’. Their experiences in their previous marriages have made them cautious while dealing with the whole issue of remarriage. One widow mentioned that she already had a man whom she could remarry but she has to take time to study him so that she does not fall into a trap and go through a bad experience again.

Most of the widows met got widowed while deserted by their husbands. That alone compounded with the ill-treatment they received from their in-laws, husbands’ sisters and from the husbands themselves have made them more careful and they tend to postpone the whole issue of

remarriage indefinitely. It is evident from their lived realities that most of them had suffered some kind of abuse in their previous marriages. It also emerged that although they knew that they had a right to remarry, they seemed not to fully appreciate the differences between the two types of marriages and their consequences. As clearly stated by a Marriage Officer:

Basotho do not understand the significance of a wedding or solemnization of the marriage. To them a wedding is just a ceremony which does not carry any legal consequences.

Most of them seemed to understand their marriages to be under the two systems or they would rather narrate the whole process that:

We were firstly married under custom and later we went to church. We now have a marriage certificate.

For them going to church is merely for the church to bless their marriage. This has an impact in terms of appreciating the right to remarriage by the widow. Society is not unanimous in the manner in which it treats remarriage of widows. While some consider widows as human beings with rights, feelings and emotions, others perceive them as women who are desperate to be loved and to have sex. When they remarry there is a lot of ill spoken about them, such as they are old women, what is it that they are looking for, can't they control their sexual desires and many others, as if marriage centers around sex alone. The question is who is in a better position to decide for the widow whether or not to remarry? Obviously it is the widow who has all the power to make her own decision, but for some reason, any decision she takes is bound to attract a lot of unwarranted criticism. When they do not remarry they are seen as people who are at all times waiting for other women's husbands to have extra-marital relationships with them.

While they appreciate (though not all of them) that remarriage is their right, and whereas they admit that their economic status changes with the new status of widowhood either for the better or worse; they however take into consideration a number of factors before they take such a move. Some include welfare of the children of the previous marriage, whether they will be accepted by the new husband and whether the children will accept their new step father. They are also exercising due care not to go through the same experiences again and also try to avoid traumatizing and re-traumatizing their children. The position taken by widows here is that of

martyrdom because they end up leading the types of lives they would not have led were it not for the sake of their children. Again for others, their decisions not to remarry are not free from influence of cultural perceptions and different socializations. For instance, for some, even though they do not remarry within or outside the clan, their understanding is that they have to remain within their late husband's family because they belong there.

Another inhibitive factor to widows' remarriage is HIV infection which is high in Lesotho. Some are aware of the power dynamics involved in a marriage setting. Those living with HIV and AIDS have different opinions and understanding as there are variations amongst widows of different age groups, educational background and many other considerations depending on what informs their knowledge. Some have lovers who also live with HIV and AIDS because they both have the same understanding about the disease and therefore are able to practice safe sex without having to negotiate for it. One widow narrated a story of a married couple which is on ARVs that are her neighbours and the woman confided in her that they do not practice safe sex because her husband does not like to use a condom. They therefore re-infect each other and are always sick and physically weak. Basing her argument on this story, she said that she did not want any man without HIV because he is likely to stigmatize her and force her to endanger her life which is already in danger. However, she clarified her position that she would not enter into another marriage because of her previous experience in marriage because she wants to be free from control by any man.

Another widow aged 33 years refused to have the interview in her own office. The person who had referred me to her had made it clear that I should not mention that she was the one who had referred me to her because she was the only one who knew that the potential interviewee was a widow and that the latter preferred having her status and any matter concerning her to be kept as a secret. The interview took place in a co-worker's office in the presence of the occupant who was not a widow. She (the widow) was uneasy at first inquiring whether there would be any confidential information discussed during the interview. Her story was that her husband died after their three months baby had also died. Her attitude towards remarriage was that she was afraid as most people are carriers of HIV. She had a relationship with a married man who was either not HIV positive or did not know his status but they were practicing safe sex. While being

asked what would prevent her from practicing safe sex in marriage, she said the husband might want to have children while she no longer wants children. An analysis of her story and demeanour points to a number of possibilities, namely that she was already infected and was probably on ARVs or on denial, and that she did not want children at her age could also be another pointer to the fact that she was infected but was not yet free to discuss her status openly. As the discussions continued she gave two more excuses that she is the breadwinner in her natal home and that she knows that a customary law marriage is not dissolved by death, and as she still belonged to her late husband's clan. Had she been open about her HIV status I could have advised her to seek medical advice on the prevention of transmission of HIV from mother to child in the event that HIV status was the genuine reason for her not wanting children. Her HIV status would not be a barrier to her remarriage as long as she was interested in marriage. Her story revealed that she was aware of her right to remarriage even though she was evasive, but did not want to enter into a marriage union where she might be forced to bear children which she knew might not live long. The fact that she insisted on secrecy may also mean that she might still not want to open up to the potential spouse about her HIV status such that the spouse would ignorantly want to have children against her will.

