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MASTERS IN WOMEN’S LAW

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

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2015-2016
DECLARATION

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

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

Signed-------------------------------------- Date --------------------------------------
ABSTRACT

This work was written by a legal practitioner who before the research was finding difficulty in defending the rights of the widows of mine workers in the courts of law in Lesotho against the application of the common law principle of *stipulatio alteri* in respect to the benefits of employment of a deceased husband who had nominated a person other than the wife on the employment contract.

She found that the courts and lawyers in Lesotho consistently uphold the claims of nominees with little or no regard to the large body of national and international laws that regulate and seek to protect the rights of spouses to their matrimonial property both before and after the dissolution of the marriage. As a result she realised that court decisions are repeatedly leaving widows destitute and vulnerable to multiple forms of deprivations due to potentially stereotype influenced decisions of nomination of beneficiary.

Alive to the provisions of various human rights instruments that advocate for the protection of widow’s inheritance rights to the estates of their husbands, she analysed the grounded realities of widows of mine workers in Lesotho. By using various methodologies that in connection with the women’s law methodology she realised that the dilemma faced by this women is a detrimental one which affects women including lawyers such as herself. This is because of the sensitivity of the issue as it involves moneys received after the death of a spouse.

She realised that the difficulty from a personal perspective for a person to inquire or insist about such nomination and came to the conclusion that to achieve the wider protection where women are able to stand up for their rights, there is a need for wide spread campaigns aimed at eradicating the influence of stereotypes in the minds of women and men of all walks of life, the campaign should aim to empower women to be able to speak-up and for men to disregard the stereotypes.

Further she noted that it is critical for the law enforcement agencies, particularly lawyers like herself to be equipped with in-depth understanding of international instruments to advance the widow’s rights. Also the courts should be judicially active and gender sensitive in advancing women’s rights as the Human Rights Watch puts it; when a woman’s property
rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women’s lives often resulting in poverty, inhumane living conditions, and vulnerability to violence and disease for women and their dependents.
EXECUTIVE SUMMARY

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

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

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

The researcher found that according to the Roman Dutch common law definition of community of property regime read with section 5 of the Legal Capacity of Married Persons Act of 2006 both provide that spouses own jointly what they acquire during the subsistence of the marriage and therefore are under a duty to consult each other in any activity that has implications for the joint estate. These two read together with various international instruments, particularly article 21 of The Maputo Protocol, which provides for a widow’s rights to inherit from the estate of her husband, form the background of the research problem.

During the research the author was dismayed to discover that in fact the courts in Lesotho in resolving disputes of this nature have consistently ruled against widows and in favour of
nominee on the basis that a nomination with regard to employment benefits, has nothing to do with the joint estate of the spouses regardless of their marriage regime.

During literature review the author discovered that this ironic situation has been going on for a long time in the courts of Lesotho, and is used to deprive many women of property to which they had a legitimate expectation to inherit.

In trying to understand the reason behind the nomination of another person other than the wife as beneficiary particularly by the mine workers, the author used various methodologies in conjunction with the women’s law methodology, to unpack the problem. The preliminary assumption was that such nominations may be influenced by stereotypes and lack of knowledge, but beyond that she discovered that in fact there is knowledge of the law on the people however the dilemma faced by these women which leads to failure to use the knowledge is a detrimental one which affects women including lawyers such as her. This is because of the sensitivity of the issue as it involves moneys received when a spouse is dead.

Therefore recommendations made for the correction of situation are that the courts should be judicially active to mero-muto advance the rights of women in line with international obligations. Legislature should seek to consolidate the fragmented laws and provide detailed provisions of what constitutes community property and as to whether benefits of employment do form part of the joint estate or not.
DEDICATION

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

To God the giver of knowledge without him all things are impossible, with this work your name shall be magnified for generations to come. I am nothing without you love.

To my colleagues at SEARCWL, without any special preference, this is a product of team work you guys provided insight and support that is invaluable I thank you all. Tatenda, Asante, Maita zvenyu, Zikomo, Twalumba, Webale, Bongo, ke ea leboha.

To my friends, and colleagues back at home, at the Ministry of Law and Constitutional Affairs the encouragement and support kept me going, hope this course will benefit the Office. My friends who kept me updated on the latest in Maseru I appreciate the love.

To my pillars of strength your constant support, the families of Khesa, Mokone, Motoena, I don’t have enough words to express my gratitude; I am writing this paper because my mother-in-law believed in me. Because my sisters and my father thought I could do it. I remain your humble daughter.

To my supervisor Rosalie you have been the guiding rod through-out my research, your contribution has been immeasurable and is tremendously appreciated.

To NORAD and the Ministry of Foreign Affairs from Norway, The whole staff of SEARCWL; Prof Stewart, Calm Sese, quite Rudo, Blessing am going to miss the brown envelop, Johnson with “the people’s tea is Ready”, Primrose with: “Madam”, Cecily with the goodies what a wonderful family we had. Thank you for everything. I couldn’t have found a worthwhile opportunity to learn.

Prof. Rudman for the interest you had in my study area, the encouragement to take it further has contributed immensely in boosting my confidence. You deserve the acknowledgement.

For my family; my kind patient loving husband and my naughty and cute kids the love the tolerance and the long distances that you had to travel just to see me is just amazing. I am truly overwhelmed. You have made every sleepless night worthy.
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CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

“Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination” (G C. 16 to the ICESCR 2005).

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

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

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

\(^2\)Defined extensively below at paragraph 1.9.

\(^3\)In the event if dead such benefits are referred to as Death Benefits, but in essence the benefits are accumulated during employment.
This paper takes its point of departure from the wording, understanding and interpretation of the law and its legal effects, with the objective to understand the possible gender and development implications thereto. The crux of the research emanates from professional engagement with the application of the principle of *stipulatio alteri* ⁴ on the benefits that accrued from the employment of a deceased miner who dies leaving a legal spouse and yet who (the surviving spouse), because of a nomination form which he (the deceased) has signed with his employer becomes unable to inherit those benefits.

Particular focus has been put on the rights of widows, who often find themselves discriminated, oppressed and deprived of their inheritance rights because of customary practices and stereotypes of their people. CEDAW at article 5 provides that: “*States have an obligation to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices ... of the ideas of inferiority or superiority of either of the sexes or on STEREOTYPED roles for men and women*” (CEDAW 1979).

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

This research asks the question whether the common law principle that emanates from the law of contract of “a business nature” can be applied strictly against the defence of the existence of a community of property marriage, which raises issues of inheritance and consultations of spouses in the administration of their joint estate ⁵. This is asked in light of

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⁴ Stipulatio is simply referred to as contract for the benefit of a third party. Further explanation will be found below under conceptual framework.

⁵ Marriage Act defines community of property and Legal Capacity Married Persons Act of 2006 hereinafter referred to as LMPCA Sec 5 outlines the need for consultation of spouses in administration of the joint estate property.
the fact that for a contract to be enforceable, it must be shown to be based on a *iusta causa*, or reasonable motive, and that a *iusta causa* is still a necessary element of contract.

1.2 SETTING THE SCENE AND BACKGROUND TO THE STUDY

Although Lesotho has ratified various International Conventions which impose obligations to protect women against all forms of discrimination and violence, which include eradication of stereotypes and believes which subordinate women according to CEDAW, it appeared from my research conducted on precedence of the courts of laws that women still suffer grievous discrimination and prejudices in the hands of those who have an obligation to protect them especially the courts.

The problem addressed by this paper arises from the interpretation of the common law principle of *stipulatio alteri* by the courts in Lesotho, it is my contention that by giving the strict interpretation of the principle without regard to the statutory provisions enacted with the objective of affording protection of property rights of spouses in the joint estate particularly the rights of widows to property of the deceased husband are infringed upon.

I also observed that the absence of a constitutional provision in Lesotho, which provides for how international law shall become part of national law, has lead to unpredictability and inconsistencies as to the value of international instruments in Lesotho (Pholo 2013). The situation is exaggerated by the inconsistencies of the real value of international law in Lesotho as can be seen in the case of Senate Masupha V. The Senior Magistrate and 7 others CC No 5 of 2010; The Constitutional Court in delivering judgement in 2012 had the following to say; “that international principles, are aids to interpretation, not the source of rights enforceable by Lesotho citizens”. This position was conflicting with the decision in Tsepe Molefi V. IEC and 4 Ors CIV/APN/517/2013, wherein the judges quoted CEDAW and the SADC Declaration and indicated that “Lesotho is a signatory to several international conventions, these conventions also impose certain duties on the state”. This is culminated by a situation where by lawyers rarely invoke the principles of international

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6 *Causa justa* is a Latin term that means on a just cause. Just cause means a legally sufficient reason. Causa justa means a reasonable and lawful ground for an action. [http://definitions.uslegal.com/c/causa-justa/](http://definitions.uslegal.com/c/causa-justa/)

7 In which case e becomes a later law and more specific hence takes precedence in accordance with statutory interpretations. See emerging issues.
law in advancing the rights of their clients, in fact I observed that in none of the cases that will be discussed later on in the paper were the international provisions of the rights of widows advance to the cases on behalf of the widows.