Presence of children can be another inhibiting factor to widows' remarriage. The first response I got when asking what their attitude would be towards remarriage they had exclamations such as: "Me! Remarry? What about my children?" Not only their presence but even their age matters. Another widow aged 36 years who has three boy children said that she would rather keep a secret lover as advised by elderly women that she should respect herself and her children as these children are already telling her that they do not want to see her with any man. Her eldest son is aged about sixteen years. Another one said that her children were already of age so if she remarried while they are of age it would be unacceptable (to the society) even though her children are aware that she is lonely. These perceptions are influenced by culture and socialization despite the fact that this widow could freely discuss the issue of her remarriage with her sons.

While presence of children proves to be thought provoking to those widows who do not discuss remarriage with their children, it has worked for those respondents who remarried. There is

absolutely no formula that since it has worked for some it is bound to work for others. ‘Maluka had a son who was the only child and aged about sixteen years when she remarried. When she went to the Master’s office for her remarriage certificate and for arrangements to secure the property for the minor son, I personally inquired as to what their plan was concerning the minor child and they both agreed that they would take care of the child together. The new husband worked hand in hand with the remarried widow to bring up the child until he completed secondary education. He is presently in college. The second widow remarried while her only daughter from the previous marriage was two years old. She married a widower with two children, one aged three months, a boy, and a girl aged three years. Presently her daughter is in college and they are bringing up all these three children together. She had however had problems with the daughter of her new husband because when she got married to her new husband, the girl was taken away by her maternal aunts for fear that the new wife might ill treat her. The girl came back to stay with them at the age of thirteen and she could not accept her stepmother because of the influence of the aunts. She received a lot of counselling until she finally accepted her and life is going on very well presently. Her relationship with the boy has always been good because she got married while he was still very young and took care of him such that the boy does not really believe that she is not his biological mother.

The fact that it worked for these two widows does not necessarily mean that it works for everybody. It depends on the age of the children; their understanding and ability of parents to discuss such issues with them and allowing them some emotional healing depending on the nature of the death of their father and the traumatic experiences they went through in the previous marriage union. I have witnessed one such case of a Nigerian widow who has lived in Lesotho for about eighteen years and has four children with the eldest son born in 1992. This case came to me by virtue of the office I hold. The eldest son was physically fighting the mother (the widow) who had remarried after three to four years after her husband’s accidental death. The main reason why the son was fighting was that he wanted his mother to leave him together with the three younger siblings in their home and in his words: and “go and start a new life with her husband”. It was a difficult case because the son to the widow was uncooperative and did not heed anyone’s advice until his mother and her new husband left. Presently that woman lives in two different places, that is, where they have rented with the new husband and in her late



husband's house. There are also several cases of this nature pending in the courts of law where the late husband remarried while the children of the previous marriage were of age and are trying by all means to disinherit the widow, while the widow too is also employing all the strategies at her disposal to disinherit them and also tries to defend her position. An example would be the estate of the late Doctor Maphathe which has taken more than ten years of administration in the Master's office pending finalization of several applications and counter applications filed in the High Court by the sons and the step mother.

Age is another issue which women believe is worth considering before they remarry. Views again differ on this point. Some say that they are too old to remarry at the age of 33 years. One widow from Maputsoe who falls within the category of what I consider to be young widows had this to say:

I can't imagine myself starting all over again and becoming someone's daughter-in-law at my age.

Analysis discloses that the issue is not age as such but remarriage itself where she has to be displaced, and start staying with the new in-laws and start being controlled again and lose her freedom while she is already used to her independence. This goes back to the gendered nature of marriage whereby a woman has to leave her home and join the husband and the in-laws. The fact that the widow's father-in-law had told her that children born after her son had died would still be regarded as belonging to the late husband's clan seemed to be a bonus for her. This was however not suggesting any levirate practice in anyway. Even if she was still interested in remarriage, the probability is that she would not want to lose her freedom, instead, the whole idea of remarriage worked as a deterrent factor because it implied forfeiting her liberty.

Older widows, who would ordinarily be expected to be the ones concerned about age, were the ones who said that "age is just a number" having nothing to do with their choice to remarry at all.

Although keeping men friends is contrary to their Christian principles, widows keep them and it seems to be more acceptable to keep a man friend than to remarry, as remarriage is often associated with a lack of respect for in-laws. At the same time the men friend relationships

should also remain a secret in an attempt to show respect to the widow's children which automatically undermines the widow's right to make her choice. The general perception is that the society is more likely to condone a widow-man-friend relationship because of the understanding that her husband is dead so she has no alternative other than keeping a man friend.

#### **4.3.2 Marriage within the clan**

Of all the respondents interviewed, none had remarried within the clan nor was intending to remarry within their late husbands' clan again. This was due to their previous experiences which some described as "hell on earth". This is an indicator that widows attach value to their liberty gained through widowhood. They mostly have relationships. On the other hand it is proof that levirate custom has indeed crumbled although some want to bring it back to life through a back door which is impossible at this stage. Widows have disclosed that to some of them proposals were made to have them inherited within the clan but they rejected such offers.

#### **4.3.3 Socio- economic factors**

While widows admit that they need a helping hand economically, this is not the main reason why they remarry. Loneliness, not having someone to share one's burden with or success seems to be the main reason advanced for remarriage. It is an established fact throughout the world that widows are among the poorest of the poor and are a vulnerable group. However their poverty and reduced source of income after their husbands' death does not force or rush them into remarriage. Widowers in the like manner want to marry women who are not wholly dependant on them. It is not only widows that feel the brunt of reduced family income but the widowers too want a spouse with some means of income. Gone are the days when women would want to get married to a certain man because he has a stable source of income so hat they can economically depend on them.

The 4<sup>th</sup> assumption that widows do not only remarry to found families but for economic gain as well has been disproved because women are no longer dependant on men they exercise choice and if the main reason for them to remarry was of an economic nature, most of them could have remarried. Their employment status reflects the true picture of their financial situation. From the level of personal secretary, the gross salary is between R8000 and R9000. The only highest salary would be that of a lawyer amongst the respondents. The factory workers and the office assistants are the least paid with the latter being the lowest rank within the public service. They earn more or less the same as the factory workers which is between R1000 and R2000. Taking into account the fact that they have children both at primary and secondary school levels for whom they pay fees, shows unequivocally that economic reasons do not push them into remarriage. A widow from ha Tšosane even mentioned that since in her house she applies her own law, at the time she remarries, lobola should be paid to her.

#### **4.3.4 The role of the family in widow's remarriage**

As has been indicated above, the family no longer has much power to push a widow into a levirate marriage. Out of the total of 32 widows met in this research, only three of them have had offers of levirate unions which they turned down outright.

‘Maliteboho described the offer made to her as a mockery. She said:

That was tantamount to an attempt to try and bring someone from Mpokho<sup>24</sup> into my house so that I could clean and feed him.

Even though the husbands' families are failing to push widows into levirate unions, they still try to do so with the little power they still have. Most widows' marriages had gone sour when their husbands died, and some had already separated though there were no divorces. When some of the widows' husbands died, their in-laws managed to persuade them to come back and mourn their husbands. This was also observed during WLSA's research (1995). Though it may reflect

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<sup>24</sup> Mpokho refers to an open place or which is covered with plastic bags inhabited by mad men and women and the beggars. It can either be the street, the tunnels and one such popular place is located at the hill below Lesotho Sun Hotel.

an element of power relationship, it is also the means used by the widows to secure their property which they would otherwise have lost had they not agreed. As to remarriage, very few widows feel they have to ask for permission or to at least agree with their husband's family on their remarriage. This is an indication of the fact that the in-laws' involvement in the widow's remarriage is predicated upon the type of relationship existing between the widow and the in-laws.