My interest on widow’s inheritance rights and the principle of *Stipulatio alteri* was drawn by a case[^8] I dealt with at my work place wherein the Master of High Court was joined, in that case the deceased, a miner working in South Africa during his life time had nominated his mother as beneficiary to his death benefits on his contract of employment. Upon his death the problem ensued when the wife claimed that she was the sole heir to the estate of her deceased husband. The recruiting agency The Employment Bureau of Africa hereinafter referred to as TEBA[^9] which is the link between the employer and the miners was unable to resolve the matter. The mother of the deceased brought the case before the courts of law alleging exclusive rights based on the principle of *stipulatio alteri* and the wife against the rights of the wife.

The court had to determine whether the nomination form was sufficient to award rights exclusively to the nominee to the exclusion and detriment of the legal dependants of the deceased being at this point his wife and minor children. Unfortunately the court, as it has done in many other cases of this nature concluded that the principle of *stipulatio alteri* is given a strict interpretation which meant that nominee benefits exclusively. Reference was made to the case of Mabofokeng Mosena v. Matiisetso Mosena[^10], as Mr Mda for the applicant submitted: “the matter of entitlement to benefits in an insurance scheme has nothing to do with family succession. Benefits accruing from such insurance do not form a part of the deceased’s estate. The insurance money goes directly to the beneficiary named by the insured person who was the deceased, and he could choose whomever he wished to name as his beneficiary”, and reference was made to many other to be discussed later on.

The loss of the case brought confusion to me as to how a benefit that has been financed by the salary of a spouse who is married in accordance with statutory community of property regime can be subject to the rules of common law principles of contract. This interest and

[^8]: Matheko Grace Tjomolane V. Mamonaheng Tjomolane and 3 ors 2014 unreported).
[^9]: TEBA is a labour recruitment and management service provider offering a number of services including human resources, social and financial services both during and post employment. [http://www.teba.co.za/about-us/company-profile](http://www.teba.co.za/about-us/company-profile) Accessed 16/03/2016.
[^10]: CIV/APN/388/87
curiosity was further manifested when I took on my master programme the course on methodologies in which I did in-depth interrogation of the Maputo Protocol particularly articles 20 and 21.

1.3 RESEARCH PROBLEM AND THE OVERARCHING RESEARCH QUESTION

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

On the basis of the aforementioned definition by Weitzman, the question to be determined in this paper is, firstly whether or not the benefits accruing from the employment of a spouse form part of the joint estate. If the question is answered in the affirmative in line with the definition by Weitzman, it would need therefore, not be over emphasised that anything financed by the salary (as a benefit of employment) of spouses should benefit both spouses equally.

The second question that this paper asks is whether it is just to invoke strict interpretation to a common law principle against statutory provisions where the principle of common law has the effect of disinheriting those who are provided with specific protection by the statute, that is to say where the statute has wider protection.

The research problem herein is informed by the apparent trending interpretation11 given to the nomination of a person other than the spouse for the death benefits that accrue form employment of a person married in community of property regime. The paper seeks to address the legal problem by asking; whether the courts in Lesotho are bound by the strict interpretation of the principle of “stipulatio alteri” or whether they can invoke the enabling principles of international laws on women’s rights which Lesotho has ratified and national

11 This is evidenced by a plethora of judicial precedence that will be discussed throughout the paper.
laws on issues of matrimonial property and inheritance laws to dismiss the application of the principle which is to the detriment of the widow’s rights to an equitable share of the joint estate.

1.4 JUSTIFICATION AND OBJECTIVE OF THE STUDY.

According to the Declaration on Elimination of Violence against Women of 2004 hereinafter referred to as DEVAW, violence against women includes the denial women to access to economic resources, and it goes without saying that the contested benefits here are economic resources. Furthermore it is worth noting that the high-light of the assumptions that inform this research is taken from article 5 of CEDAW and 5 of Maputo Protocol which both refer to the elimination of all forms of stereotypes and prejudices against women and girls. As such one of the assumptions is that this disinheritance at times is due to both lack of knowledge and stereotypes.

In line of my understanding of the definition of community of property and the requirement of consultation of spouses on any activity that has implications on the joint estate together with the international instruments that seek to afford protection of spouses and widows to the rights of inheritance, it is my perception that the nomination of another person other than the spouse for the benefits that accrue from is both illegal and unfair. Moreover it is also my perception that the over-reliance on the precedence that supports this unfortunate arrangement by the lawyers as legal advisers of the court is fraudulent and misleading to the courts and is also a result of lack of both the appropriate knowledge and lack of judicial activism.

The objective of this paper is to establish the legal problem which is faced by the widows who become victims of the unconscious stereotypes of their husbands manifesting in deprivation of their rights of inheritance as widows. At the end of this paper it is my wish that the various actors in the administration will benefit the following:

1. That the courts will realise the extent of the impact caused by the deprivation and discrimination that is brought by the strict application of the principle of stipulatio
alteri particularly with regard to death benefits, which particularly deprive women of inheritance.

2. That the law makers will see from these findings the need to be more specific regarding what constitutes community of property rather than leave same for interpretation by the courts. This is in line with my understanding that a salary of a spouse is part of the community of property.

3. That there will be a level of clarity and to the extent of the freedom of testation of spouses married in community of property where they are not having a joint Will. This is because my understanding is that although there is constant contention that the benefits that accrue from employment do not form part of the joint estate however the reality is that they are part of the estate of the deceased. And in this regard it should be borne in mind that the widow has rights to inherit from the estate of her husband (Maputo Protocol Article 21).

1.5 ASSUMPTIONS THAT INFORMED THIS RESEARCH

1.5.1 That community of property extents to employment benefits and pension funds of the spouses.

1.5.2 That in the event that a deceased nominates another person other than the surviving spouse (s) as beneficiary of his death benefits the strict application of Stipulatio alteri against the wives of mine workers disinherits the widows. This violates their right to property both under domestic and international law.

1.5.3 That the nomination of another person other than the spouse as the beneficiary by most mineworkers is based on stereotypes and lack of informed implications of their acts.

1.5.4 Lack of legal education and information dissemination on matrimonial property regime is a result of the persistent stereotypes that if a wife is nominated as death beneficiary she will kill her husband for the money.

1.5.5 That failure by the courts to apply judicial activism to protect the rights of women against the principle contributes violation of women’s rights to property.

1.5.6 The laws of Lesotho regarding what constitutes matrimonial property are fragmented leading to ambiguity and discrimination on the rights of women.
1.6 RESEARCH QUESTIONS BASED ON THE ASSUMPTIONS

1.6.1 Does community of property extend to employment benefits and pension funds of the spouses?

1.6.2 Does the strict application of the principle of *stipulatio alteri* designed to disinherit widows constitute violation of their human rights in accordance with the provisions of international law?

1.6.3 Is the nomination of other people other than the spouse based on stereotypes and lack of informed implications of the act?

1.6.4 Is the lack of information regarding community of property a result of the persistent stereotypes?

1.6.5 Is the court’s failure to be judicially active to protect women against the strict application of the principle contributing to the violation of women’s rights to property?

1.6.6 Are the laws regarding what constitutes matrimonial property unclear and ambiguous and as such leading to discrimination of the rights of women?

1.7 LIMITATIONS TO THE STUDY

Various cases were found in the High Court related to the research topic however the researcher could not access the widows who suffered the brunt prejudice of the strict application of the principle because of the their geographic locations as it has been indicated most of them were coming from the rural areas. As a result only two widow’s voices have been captured in this research and this are the widows whose cases I was personally responsible for in my work as Crown Counsel in the office of the Attorney General representing the Master of the High Court.

It was not very possible for me to contact the specific judges who made judgements with regard to the principle because of various commitments on their part that included their tight schedules due to end of the years closures and the closure for holidays.
However, regardless of the limitations I was still able to collect enough data that enabled me to deal with the issue as desired.

1.8 DELIMITATIONS

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

The research is primarily focused on benefits that accrue from employment of spouses married in community of property regime. This is because in line with the definition of what constituted community property as has been explained below, it is my perception that based on the explanation each spouse has a legitimate expectation that the benefits that accrue from the employment of the other spouse whether it be during his employment in the form of salary or at the termination of employment as employment benefits or at the worst case at the time of death at death benefits will form part of the joint estate.