Some of the widows mentioned that neither their husband's families nor their natal families ever discussed the issue of their remarriage with them, except for three widows. A widow who was aged twenty-nine years whose husband died in 2008 was asked by her biological father as to whether her in-laws had ever alluded to her remarriage which was not the case and the conversation ended there. Another widow whose husband died in December 2009 was openly given instruction by her elder brother (sibling) not to remarry but to stay with her in-laws as they were her parents. This instruction together with the rumour-mongering that was going around that she was going to be chased away if she did not observe mourning rituals for her husband as she had intended not to instilled some fear into her and she surrendered. The elder brother being a man and a custodian of culture wanted his sister to stay with her in-laws, while on the other hand he probably did not want her to be chased away and to become a burden unto him as they no longer had parents. She observed the mourning rites against her will. Whether or not she will remarry will be determined after she has undergone cleansing rituals.

The third widow who demonstrated that the family may or may not have power over the widow and her decisions is 'Malebohang'.<sup>25</sup> She did not ask for anyone's permission, the decision to remarry was hers. All she did was to approach her church leaders for guidance in that regard. The family no longer enjoys great amount of power and influence it had earlier on widows, but the above stories point to the fact that the more empowered and assertive the widow, the better chances she has of carrying out her decisions.

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<sup>25</sup> Supra. Page 54

#### **4.3.5 The role of the church in remarriage of widows**

Most widows have heard from the teachings of the scriptures that they are free to remarry when their husbands have died. Churches however do not play any active role in this regard. When their member has lost a spouse, they do not involve themselves except as regards the burial, comforting and offering prayers for the member who is bereaved. This was confirmed by the church that they do not even have special programmes for the widows or widowers. All that the widows know about their right to remarriage they gathered from general teachings meant for every member of the congregation. The churches, though they are not opposed to the right, wait until the widow or widower takes steps to inquire from the church or asks for guidance. However they can be very useful partners when it comes to strategizing around the promotion of widows' right to remarriage. The existing women groups within different churches are meant for every woman, none exists for the benefit of widows where they can share experiences, be counselled, advised and even be assisted with grief management which were identified specifically by the group of widows from ha Tšosane as areas of need. This exclusion which affects widows does not only exist in churches, but also in the national programmes. The Lesotho Gender and Development Policy does not single widows out of the main group of women. Up to now, the Ministry of Gender does not have anything in place or in the pipeline for the benefit of widows, except for them being generalized under the bigger but homogeneous group of women.

#### **4.3.6 Conclusion**

Properly speaking, remarriage only truly takes place outside the widow's deceased husband's clan. Generally and universally speaking, so-called 'remarrying' within a deceased husband's clan is not really remarriage, as, under customary law, death does not terminate a marriage. The form which so-called 'remarriage within the clan' takes differs completely from remarriage outside the clan. The right to remarry outside the clan is both acceptable and unacceptable amongst the Basotho with the main difference being the degree of acceptability which largely depends on the understanding and awareness of the right by the general public.

#### **4.4 Adequacy of the laws on remarriage in Lesotho**

Lesotho has a plural legal system. There is common law, customary law and statutory law which conflict with each other in their application. The tension is mostly between the other two systems and customary law as most of the common law principles have been incorporated into the Marriage Act. For instance, customary law allows polygamy while statutory law does not. The effect of this conflict is that people end up not knowing the legal regime under which they are married and ultimately confuse these two systems such that women who consider themselves to be the widows of the deceased man are not found to be widows nor can they legally inherit from such relationships. There are many cases where I have had to pronounce other women who had intimate relationships with certain men as not having contracted valid marriages and therefore not eligible to inherit from them. The courts quite often make similar pronouncements because some people do not understand that they can marry more than one wife under custom but they cannot do the same under the Marriage Act. However they continue to do it and women, especially those who consider themselves to be widows of the deceased suffer terrible injustice as the wife whose marriage is legally recognized can dispossess the other wife under the guise that she was taking her husband's property. The prejudice caused by this confusion affects women adversely.

The Marriage Act does not expressly provide for the right to remarry, it only does so by implication. As a result, there is not much guidance provided in the law concerning this right and its exercise, except as regards inheritances of minor children. As to what options are available to the minor children, that Act is silent.

The Constitution remains the supreme law of the land rendering any law which is inconsistent with it void to the extent of its inconsistency. Lesotho is also a member of the United Nations and is bound by its international and regional instruments which she has signed. Such include the African Charter, CEDAW, ICCPR, ICESCR and Protocol to the UN Charter to mention a few. As such, the laws of Lesotho have to comply with international standards in all respects. For international instruments to apply in Lesotho they have to be domesticated into the national laws. Failure to incorporate international standards into national laws makes it difficult for the judiciary

to adopt a progressive interpretation of the law as they adhere to the so-called judicial precedent which is also conflicting due to the pluralist system. One judge hands down a judgement on non-discrimination today, the following day another judge has reason to distinguish it even though the facts are similar, that is why discriminatory provisions such as section 3(b) of the AEP have remained unchallenged for more than 69 years since the promulgation of this Proclamation until when pronounced discriminatory by the High Court in 2004. In essence there is nothing like being European-African (*khoana-tšoana*) nor African –African (*sochoana*) in Lesotho as suggested by the above provision which is based on the old mode of life test which is still applied, discriminatory and outdated as it is. As WLSA rightly puts it, some people who might be considered to be improved in some areas might be found to be governed by customary law in other areas of their lives (WLSA: undated). The legal dualism or pluralism makes the choice of law a very difficult exercise which is further complicated by the use of outdated legislation.

The provisions of the Marriage Act under section 24 are inadequate for Lesotho's modern society. The particular section on remarriage excludes widows and widowers governed by customary law and their children, while the gist of the provision is calculated to protect inheritances of minor children whose parents intend to remarry. This provision was modelled on the provisions of the AEP which only apply to a selected group of people. However, the fact that both the Marriage Act and the AEP recognize and acknowledge the widows' right to remarriage cannot be overlooked.

Its inadequacy lies in the fact that it does not provide for the right expressly but the right is implied from the manner in which the section has been couched. Further it is discriminatory. It is not odd to find such a provision long after Lesotho gained independence as it is in conformity with the Lesotho Constitution and has never been challenged. The inadequacy of the law cannot only be determined by having it in the law books without taking it to the people. Non-dissemination of the law as is the case with most of the old laws in Lesotho which were never disseminated to the public, service providers and the judiciary resulted in the law, its implications and weaknesses not being known. Other laws which have a bearing on the widows' right to remarriage in Lesotho which have been alluded to in the literature review were

largely enacted during and soon after the colonial rule such that they still portray colonial influence which was meant to suit the colonial masters.

In 2006 the Parliament of Lesotho enacted the Legal Capacity of Married Persons Act<sup>26</sup> which states in its preamble that it is meant to remove the minority status of married women and to provide for incidental matters, which is a commendable effort. However it may be rendered a futile exercise altogether at the instance of unscrupulous lawyers should a dispute arise and the judiciary remains passive as it seems to be.

This Act is in direct conflict with the provisions of the Constitution which sanctions the operation of personal laws because it repeals marital power of the husband in marriage, administration of a joint estate under common law or customary law, and over the person of the wife which are the areas where customary law has its deepest roots and most people unknowingly consider their affairs to be governed by customary law without fully appreciating the consequences thereof.

The absence of legislation on domestic violence in Lesotho is also a setback in addressing customary and cultural practices which infringe upon widows rights. Ghana has amended its Criminal Code as regards inhuman and degrading cultures (Owen: 1996: 186). The relevant section provides:

- (1) Whoever compels a bereaved spouse or relative of such spouse to undergo any custom or practice that is cruel in nature shall be guilty of a misdemeanors
- (2) For purposes of subsection (1)...a custom or practice shall be deemed to be cruel in nature if it constitutes an assault within the meaning of 2 sections of this Act.  
Whoever compels a bereaved spouse or a relative of such spouse to undergo any custom or practice that is immoral or grossly indecent in nature shall be guilty of a misdemeanour.<sup>27</sup>

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<sup>26</sup> No. 9 of 2006.

<sup>27</sup> Owen pages 186-7



## **Marriage of a minor child**

The law is again inadequate in this area. The Marriage Act further provides for the minimum age for entering into a marriage contract for both sexes. For a girl child it is sixteen years, and eighteen years for the males with parental consent for both. African children are mere teenagers at that stage who have not even gone through their secondary education. The age limit is even lower for a girl child. In this way, this law sanctions child marriages which is against the spirit of the Women's Protocol and CEDAW. If consent to marriage has to become a reality, there should therefore be no child marriages sanctioned by the law. It goes further to provide that if there is no surviving parent to consent to such a marriage, the Minister responsible for the administration of that Act should give such consent, thus making sure that the minor girl gets married at all cost.

This law is highly unfavourable for girls during the HIV and AIDS era when orphans may be forced into marriages as a way of getting rid of them, or if not forced, they may feel that marriage is a solution for the orphanhood problems they are faced with which are often exacerbated by poverty.