The paper also focus specifically on the miners and widows of mine workers as a case study in this regard because of specific attributes they hold. It is common course that a lot of mine workers in Lesotho hold very low education qualifications if at all. Most of them come from the rural areas where stereotypes are still strongly held and have strong influence on the conduct of women and men. Also in the rural areas where women and men reside the influence of the semi-autonomous social structures12 like family still have great impact on the decisions that men and women take in the administration of their marriages. Also because most of the wives of the mine workers are often unemployed or are involved in very low earning jobs which make them totally dependent on the income that the husband brings for the maintenance of the family particularly children.

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12 These are the structures which themselves generate rules and coerce or induce compliance. They are the fundamental unit of Social control which is directly connected to behaviour norms of conduct (Lempert 1972).
The delimitation of the paper is further based on the scenario where the miner (now deceased) was at all the material time in his life living peacefully with the now widow and were also in a legally recognised marriage. This delimitation is material in that there are situations where there is evidence that before the death the spouses may have been separated for various reasons in which case the disinheritance may reflect a clear intension by the deceased to disinherit the legitimate spouse\textsuperscript{13}. However, even in such cases it is still my contention that the courts should be in a position to look at the surrounding circumstance of the case in awarding justice rather than take an arm chair approach.

1.9 CONCEPTUAL FRAMEWORK.

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

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

However, it should also be noted that in the case of employment, in fact A enters into a contract with B for himself to benefit through the salary and all other benefits that accrue from the employment contract. However, A makes a provision that should he fail to receive such benefits from his employer due to death such should be given to C. It should further be noted that at this point C does not essentially enter into a contract with B but rather B merely has an obligation to give the benefits to C and their relationship ends.

\textsuperscript{13} “Maneo Moremoholo V. ‘Mantsupi F. Moremoholo CIV/APN/135/2010, in this case the applicant alleged that she had been married to deceased in customary law but that they had separated. However, the applicant is unknown to the deceased’s employers. She failed to prove her claim of marriage to the deceased. There is no evidence of any right of claim of the estate of the deceased or portion thereof, by this applicant.
This distinction is important because with the attribution of the principle of *stipulatio alteri* to the nomination for employment benefits there seems to be an assumption by the proponents that the contract between the employer and the deceased was for the benefit of the third party. And to give the employment contract such narrow interpretation leads to absurdity.

2. **Stereotypes**: Is a thought that can be adopted about specific types of individuals or certain ways of doing things. As Webster puts it;\(^{14}\) “it is to believe unfairly that all people or things with particular similar characteristics are the same”. For the purpose of this paper the stereotypes that form the basis of the discrimination that women suffer due to the influence of the semi-autonomous social field, include but may not be limited to the following: Wives kill husbands for the money and enjoy the money with lovers and friends, wives do not know how to administer money because they are minors, women cannot handle a lot of money the need help of a male person. Widows should not be going up and down in mourning clothes they should stay at home and mourn the death of a loved one, hence will be unable to facilitated the claims for the death benefits of the husband.

As a typical village Mosotho who grew-up in the rural areas but was enlightened by urban education and exposure and later becoming a lawyer it is my believe that some of this stereotypes or others not mentioned at times inform the decisions of some miners when they nominate beneficiaries for their death benefits. And it is the effects of these stereotypes which ultimately disinherit the wives of a bulk of mine workers. The stereotypes in this regards should generally be limited to where the deceased has nominated a parent, a sibling or relative to the benefits rather than where he has nominated a second wife in a putative marriage or a lover, in which later case there may be other factors that influenced the decision to disinherit the legitimate wife which are outside the scope of this paper.

3. **Community of property marriage**: In a community of property system the earnings of each party together with all other property acquired other than special inheritance and gifts during the subsistence of marriage becomes part of the community property. Each spouse is entitled to half of the community. This system assumes that both spouses have contributed

equally to the economic asserts whether by homemaking or by earning a salary (Weitzman 1985).

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

4. Benefits that accrue from employment: The amount of money that an employee would receive from the employment in terms of the rules of employer if he were to leave the employment as a result of the resignation or pension. For the purpose of this paper the benefits in question are termed death benefits, in that the employee died before accessing the benefits himself. There has been confusing and inconsistent approaches from our courts as to when and whether these benefits accrue to the joint estate. It should be note however that pension interest should be regarded as an asset which falls automatically into the joint estate of parties married in community of property immediately when the marriage comes into being (Marumoagae 2014). And this is the basis of the argument that this paper seeks to make.

5. Freedom of Testation: This is the liberty with which the person wishes to distribute the assets he/she collected in life to the surviving family or any person of choice after his/her death. “While nothing is as precious as freedom, if complete freedom of testation was permitted, this would result in a blatantly unfair situation”17. The concept of freedom of testation becomes relevant in this paper in that as it emerged from the research the issue was that there is no doubt that the benefits in issue form part of the deceased’s estate, but now

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15 Legal Capacity of Married Persons Act 2006 at Section 5.
16 Which can become death benefits if the employee dies during the employ.
17 Minister of Education and Another v Syfrets Trust Ltd NO and Another 2006 (4) SA 205 (C)
the question that kept coming was whether such nomination could be referred to as a form of testation in which case the freedom of testation of a spouse in a community of property is curtailed by the rules of equality that prescribe that a spouse is only free to dispose of only his half-share of the estate. But the assumption was rebutted by the contention by the proponents that in fact the application of the principle of *stipulatio alteri* has nothing to do with the laws of inheritance as will be seen later on in chapter three.

6. **Inheritance and disinheritance**: inheritance is the practice of passing on property, rights and obligations upon the death of an individual. Disinheritance means to exclude from inheritance or to deprive of a natural or established right or privilege (Rhodes 2008). These two concepts found relevance in this research in that the research is based on the premise that the wife has rights of inheritance “*ab initio*” from the estates of her husband\(^\text{18}\), therefore, by excluding the wife from through the *stipulatio alteri* principle is in fact disinherititing her.

7. **A widow**: A widow is a woman whose spouse has died during the subsistence of the marriage, regardless of whether at the time of death the couple was living together, separated or even in the process of divorce (Mpapa 2014). The definition of widow in this research becomes imperative because the point of departure is taken from the widows rights to inheritance in accordance with national and international laws. As such where there is contestation over the inheritance it is vital for one to establish widowhood, through establishment of requisite formalities of a marriage (Aphane 1995). It is also important to note that in the case where widowhood has to be established due to lack of a formal document like a marriage certificate in that case the influence of the semi-autonomous social fields becomes really controversial. Widows of mine workers are very often affected by this principle of *stipulatio alteri*.

1.10 **OVERVIEW OF THE RESEARCH AREA.**

The research was conducted in the district of maseru and Mafeteng. Maseru was chosen because it is the capital city where the High Court is housed and all other pertinent institutions for this research such as the office of the Master of High Court, Pension Fund,

\(^{18}\) Which emanates both from national laws and international laws to be discussed in details in chapter three.
The labour Commission, TEBA. Most of the lawyers who participated in the research were also located within Maseru. Mafeteng was chosen firstly because of proximity to Maseru hence easy of access also because this is the place of residence of one of the two interviewed widows whose cases informed the bases of the research. Also Mafeteng is a rural area from which the Assistant Master of High Court who referred the case of Tjemolane to our offices is residing.

It is worth noting that in cases of this nature only the High Court has jurisdiction because of the nature of the case and also because of the quantum in dispute. It becomes clear that if the case can only be heard by the High Court firstly the cost of appearance in the High Court is quite high and may be unaffordable for a majority of widows, also it goes without saying that widows because of the geographic location of the High Court some of the widows may find it impractical to attempt to approach the court for legal redress as such maybe unable to access justice.

1.11 RESEARCH OUTLINE

This paper is divided into five chapters with specific sub-headings. The assumptions, objectives limitations and conceptual framework are introduced in chapter 1, and an overview of the research area. Chapter two discusses the methodologies and methods that were employed in the collection of relevant data, this chapter further highlights the important issues that emerged during the field research which although they had not been initially issues, when they emerged, they enhanced the substance of the research problem. In analysing from a human rights and feminist perspective the situation of women and the impact of the application of the principle of stipulatio alteri chapter three interrogates the findings on the ground and lived realities of widows affected by the principle. On the other hand this chapter also analyses the laws that regulate matrimonial properly regime knowledge and application of such laws by both women and the judiciary.

It is in Chapter four that the influence of actors on structures is fully discussed, the actors being the lawyers and the judges. And the gaps that were found during the research period
as the inhibiting factors to the protection of the rights of widows, chapter five entails conclusions and recommendations regarding the research.
2.1 INTRODUCTION

In the changing composition of the total economic resources of family members traditional family property is of less importance for most people than benefits derived from work. New property has afforded more economic security to many who are property-less in the old sense (Glendon 1981).

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

In this chapter the methodologies which were chosen were those that would help elicit clearly the importance of the benefits that accrue from the employment of the spouses in the joint estate. As a women’s law student at masters’ level I have been enlightened to look at the gendered nature of the law which results in discrimination against women. The data in this regard is analysed from feminist lenses in that focus is made to the discrimination that women as a group at times suffer simply for being women.

20 Ibid.
With the exposure to the use of feminist lenses in interrogating laws I came to realize that in fact in various cases where the common law principle of *stipulatio alteri* is alleged and given the strict application very often vulnerable women and children are victims and that in fact their rights which are provided both by statutes and international instruments are thereby infringed upon.

### 2.2 APPLIED METHODOLOGIES

![Diagram of Methodological Choices]

Figure 1: Outline of the Methodological Choices

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

2.2.1 Women empowerment as Human rights

This approach uses the guidelines set by international human rights instruments to analyze the inequalities lying at the heart of the problems related to women’s rights to access property and economic resources (A.W Bentzon 1998). For a long time now, the economic empowerment of women has been a human rights concern which is at the heart of most international human rights institutions; it is a shared belief that women’s access to economic resources can be used to address a lot of the interlocking oppression on women.

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

One of my assumptions is that in the event that a deceased nominates another person other than the surviving spouse (s) as beneficiary of his death benefits the strict application of Stipulatio alteri against the wives of mine workers disinherits the widows. This violates their right to property both under domestic and international law. To establish this reference has been made to international instruments such as the Maputo Protocol Articles 20 and 21, CEDAW and SADC Protocol on Gender and development. This approach was important because as Hellum says the rights based approach places the individual as a holder of basic rights at the core process of development (Hellum 2000).

Therefore, by holding widows as holders of basic right to inheritance from the estate of their husbands, I was able to then ask myself questions such as what is the obligation of the state to ensure that widows are enabled the enjoyment of this right. The response I got was that, the state can achieve that through enactment of legislation and to this I could then go further to say indeed Lesotho has been able to achieve such through the enactment of Legal Capacity of Married Persons Act Lesotho of 2006. But now as it appears from the judicial decisions from the courts of law either the courts or the husbands are not affording women the protection promised by international human rights instruments and domestic legislation.
Using the question of state responsibility in the protection of human rights I further asked myself whether on the apparent failure by the courts and husbands to afford widows protection whether the government of Lesotho can be held liable under international law for the failure to protect human rights. According to CEDAW Article 5 read in line with the case of Ms A.T V. Hungary 2003\textsuperscript{21} in which the committee held that: “Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights”. On this I came to a conclusion that Lesotho should be held liable for failure by the courts and husbands to protect rights of widows to property from the estates of their deceased husbands.

2.2.2 Widows Reality; grounded Research

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

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

And in analysing their position in law I came to realize that not only are they geographically situated far away from the courts but they are also economically disadvantaged to take up the cases to courts, further the legal aid facility provided by the Ministry of Justice also has its offices only housed in the capital city making it inaccessible, moreover some women did not even know about its existence.

\textsuperscript{21} CEDAW Committee Communication No.: 2/2003
With this women’s law theory there is also, constant engagement with data, theory and lived realities which help in the shaping of data collection and interpretation of already collected data. It allows one to go deeper into finding the possible causes of the problems of women and the corresponding interventions (Katsande 2006). As I tried to go deep in my thoughts in finding the possible causes of the nomination of other persons by the mine workers I was confronted with two possibilities; either that there is a lot of lack of knowledge of the law amongst the people or the effect of stereotypes that have been highlighted earlier have greater influence on how they conduct themselves. Hence my assumption that the nomination of another person other than the spouse as the beneficiary by most mineworkers is based on stereotypes and lack of informed implications of their acts.

It was through these deep engagements that I had occasion to do an introspection of myself as a woman, whether there was a possibility that I, regardless of my being a lawyer could be affected by this principle. I placed myself in the position of those women and found that it is a very difficult thing for a Mosotho woman or any other woman “I guess”, to ask her spouse as to who he has nominated for his death benefits for upon such question the next logical question would be as my supervisor puts it; “why? Do you want me to die?”, and clearly no woman wants to put herself in that position not even I.

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

2.2.3 The gendered nature of application of the principle of stipulatio alteri
The sex and gender analysis was made firstly through the use of judicial precedence, cases in which the principle of *stipulatio* was alleged were analysed to determine as to which sex is mostly adversely affected by the application of the principle. This method reflected that many women as opposed to men are adversely affected by the strict application of the principle. It also showed how often women nominate other persons other than their spouses as opposed to how often men do.

In line with the methodology, gender describes the social relations and characteristics of men and women. It concerns their participation in determination of their lives including
access to rights, power and control over resources (Coates 1999) in (Katsande 2006). It is through “gender stereotyping” that women and men are taught the appropriate behaviour and attitudes, the roles and activities for them and how they should relate to other people; this was evidence by the reality on the ground that I even have personal experience of, that men hold power and control over the resources of the family, that although women may be to a great extend administrators thereof, they are only so as receivers and would rarely ask about the source. These gender roles remain unchallenged although they have direct effects on communities, households and individuals, in particular women and children (Coates 1999), (Katsande 2006).

Using this analysis on the ground particularly with the conversation different emotions were reflected. For the bulk of women who interviewed, this topic raised painful emotions; participants both professional and none professionals could easily relate or remember someone who had experienced the effect of the principle. However they all felt helpless for lack on an appropriate strategy to approach the issue with their spouses.

I can easily recall one friend telling me that once she asked her male colleagues at work how she could approach the question of who her husband had nominated as beneficiary. This was because when they got married her husband was already working, so for her the assumption was that logically her husband probably had his parents as beneficiaries. She wanted to find out whether her husband had updated the file to include her and the children. However, the response from the colleagues shut her down for good; he said “you see the problem with you women is that you think too much, you stress yourselves with unnecessary things, the other colleague said, “Women and money! Hei! You are already fantasising about the money you will get should you husband die”. She told me she was so embarrassed that she never wanted to raise the issue with anyone. To the time of the conversation she did not know who her husband had in his file as beneficiary, nine years after their marriage, how sad!

However, on the same set of issues with the conversations and interviews with men very little emotions were observed, I recall an interview with one lawyer who boldly said; “you see, like me right now, since I got married I have not upgraded my file to include my wife in my employment file therefore should I die today before I include her hard luck to her”, this reaction was totally different form the reaction of my female colleague who during our
interview she was so surprised that she even said “right now after this conversation am going to the office of Human resource to upgrade my file to include my husband and child”.

2.2.4 Feminist Theory

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

The “woman question” rests on the assumption, correlating with the core message of feminist legal theory, that the law may not be neutral and further that it may even be “male” orientated in a specific sense. The purpose behind asking the “woman question” is to make these features visible (Rudman 2009). Asking the question has the potential to expose the ways in which political choice and institutional arrangement contributes to the subordination of women. It reflects how the position of women in society is a matter of organisation rather than an inherent characteristic of women. For the purpose of this paper then, by asking the women question helped in eliciting the fact that the application of stipulatio alteri with employment benefits was a neutral law that had the potential to affect women negatively as opposed to men. In fact during one interview the responded (a lawyer) who is pro the strict application of the principle said; “Ms Khesa I think you are missing the point, this principle is not designed to discriminate women as you want to assume, but rather this is a common law principle that has nothing to do with your feminism, anyone is free to use it”.

The systematic undervaluation of female activities, values and characteristics by law and society is seen as the main source of women’s subordination (A.W.Bentzon 1998). Its nature of being grounded approach as well enables the immersgence of the interlocking realities that burden women on the ground, and through this methodology the legal situation in question is considered in the light of women’s needs and values with regard to information, participation, self-determination and evaluation of their work.
2.2.5 Structural barriers

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

The actors for the purpose of this paper are the officials who directly or indirectly deal with the issues of administration of benefits of employment of deceased persons, and in this regard the following officials were interviewed, TEBA Manager as the main agency between the mines is south Africa, the mine workers and their families in Lesotho, Labour Commissioner was also vital in that it was apparent that if TEBA was a labour recruitment agency it had to be regulated by a certain national body and that happened to be the Labour Commission as established by the Labour Code of 1992.