## **Policy considerations**

The Ministry of Gender, Youth, Sports and Recreation has put in place a Gender and Development Policy which in its foreword is supposed to be a tool geared towards addressing the challenges of gender inequities and inequalities, poverty, increased spread of HIV and AIDS, retrenchment and unemployment by adopting a rights-based approach. There is nowhere in this policy, however, where widows, within the bigger group of women, are singled out for special treatment and protection. While protection accorded other women extends to the widows as well, it is important to take into account those differences that exist among women rather than having a blanket provisions as if women's needs are the same across the board.

Up to now there are no programmes designed specifically for widows, neither is there anything in the pipeline designed to specifically to address widows' plight nationally.

## **CHAPTER FIVE**

### **5.0 Conclusion and Recommendations**

#### **5.1 Conclusion**

Over and above all the exclusion, subordination, marginalization and miseries that women go through, widowhood has added another dimension of suffering peculiar to widows which makes them suffer even more than other women. Lesotho is faced with a serious challenge of offering lip-service both to the international community and to its nationals. Whatever is being done in terms of improvement on women's rights is merely cosmetic. This is evidenced by the Government's unequivocal lack of political will to have the Constitution amended which is feared might pave the way for women to ascend to the throne as queens.

The Government of Lesotho should, by now, be aware of its international obligations as regards women's rights, talk less and do more for their 'forgotten' widows. The manner in which some of the women's concerns are addressed is so haphazard that it is proof that they were never envisaged nor even planned for. The time for Lesotho as a member state to 'walk its talk' as regards women's rights is long overdue. NGOs exist in order to assist the Government not to substitute it. The state is the duty bearer not the NGOs, so it is up to the state as the duty bearer to fulfill its obligations.

#### **Emerging issues**

Marriage as a concept is neutral, favouring neither women nor men. The society, the law and religion have constructed it in such a way that entering into a marriage is like entering into an institution of power socially, legally and religiously constructed (CEDAW committee Concept note 2009:2). This has resulted in the understanding that it is a man who marries a woman, and a woman therefore is being married by a man (Ncube and Stewart: 1995).

By their nature, African marriages give a man an upper hand within a marriage union. During negotiations that take place before marriage, both families are equally involved but, for some reason, the man's family ends up being the dominant party at some point (WLSA: 1998). The woman is ultimately paid for, taken and displaced. She relocates to the husband's home.

For those who believe in the Bible, it clearly provides:

Therefore a man shall leave his father and mother and be joined to his wife, and they shall become one flesh.<sup>28</sup>

This verse does not in anyway suggest that a woman should be displaced. It makes it clear that a man shall leave his own parents and go and cling to his wife. One may ask, where? It is only fair for a couple to leave their parents and start their own life together at a place chosen by them, not because one is marrying and the other is being married, therefore one should follow the other. This verse's interpretation it would seem has been subjected to the cultures of the Christians. This position is also obtains in Lesotho. This type of arrangement is the one that results in most of the problems a woman encounters within a marriage union. Practically she is the one who joins the man (as opposed to the man joining her) and she merges with her husband in the sense that she ends up being identified through her husband. Ultimately the husband has to be respected and served by the woman while he does not have reciprocal duties towards the woman, perhaps because he has paid the purchase price in the form of lobola.

In remarriage the position is even worse because, in a cultural sense, no remarriage takes place. The widow has to continue bearing children for the dead man and has to stay within her dead husband's clan where she is inherited or, if not openly inherited, anyone from the husband's family can secretly have sex with her. A widow who bears children for her dead husband by men other than those from her deceased husband's clan, suffers her children being given derogatory names such as 'that of my younger sister' which implies either a 'tail' or 'you are not one of us' (*Mosele*). Whether or not a widow remarries becomes an issue for the whole society, which keeps an eagle eye on her and all her movements, to the extent that her power to make decisions diminishes significantly for fear of what people may say or think about her.

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<sup>28</sup> Holy Bible, Genesis 1:24 New King James Version.