The Manager of Pension Fund Lesotho was also interviewed, she was key as an actor in that she was able to give quite a distinctive perspective to the approach that is taken by the courts with regard to the nomination of beneficiaries, in her interview she made reference to the Public Officer Defined Contribution Pension Fund Rules: Section 26.5: which provide that “payment of death benefits shall be in line with the prevailing legislation in Lesotho”, this she explained means that to them a nomination is a guider however in accordance with the Act where the nomination is contrary to the national laws prevailing in Lesotho they totally disregard it. An example is the case of ‘Mannuku Nkama V. The Master of the High Court and ors’ in which the court held that: that according to the Fund rule the trustees are granted a discretion as to how they are to distribute the benefits to an extent that they are allowed even to ignore the request of a member for the sake of equity.

The respondent went further to make an example that recently they had a case where the nomination excluded the spouse. The mother of the deceased was the only beneficiary nominated, but through their own initiative they discovered that in fact the deceased had a wife. When the wife was contacted; she then told them that the “family of her late husband”, had told her that because she did not have a marriage certificate the fund could

not accept the customary law confirmation of marriage. The manager told me that they reversed the nomination of the mother and substituted with the widow as sole heir.

From the judiciary I engaged with lawyers and judges as actors within the judicial system. Their role as administrator of justice was important in trying to understand from them how they are able to distinguish benefits of employment from the estate with a spouse. Although I found conflicting understandings from this set of actors ultimately my analysis of their responses was that they have heavy reliance on precedence even that which is bad in law.

According to my personal observation, this reliance is a result of lack of the necessary skill to interrogate the law in-depth, in this case I will make particular reference to myself when I was confronted with the case of Tjemolane in 2014, the manner in which I responded to the case then is totally different from the way I would respond to it now. I discovered during the field that most of my colleagues lose cases of this nature because of the approach they take to defend the case and at the end of the day literally fail to protect the rights of widows. The judges on the other hand are also failing to be pro-active in protecting the rights of women by failing to be judicially active.

### 2.3 EMERGING ISSUES

I. **Hierarchy of application of common law against statute:**

With Lesotho being a pluralist legal system with the customary law, common law and statutory laws applying concurrently, it is my contention at this point that the cliché argument about the dichotomy of customary law applying to certain people and not some has since worn thin, leaving us only to determine our lives with civil law. However with regard to civil law from time to time where statute is silent common law is still referred to. But the million dollar question in this paper is “to what extent does common law penetrate?”

A few lawyers during the research period raised the fact that *stipulatio alteri* is a common law principle, and therefore because there are statutes regarding the distribution of benefits that accrue from employment23, the rules of interpretation are that where there is a conflict between a common law and a statute, then statute will take precedence in terms of hierarchy.

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of laws. This means therefore, that the strict application of the principle in this regard is improper and contrary to the rules of law.

For the issue in question herein there is a clear conflict of laws between on the one hand the law that protects the rights of a beneficiary under the *stipulatio alteri* contract and the rights of the widow (Spouse) to inheritance from the estate of her husband. The first set of rights is completely regulated by the principle of common law which is clearly the earlier law in this regard. The second set of rights on the other hand emanate from statutes and international laws which now constitute the latter law. On the basis of the aforesaid I now move in to the issue of interpretation of the conflict of laws in a scenario of this nature.

According to the rules of interpretation of statutes; legislation\(^{24}\) should be interpreted in such a way that it is in accordance with existing laws (Botha 1998), so the question at this point would be what exiting law does the strict application of the principle of *stipulatio alteri* comply with? It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of common law\(^{25}\). In the case of Seluka V. Suskin and Salkon\(^{26}\) the court had the following to say “this presumption is rebutted if the legislation in question clearly provided that the common law is being altered”.

It is clear from the wording of the LCMPA that the marital power which allowed husbands to do as they pleased with their estates has been altered, Section 5 provides “(1) Subject to the provisions of this Act with regard to the administration of a joint estate, the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed”. Botha further says that the legislative repeal by implication will be accepted by the court only if the subsequent legislation manifestly contradicts the earlier legislation (Botha 1998). Which is the position posed by the introduction of LCMPA.

However in the unlikely event that the above argument does not hold it can still be argued that in the interpretation of common law against statute an attempt should be made to read the earlier and subsequent legislation together and to reconcile them\(^{27}\). In the case of Shozi

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24 Legislation here is used loosely to encompass all applicable laws be it common law, statute and judicial precedence as the case might be.
25 Johannesburg Municipality V. Cohen’s Trustee 1909 TS 811.
26 1912 TPD 265.
V. Minister of Justice Kwazulu\textsuperscript{28} the court said “if two apparently contradictory provisions are capable of a sensible interpretation which would reconcile the apparent contradiction that interpretation should be preferred, if such reconciliation is impossible, it has to be presumed by necessary implication that the later of the two provisions prevails, resulting in the amendment or repeal of the earlier one”. This is the point where judicial activism is crucial in advancing protection by giving a sensible interpretation that is aimed to reconcile both laws.

II. At what point is salary become part of the joint estate?

This question emerged as an important one because during the debates and conversations constantly the issue arose as to at what point does a salary forms part of the joint estate. A few lawyers were of the view that the salary forms part of the estate when it goes into the personal account of the spouse and some were saying when the spouse has earned it and has a right to receive it. This question was crucial because my first assumption was that community of property extents to employment benefits and pension funds of the spouses, this assumption was simply based on the assumption that the salary is part of the community and as such anything financed by the salary should form part of the community of property. As Marumoagae puts it, “when parties are married in community of property it does not make any sense why the “pension interest” will be regarded as falling into the personal estate of the member, as if a “pension interest” is a non-patrimonial benefit” (Marumoagae 2014).

Once earned the working spouse has rights and the other spouse has at least a legitimate expectation that it will be brought into the joint estate. (Weitzman 1985). Marumoagae said in his article, “I submit that since the contributions towards such benefits were made from the member’s salary which ostensibly formed part of the patrimonial benefits of the marriage, there is no reason why post-divorce (or death for the purpose of this paper) pension benefits cannot be regarded as forming part of the joint estate as it existed before...” (Marumoagae 2014).

2.4 METHODS OF DATA COLLECTION

\textsuperscript{28} 1992 (2) SA 338.
The research was mainly qualitative as such the sampling of interviews was mainly based on those respondents who had firsthand experience with the application of the principle of *stipulatio alteri*, be it at work or as a victim. The following methods of data collection were used to help me achieve the objective of the research.

**2.4.1 In-depth interviews:**

In-depth interviews were conducted with key informants mainly lawyers and officials dealing directly or indirectly with issues of distribution of death benefits that accrue from employment and those who have dealt with the principle as applicants or defendants in the courts of law. The value of the informants was directly linked to their professional experience. The lecturers interviewed were those who teach family law and property law. The main concern was to find out from them what their take on the salary as a property that benefits spouses married in community of property and as to when it becomes part of the joint estate. The Judge interviewed was asked questions revolving around the assumption on the effect of judicial activism in that when the role of the lawyers is to defend the case of their clients but how do judges use their positions to advance rights of widows.

<table>
<thead>
<tr>
<th>In-depth interviews</th>
<th>Women</th>
<th>Men</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Manager Pension Fund</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Lecturer</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Lawyers</td>
<td>6</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td>TEBA Manager</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Labour Commissioner</td>
<td>1</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td><strong>Insurance Personnel</strong></td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>Master of the High Court</strong></td>
<td>1</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>12</td>
<td>12</td>
<td>24</td>
</tr>
</tbody>
</table>

*Figure 2: table of In-depth interviews*

**2.4.2 Harvesting from Conversations;**
During the research period I constantly engaged in casual talks with friends, family and colleagues I would often pose a question relating to the topic to find the opinion of people about this issue. From those casual conversations a lot of valuable information came out because in this form of conversations people were more relaxed as the setting is not one where a person prepares what they will say, rather the respondents were speaking from their hearts and relating various stories they have seen life. People were more inclined to bring out emotional attitudes to this principle.

My father as a former mine worker was quite informative in this area, my colleagues including my boss who immediately headed to the Human resource office to update her file after our conversation. In one of the conversation actually people were actually learning about this principle and how it applies and one women actually asked a saying, “you want to tell me that the laws of Lesotho will allow my husband to nominate his lover as death beneficiary and I am left destitute with ‘HIS’ children?” when I said yes! She said “This means the law protects adulterous relationships than it does marriages”.

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

The most important issue that I harvested from the group discussions was a comment from one of my colleagues. He said, because it may take time for law reform to legislate on the issues raised with regard to which property forms part of the community of property, then maybe the next practical step would be to bring a public interest litigation case for the court to pronounce itself on this issue. With the various women’s property rights perspectives advanced vehemently in the case, because it appeared from the numerous cases that went through the courts that the component of human rights was not there at all or rather not strong enough to persuade the courts to decide in favour of the rights of widows.
Below is a table reflecting the group discussions and the conversations which were conducted with respondents. Widows are included under conversations because although they are the key subject of the research however the approach I took when talking with them was more inclined to conversation that is interactive than being a formal interview. My attitude was that the conversation enabled the woman to see me as another woman who would understand what she is going trough and would be able to open up and tell me all that she has gone through because of the application of this principle.

<table>
<thead>
<tr>
<th>Who</th>
<th>MALE</th>
<th>FEMALE</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Widows</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Lawyers</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Miners</td>
<td>9</td>
<td></td>
<td>9</td>
</tr>
<tr>
<td>Other respondents for the conversations</td>
<td>4</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>13</td>
<td>9</td>
<td>22</td>
</tr>
</tbody>
</table>

**Figure 3: Table of Respondents**

### 2.4.4 Desktop research:

The present research problem stems from a court case; as such a plethora of case law regarding the application of this principle was interrogated to show how courts in Lesotho approach the interpretation of the principle particularly in the cases where the defence was alleging community of property with the stipulator. Case law was used to illustrate the attitude of the courts in Lesotho towards international law and other enabling legislations designed to protect the rights of widows to property and inheritance.

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

Case law also reflected the ability or inability thereof of the defence lawyers to take advantage of the plethora of legislation both national and international to advance arguments against the disinheritance of the widows. As noted earlier, in none of the cases that were reviewed was reference made to the international laws on the rights of widows to inheritance of the estates of their husbands, to persuade the courts to rule in favour of the legitimate widow. However, what we see common in all the cases is the dismissal of the use of national inheritance laws on the basis that the in the case of stipulatio alteri the benefits do not form part of the joint estate, In the case of Tsosane V. Tsosane and 3 other Justice Hlajoane had the following to say;

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

International human rights instruments used reflect on the international obligations that Lesotho has over the protection of the rights of widows. They were analysed by using the mechanism that Lesotho used to adopt international instruments and the extent to which Lesotho has complied. The instruments are used to support the human rights approach that has been taken as the starting point. The same instruments have been used to show what is the state’s obligation towards it subjects after ratification of the international instruments as measures to ensure that married women enjoy their rights on an equal basis with men. National laws were used to establish national compliance to international human rights instruments obligations by the extent to which Lesotho has incorporated principle of international law in the quest to protect women’s rights to property and inheritance in marriage settings.

National laws on laws of marriage and inheritance were used herein to outline the plethora of enabling legislation however to also show the potential to misuse it because of the fragmentation and lack of clarity.

Legal text was used to show the feminist approach. How feminists think the law should be used to protect the rights of women and to eliminate the persistent stereotypes. How

29 CIV/APN/517/2013
information dissemination can be used to bridge the knowledge gap and provide the interventions necessary to aid in the use of the law. Literature review was used to emphasise the interpretation of common law against statute.

Also to show the extent of community of property in a joint estate literature was used to reflect different author’s views. The incorporation of the salary as part of the estate and the benefits that accrue from employment of spouses married in community of property regime. Literature review was used to reflect the impact of property grabbing on the lives of women who are already vulnerable due to various interlocking oppression which they suffer due to their sexual identity as women.

2.4.5 Experiential data:
My personal and professional experiential encounter with the principle forms the backbone of this research. At a professional level I have dealt with two cases where the principle was alleged against legitimate dependants of the stipulator. In my personal life I have seen the out play of the application of this principle from people that I had personal knowledge of. However, at the professional level I must confess that due to lack of in-depth analysis and understanding of the injustices of women I was unable to successfully protect the rights of women.

However with the knowledge and insight and research skill acquired from the master’s programme as SEARWCL I have come to realise that there was a way I could have secured the rights of the widows. My background as a lawyer helped a lot in manoeuvring to secure appointments with lawyers and judges. Even with other officials at times I found that my background helped in scheduling appointments earlier than maybe the official would have otherwise done. And for some reason the bulk of the informants were people that I had previously interacted with at a professional level at one point or another.

Personal experience on the issue at hand:
A long time ago while I was still a law student I remember a woman who was a neighbour to my home who had for a number of years divorced with her husband. The ex-husband worked for the government of Lesotho. The ex-husband had remarried and was living in another district. One day a message came that the ex-husband had died, later in a few days she got a call, calling her to the ex-husband’s work place, there upon she was informed that
she was still the beneficiary to all the death and employment benefits of the ex-husband despite the fact that they had for many years divorced. She accepted the nomination and the benefits with full knowledge that there was a wife of the deceased who had a legitimate expectation to benefit from monies. To make matters worse the legitimate wife was rejected when she attempted to recover the benefits in preparation for the funeral.

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

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

This scenario to me seemed very unfair both to the legitimate wife of the deceased who was left destitute while a long time ex-wife of her husband walked away with the benefits that could help her and her minor child survive. I also found the scenario to be unfair to the deceased himself who was in no position at this time to have a say as to who should or should not benefit. I felt without the influence of legal background that there must have been an omission on the part of the deceased to replace the ex-wife from all his important contracts and policies. I also felt that the law had failed to protect the current wife who probably was not even aware that something like this would befall her, or at least it never even grossed her mind to inquire about who the husband had nominated as beneficiary of his benefits, not necessarily out of ignorance but because it was taken for granted that such an issue could arise.

**Professional experience with the principle of stipulatio**

Fast tract to 2014, as a lawyer working for the government of Lesotho in the Ministry of Law and Constitutional Affairs under the office of the Attorney General I represent
government in civil litigation, amongst case are those brought by the Master of the High Court where there is a legitimate case on behalf of minor children.

I then came across the Cases of Tjemolane V. Tjemolane CIV/APN/2014(UNREPORTED), in this case a man who had worked for the mines in south Africa but who had because of ill health retired from the mine for a couple of years died. A conflict between the mother-in-law and daughter-in-law ensued when it appeared that during his employment time the deceased had nominated his mother as death beneficiary on a form called Nomination Form, according to The Employment Bureau of Africa (TEBA) when a miner dies only the person who has been nominated as death beneficiary can receive the money.

The widow of the deceased approached the Master of the High Court for intervention, but the intervention did not succeed, rather the mother-in-law took the matter further by applying for an interdict for TEBA not to release such funds to the widow pending finalization of an application in which she alleged to be the sole beneficiary of such funds in accordance with the principle of *stipulatio alteri*.

The applicants in their founding papers made reference to a plethora of case law in support of their case\(^\text{30}\). They won the case due to overwhelming precedence but I remained convinced that there was something that could be done to protect the rights of the widow and her child. It is through the enlightenment I got in pursued of my Masters in women’s law that I gathered the courage to defend the rights of widows affected negatively by the principle of *stipulatio alteri*.

### 2.5 CONCLUSION

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

\(^{30}\) The case law will be referred to throughout the paper.
The importance of detailed legislations that do not need to be left for interpretation by the court, such as the real need to be more precise as to at what point of the earning of the salary does it form part of the community of property, because it became clear during the field work that there is a perception that while the employee has not yet received the salary it does not form part of the community, and yet the risk is that while it is still with the employer the employee is at liberty to direct as to what it should do even before it comes to him.

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

CHALLENGES BROUGHT BY THE STRICT APPLICATION OF THE PRINCIPLE OF STIPULATIO ALTERI

3.1 INTRODUCTION

“State parties undertake to all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” CEDAW Article 2(f).

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

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

According to my personal experience, in the context of Lesotho this would refer to the fact that in the olden days families relied extensively on traditional forms of wealth like cattle, sheep and fields for their survival however with increased migration both to the urban and largely to south African mines there has been a paradigm shift with now benefits of employment forming the bulk of the family’s wealth. What this means is that very often the men migrate to South African mines and the women remain at home as home makers with the full expectation that the men will remit the benefits of his employment for the maintenance of the family and as such should be protected from any manipulation that can lead to disinheritance.
Furthermore, the heavy reliance of families to the benefits of employment can never be over emphasised, in the current era of climate change where the traditional wealth of animals and fields have lost value. In an era where unemployment for women is escalating and the burden of care on women is mounting due to the effects of death by HIV/AIDS. However, regardless of this sad reality of women, women in Lesotho continue to suffer various forms of discriminations and deprivations to economic resources due to the uncritical and unconscious protection of customary practices which are clouded by patriarchal and stereotypical attitudes.