The current position in Lesotho is that most widows have not remarried but prefer having men as friends. Widowers also keep women friends, especially those who have young children. Widowers who refrain from remarrying or remarry long after their wives' deaths entertain the same fears as their female counterparts as far as remarriage is concerned. Out of the total number of three widowers interviewed in this study, only one had remarried after twelve years of the death of his wife. As indicated earlier (that widowers remarry soon and in greater numbers than widows), I found out that of the 2624 marriages registered from January 1<sup>st</sup> to 31<sup>st</sup> December, 2008, the remarriage of widowers is more common than that of widows:

Total number of widows remarried was 19

Total number of widowers remarried was 99

Total number of bachelors married to widows was 2

Total number of divorced men married to widows was 2

Total number of widowers married to widows was 14

Total number of widowers married to spinsters was 76 and

Total number of divorced women married to widowers was 3.<sup>29</sup>

From a total number of 32 widows only two had remarried. Widows are quite aware of their freedom to choose. By remaining single but in relationships (open or secret) they command a certain amount of power over their men friends and apparently postpone their remarriage seemingly indefinitely. What is remarkable is the fact that while widows may shun remarriage due to a number of reasons, they are determined to face whatever challenge is necessary relating to their choice of widow-men-friend relationships.

The following statements are some of their comments as regards their freedom gained through widowhood:

I do not want to be controlled by any man again

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<sup>29</sup> Source: Marriage register from the Registrar General's Office

Another one had this to say:

I am better off without him (the late husband) because all the money that I am raising now was going to cause a fight and I would end up making a loss. My income supplementing activities are now successful.

‘Mamakutselane said:

I and my children need our breathing space.

Opinions differed from one person to another. Others felt that keeping men friends was the solution as entering into a marriage would cause a lot of problems and that the amount of care and love shown in a relationship declines from one marriage to another. They have also recognized that, unlike in their marriage, in a relationship they are able to negotiate for safer sex. This was also observed in a Zimbabwean study, though the observation related to prostitutes:

It was also sad to find that prostitutes unlike their married sisters have more freedom to express their sexual desires and feelings. Further, that they are better placed to negotiate not only for sex but also for safe sex.<sup>30</sup>

Indeed two of three widows who disclosed their HIV status were aware that they had been infected by their husbands.

By remaining single as the widows in Nepal prefer to be called (Women e-news), widows in Lesotho are able to choose either a HIV positive or HIV negative partner.

While they wield a certain amount of power over their lovers, they are at the same time in control of their sexuality. There are those who mentioned categorically that they masturbate when sexually aroused in the absence of their men friends.

This is a new shift and turn of events. Women are designing the manner in which they want to live their own lives without any interference from anyone. Widowhood has brought some form of

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<sup>30</sup> Mary Maunga’s dissertation submitted at for partial fulfillment of a master’s degree in 2008 at the University of Zimbabwe, SEARCWL.

liberty to the widows as some are even free to sell their immovable property. There was a widow who was selling her eight roomed house built with the husband because she did not want to keep a record of sad memories and bad experiences she and her children went through in that house.

## **5.1 Recommendations**

### **5.1.1 Legal Interventions**

- For human rights instruments to be applicable nationally they have to be domesticated, which is a very dilatory process and actually defeats the whole purpose of ratification because ratification without domestication is as good as non-existent. Not only is domestication necessary for Lesotho to realize its international human rights obligations, but amendments to the Constitution are imperative to enable the merging of the two systems on marriage.

The Lesotho Law Reform Commission has to take an audit of all the obsolete laws, and those which are oppressive and discriminatory against both widows and other women, and determine which ones need urgent reform so that the plight of women can be speedily addressed. One such law is the Marriage Act. There is no need to cling on to discriminatory provisions of both the Administration of Estates Proclamation (AEP) and the Marriage Act. The Law Reform Commission should lean more towards a unified system of law looking at the positive aspects of those laws and coming up with new provisions but unify them in such a manner that widows and women will no longer be adversely affected (WLSA:1995). This would also enable making consent to marriage an integral part of marriage, not only for the widows but even for minor children. Care should however be taken not to bastardize those born before such a unified system came into force.

- The law should expressly provide for the right to widow/er remarriage, and provide some guidance as to what alternatives there are especially where there are children of the previous marriage, thus improving on the existing provisions of the Marriage Act. The Marriage Act must go a step further to outlaw marriage of minor children and stipulate the marriageable age as eighteen years for both sexes. Common law should be strengthened in order to allow

a minor child to lodge a complaint against her abduction as presently it is only a parent or a guardian who can do so.