This simply means we need comprehensive legislation protecting proceeds of employment of spouses married in community of property regime. An example in this instance is the Land Act 2010 which provides in Section 10 (1) that;

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

Sub section (3) provides that;

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

3.2 SITUATION ANALYSIS

\begin{quote}
With the changes in the economic sources and social behaviour of the modern society, hereby earnings and proprietary rights are no longer confined to physical property but also include future interest and future earnings such as investments, trust fund and business ventures, it is perceived that the scope of claims on matrimonial property shall also be revolutionised to include claims in future (Norliah Ibrahim 2014)’
\end{quote}

From the subject matter of this research it proved vital for to analyse the impact of the strict application of the principle to the lives of the widows who were during the lives of their husbands primarily reliant on the income brought by their employment and who would logically anticipate that in the unfortunate incident of the death of the husband the benefits of the employment would continue to sustain them but are dismayed by the nomination of
another person to such benefits, and unfortunately find themselves helpless and vulnerable when the court rule against their rights.

In Crookes No V. Watson 31 Schreiner JA had the following to say regarding *stipulatio alteri*:

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

To me it becomes very clear from this definition that B only drops out when C accepts to be a part of the contract with A, and it truly beats normal reasoning to assume that in a case where there is a nomination of one as a next of kin or a death beneficiary that can be given the context of a *stipulatio alteri*. Because the reality is that the contract between A and B is in essence for the benefit of B not for C who is only incidental.

On this basis it is my opinion that to construe a strict approach to nomination of death benefits without taking into consideration all the surrounding circumstance is tantamount to denying the widows of the right to access to justice 32. This is because as was found during the research period some nominations might have been done way long before the spouse got married or better yet may have been without the full comprehension of the implication or be based on stereotypes.

### 3.3 LEGAL OBLIGATIONS OF LESOTHO TO PROTECT PROPERTY RIGHTS OF WOMEN

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

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31 1956 (1) SA 277.
32 CEDAW G.C. No 33 Paragraph 14 (c) Accessibility requires that all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination.
highlighted are critical in defining discrimination that women suffer in the context of this paper.

The exclusion refers to the failure by the husband to nominate the wife as beneficiary to benefits that accrues from his employment. The restriction is the strict interpretation given by the courts constantly to cases of this nature by failing to give wider interpretation to what constitutes the joint estates for purposes of inheritance but rather the courts find it easy to rule as it did in the case of ‘Matumo Tsosane V. ‘Malikoebe Tsosane and 3 ors’ that,

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

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

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

The honourable judge made this statement in full view of the rights of spouses married in community of property both nationally and internationally that not only speak of the equitable shares to the joint estate but to the elimination of all those harmful cultural practices. But in this particular case the judge brought a historically oppressive and detrimental customary principle to use it to exclude and restrict the widow’s rights to inheritance from the estate of the deceased husband.

To show that she was in full view of the rights of inheritance of widows in concluding her judgment she had the following to say:

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

33 CIV/APN/517/2013
34 The Sesotho customary saying that the words of the deceased are respected brought in the context of death benefits in this context becomes a harmful cultural practice as it has the effect of disregarding the rights of the widows to inheritance.
According to CEDAW "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity. On the basis of the definite clearly a pro-active judge under the circumstances should be able to detect a customary practice or saying that is harmful and in this context it is obvious that to uphold this customary saying has negative effect on the fundamental rights of women.

3.4 STATE OBLIGATION

The best ways of addressing the issue of women rights or giving legitimacy to women human rights issues is the use of international legal instrument. Leaving women rights to national or domestic law will surely leave women's rights at the mercy of national and cultural prejudice (Michelle 2004).

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

The CEDAW committee has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. Article 2 of CEDAW provides that; all state parties shall take all appropriate measures to eliminate discrimination against women by any person\(^{35}\), organization\(^{36}\) or enterprise; In the case of Ms. A. T. v. Hungary brought before the CEDAW committee, the committee had the following to say:

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

The developments brought by this article is that first it places responsibility on the part of individuals to protect the rights of others in accordance with UDHR secondly that the state ensures that individuals observe the human rights of others. The committee on the other

\(^{35}\) In this case this will be the husband by nominating another person other than the spouse.

\(^{36}\) In this case will be the court as a state organ for failing to take appropriate measure to protect the rights of widows.
hand goes further based on that obligation to say failure by the state to protect the individual even from acts on non state actors may lead to liability on the part of state.

Lesotho like other member states to various international instruments acquires responsibilities by ratifying the international and regional instruments. The CEDAW Committee in the concluding remarks of 2011 recognised the efforts of Lesotho to promote gender equality and protect women’s rights, such as establishment of the law reform commission, with the mandate to review discriminatory laws (CEDAW 2011).

However, judicial precedence that we see dating before the ratification of the conventions and protocols to date does not reflect any grounded development in terms of protection of widows rights to inheritance of the estates of their husbands in cases where such estates in contested by someone other than the rightful widow of the deceased, through the common law principles of stipulatio alteri.

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

From the findings on the ground I observed that indeed the stereotypes against women still persists, and ultimately may still influence the decision to nominate another person other than the spouse as beneficiary by some mine workers. This shows that Lesotho still has to take on appropriate measures to modify those practices, as women are already being prejudiced by them.

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

It emerged during the research that the legislature in Lesotho has generally attempted to advance the provisions of CEDAW through the LCMPA of 2006 as will be seen at paragraph 3.5 below. However the problem appears to the understanding and application of common laws against civil laws by both lawyers and the judges. In one of the interviews with a lawyer who is pro the principle of stipulatio alteri, he vehemently emphasised with unequivocal certainty on his part that the common law principle of stipulatio alteri should be given strict interpretation regardless of the circumstances as long as it is clearly established.

The stance can also be seen through the various judgements where the principle was upheld by judges who maintain that where the principle is raised then the question of inheritance cannot be raised as the subject of stipulatio does not form part of the estate of the stipulator.

African Charter on Human and People’s Rights hereinafter referred to as the Banjul Charter at Article 18 provides that: The States shall ensure the elimination of all forms of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Art 19, all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Based on personal experience as a legal officer both for Women and Law in Southern Africa Lesotho during 2011-2012 and currently with the government, I am positive that there are attempts by the government of Lesotho to eliminate various forms of discrimination against women and girls particularly gender based violence and on property rights. And there are considerable developments leading to the enactments of acts such as the 2003 Sexual offences which is quite detailed on what continues sexual violence and also introduces marital rape. The Land Act of 2010 also secures the land rights of women and girls to a large extent. However, there seems to have been an oversight on the benefits of employment
as a potential area of dispute, particularly for those people who are not employed by government.

**SADC Protocol on Gender and Development:** Article 8 states that; states parties shall enact and adopt appropriate legislative administrative and other measures to ensure that women and men enjoy equal rights in marriages and are regarded as equal partners in marriage. The LCMPA of 2006 in its preamble specifically codifies Article 8 of the protocol by providing for the elimination of marital power which the husband had historically on the person and property of his wife and does makes husband and wife equal partners with equal rights to the property they both accumulate during the subsistence of their marriage.

**Beijing Declaration:*** Paragraph 61 (b) states undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property.... Paragraph 125 (e) to organize, support and fund community-based education and training campaigns to raise awareness about violence against women as a violation of women’s enjoyment of their human rights and mobilize local communities to use appropriate gender-sensitive traditional and innovative methods of conflict resolution.

Above the enabling legislations already stated above on the protection of spouses in community of property, administratively the government of Lesotho engages the Ministry of Gender Sports and Recreation to organize, support and fund community based education and training campaigns to raise awareness about violence against women at various levels and also during the worldwide celebrated 16 days of activism against violence against women and girls.

With Lesotho being party to all the above mentioned instruments it is deplorable that even in the light of such persuasive international commitments the courts in Lesotho continue to disregard rights as clear as this one’s for a common law principle justified by customary saying as Justice Hlajoane said in the case of Tsosane.
3.5 ANALYSIS OF STATE COMPLIANCE TO THE INTERNATIONAL OBLIGATION TO PROTECTION OF WOMEN'S RIGHTS

In determining the extent of compliance with the international instruments which seek to protect the rights of women to property and inheritance it was established through this research that under customary law the heir to the estate of a married couple is still the first male issue of the family, giving the widow only the rights of use of the property without depriving the heir half of the estate (Laws of Lerotholi). This remains the position under customary law despite the developments of International Law.

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

However, as indicated the cliché distinction of the application of customary law and civil law to the Basotho as provided by Proclamation 2 B of 1884 has lost a clear demarcation line, leading the distinction to only be applicable as a moot question. According to the distinction, for those who have abandoned the customary way of life their estates are administered through the Administration of Estates Proclamation of 1935 at Section 3 and the Intestate Succession Act of 1953 where it provides that the remaining spouse inherits her half share and a share equal to that of a child ‘share.