- The customary law principle of heirship has to be revised and incorporated into statute law to enable the surviving spouse to be the sole administrator of the joint estate (WLSA:1995). This is already happening in Lesotho as WLSA research has uncovered it. I have actually witnessed this phenomenon which has been going on for some time and only needs legal sanctioning. The practice goes beyond mere administratorship but the families of the deceased male persons actually follow the usual procedure for introducing the heir and introduce the widows as the heirs. However care should be taken to ensure that minors or children who are in need of maintenance are not disinherited.
- Express provision should be made for distribution of property in cases where couples stay and acquire property together even without a valid marriage. This provision should cover the sharing of such property when such a couple separates, divorces or one of them dies, giving effect to the rules of universal partnership and to the provisions of CEDAW.
- Widowhood should be defined in a more liberal way so as to include other people who consider themselves to be widows so that they are not excluded from inheritance and empowerment programmes which might be beneficial to them (WLSA: 1995:51). This should be provided for under the law taking into consideration the period for which they have been together.
- Domestic violence law should be enacted to cater for practices such as property grabbing and other forms of violence in the name of 'culture'. This means that legislators must ensure that the definition of 'domestic violence' is drafted broadly enough to include cruel, inhuman and degrading treatment. Until such legislation is enacted, criminal justice through the penal laws of theft, robbery, etc., should be vigorously enforced to protect victimised widows (WLSA: 1998) without, in any way, reducing such crimes to lesser offences.



- Following in the footsteps of Uganda, Lesotho's Constitution should be amended to include the right to institute public interest litigation which could be utilised by women and widows to conduct strategic litigation (see Section 50 of the Constitution of Uganda).

### **5.1.2 Non-legal Interventions**

Active participation of widows themselves in any movement to improve their status is crucial to its success (Owen: 1995:207). Widows' groups have proved to be very effective. There is therefore a need to strengthen and empower these groups and establish networks with other organizations for widows nationally, regionally and internationally where they can share experiences and good practices. The Tšosane support group is one such example.

- Needs and capabilities assessment for widows has to be carried out in order to identify the needs and capabilities of widows which will in turn inform the interventions to be put in place. Some of the widows have already made it clear that they need counselling and psychosocial support especially on how to deal with grief.
- Training in income generating activities is also important if widows are to attain economic independence. From the total number of widows interviewed, the highest level qualification was an LLB degree for only one respondent followed by a Diploma in Social Work. Three were personal secretaries, positions for those who have completed secondary school education but did not make it to universities, and the rest ranked from the lowest rank within the public service, namely office assistants, textile factory workers and street vendors. Just because they are widowed, women should not be forced to opt for remarriage because of their weak economic status; rather they should be empowered to attain economic independence.
- Judicial activism in the form of progressive interpretation of the law has to be encouraged through the proper training to judicial officers. They should be trained in the discipline of gender studies and their relevance to issues involving widowhood and inheritance.

- Legal literacy is very important in imparting knowledge to the widows first on their rights, and the type of programmes that exist for them and how to gain access or benefit from them. The media is one important tool that can be used to create public awareness and educate widows and their families and the community about widows' legal rights. Sensitizing the press not to cover only sensational crimes against widows, but also the new ways by which the widows are organizing themselves to maximize their economic contribution, and provide community care may change local attitudes towards widows and create a more positive attitude towards such unattached women (Owen: 1996:206). Tšosane Support Group may be a very good example in this regard. It was known as one of the first and best performing support groups within the country which gives care to those infected and affected by HIV and AIDS. It is made up mainly of widows and one widower since its inception more than six years ago.<sup>31</sup>

The CEDAW Committee had this to say in relation to dissemination of the law:

even positive legal changes can fail to have an impact on women's lives if information about the law is not adequately disseminated and because women frequently lack access to legal assistance in claiming their rights.<sup>32</sup>

- Awareness campaigns should specifically target changing the perceptions and attitudes of the public at large towards widowhood, and training of the judiciary on activism as the judge-made law seems to be lagging behind in the development and evolution of women's rights. Judges do not feel free to pronounce customary law inadequate even when it clearly discriminates against women.

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<sup>31</sup> See picture on page 42. The widower is excluded in the picture because it was a widows' focus group discussion.

<sup>32</sup> CEDAW Committee's 44<sup>th</sup> Session (2009) General Recommendation on Economic Consequences of Marriage and its Dissolution: A concept Note, page 2.

- Because the issue of women's rights and gender relations is such a large one, covering almost all interactions between the government and its citizens, they warrant the establishment of their own ministry. This would be far better than the current situation in which these areas of concern are simply 'tagged' on to youth or sports ministries as though they were inconvenient afterthoughts.

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