For the purpose of this paper it should be noted that the estates in issue can never be administered under customary law due mainly to the contested issue which is employment benefits which are administered by civil law. Leading us now to question the contention of the Honourable Justice Hlajoane in the case of Tsosane V. Tsosane (supra) where she referred to Sesotho customary principles to resolve a dispute over employment benefits but refused to engage civil laws of inheritance by alleging that where the principle of stipulatio is invoked a question of relationship of the beneficiary and the stipulator are irrelevant and that the question of inheritance cannot be raised.
The development of the laws of inheritance and administration of the joint estate in line with international law gave birth to **Legal Capacity of Married Person’s Act of 2006** which provides at Section (1) that: *Subject to the provisions of this Act with regard to the administration of a joint estate, the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed.* Section 5 proceeds to provide that: *Spouses married in community of property have equal capacity to do the following in consultation with one another (a) dispose of the assets of the joint estate; (c) administer the joint estate.*

The implications of the LCMPA as harvested from the interviews and group discussion are that either of the spouse does not have power to do as he or she please with the benefits of employment because all this are part of what they acquire during the subsistence of the marriage and as such form part of the community of property and has to be administered in consultation with one another. It then surpasses comprehension as to how despite the provisions of LCMPA that the judges are still able to regard benefits of employment as an entity outside the context of the estate of the spouses.

However a closer look at the **Labour Code Order 1992** Section 78 brings new light as it provides that: *After the death of the employee the employer shall as soon as practicable pay or deliver to the labour commissioner, for distribution in accordance with law ‘all ways’ and other remuneration due to and all property belonging to the deceased employee which is in the employer’s possession.* Reference to this section was made by the Labour commissioner during our interviews whereat I had asked how they regulate TEBA to show that it complies with the laws of Lesotho and that the employment benefits of deceased miners reach to the lawful dependents of the deceased miner. The paradox here was that particularly with regard to miners working in South Africa through TEBA this was not happening at all. She indicated that this is what is supposed to happen but they are rarely engaged and they almost thought all was still going on fine.

Furthermore, the other problem is seen through the management of TEBA which has relegated the administration of the benefits particularly where there is a dispute to the courts. The Manager of TEBA indicated that whenever there is a dispute regarding the nomination of the beneficiary they leave the matter to be decided by the courts and they simply comply with the court order. This approach by TEBA is clearly not in compliance
with Section 78 of the Labour Code which TEBA is bound by as a labour recruitment agency operating in Lesotho.

As indicated at paragraph 2.2.5 above from the DCPFA the following is construed: Section 2 provide that: *a dependant means a person in respect of whom a member, pensioner is legally liable for maintenance, or not legally liable for maintenance if such a person was at the death of the member in fact dependent upon such a member for maintenance or is the spouse of a member.* To show that the legislature understands that the contribution of the member may have implication on the joint estate it is provided at Section 32 that *a benefit granted under this Act shall not be assignable, executable, payable or transferable except for the purpose of satisfying*

(a)......

(b) A maintenance order

(c) A divorce order.

On the other hand the **Public Officers Defined Contribution Pension Fund Rules 2008** at Section 3 (1) provide for payment of the contribution says; *that a member’s contribution in terms of the Act and the rules shall be deducted by his or her employer from his or her salary or wages*... this provision fully responds to my first assumption that the employment benefits in any form they come in are financed by the salary of the employee.

The Rules go further to provide at section 26 (5) *that payment of death benefits shall be in line with the prevailing legislation in Lesotho.* This was emphasised by the manager of Pension Fund when she indicated that indeed they regulate the death benefits in line with the laws of Lesotho she further added that where the nomination found in the file of the employee is contrary to the laws they have the power to disregard it totally.

On face value of the legislation advanced above one could swear the law is water tight in protection of widow’s rights to inheritance and that indeed Lesotho complies with its international obligations but compliance should be more practical than on paper. It is clear from the cases that have been referred to, beginning with the case of Tjemolane that the widow’s rights are overridden by the application of common law principles.
3.6 THE REALITY FACED BY WIDOWS AFFECTED BY THE PRINCIPLE OF 
STIPULATIO ALTERI

“... Cultural prejudices ... are incompatible with the dignity of and 
worth of human person and must be eliminated” (VDPA 1993).

Regardless, of favourable statutory and international provisions the courts have on a number 
of cases invoked strict interpretations of the principle of stipulatio alteri to the detriment of 
widows. The question is whether the courts are bound to use principles of international law 
to protect the rights of widows. The Court of Appeal in the case Senate Masupha, in 
response to the submission of amici curiae who submitted that the court should invoke 
principles of international law in its decision stated; “that international principles, are aids 
to interpretation, not the source of rights enforceable by Lesotho citizens”. This was 
conflicting with a prior decision in Tsepe Molefi V. IEC and 4 Ors, wherein the judges 
quoted CEDAW and the SADC Protocol to Gender and Development to indicate that 
“Lesotho is a signatory to several international conventions, these conventions also impose 
certain duties on the state

As a result I found that it is very confusing as to whether in Lesotho principle on 
international law can be used in courts to advocate for protection of women’s rights.

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

“I agree that there is quite a bulk of precedence on the issues of stipulatio alteri, I 
think the principle is abused by being used by manipulative laws who find an 
environment that is conducive from judges who do not have judicial activism”. Advocate37.

“I am really failing to understand how the courts of Lesotho are able to separate a 
person’s employment benefits from the joint estate while those benefits are sustained 
by the efforts of the joint estate”. Advocate38.

“This is a clear case of fraud to the joint estate if one party can divert benefits that 
are inherently part of the joint estate and give them to someone else under the 
pretence of stipulatio alteri”. Advocate39.

37 19 November 2015
38 16 November 2015
39 17 November 2015
On the first assumption I came across conflicting views with some respondents holding the view that salary does not form part of the joint estate while other believe they do. These conflicting views were also reflected in literature that was reviewed.

I found that according to domestic legislation and international laws spouses married in community of property have equal shares to all things they acquire individually and collective during the subsistence of the marriage also that they have to consult each other on any act that will have impact on the joined estate (LCMPA, Maputo Protocol, CEDAW etc). Accordingly widows have rights of inheritance form the estates of their deceased husbands regardless of where the estate is kept. The widows have a fair understanding of these laws but often that knowledge means nothing if the common law principle is used to block their claiming of their rights.

3.7 THE LINK BETWEEN PATRIARCHY AND WOMEN’S ACCESS TO ECONOMIC RESOURCES

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

The removal by law of minority status for women in 2006 through LCMPA improved the position of Basotho women but the traditional culture still holds strong. For example: “A Basotho man will still introduce his family as ‘his children’ and that includes his wife” (Gymm 2015). Whilst legislation has increased rights for women on paper, there is still a long way to go before this makes a difference to women on the ground, because the patriarchal attitudes are so engraved in our culture that it will take time to get rid of them.

Today, Basotho women face severe disadvantages brought about by the patriarchal culture which keeps women oppressed and makes them more vulnerable to abuse, poverty and disease. These values hold especially strong in the rural communities (Gymm 2015). This
stance was envisaged though the voices of the women with whom I engaged in conversations. Most of the women indicated that they knew the laws that provide that they are equal partners with their husbands in marriage regardless of the type of marriage they have entered into be it customary marriage or civil marriage. However they indicated that neither do they have control over who their husbands nominate as beneficiary nor can they ask because of the controversy around the issue of death benefits. Because as I indicated earlier, to raise this question will only lead to affirmation of the stereotypes that are already held about women with regard to benefits of their husbands.

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

3.8 THE RESULTS OF THE STRICT APPLICATION OF *STIPULATIO ALTERI*

*The improvement in the intestate position of the surviving spouse and the trend towards property and the steady expansion of a surviving spouse’s protection against disinheritance are all too often explained as following from some single principle of justice which requires sharing of matrimonial property between spouses* (Glendon 1981).

When the law fails to protect the rights of vulnerable people it is in essence turning a blind eye to the repercussions that are likely to be suffered by those affected. At this juncture I turn now to outline the possible and yet not exhaustive list of some of the after myths of the strict application of the principle on the lives of widows.
3.8.1 Human Rights Violation

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

3.8.2 Effect on economic welfare

Insecure property rights perpetuate poverty and gender inequalities and lead to a vicious cycle of deprivations. Property grabbing could lead to loss of shelter, loss of livelihoods, which further cause destitution (Kaori Izumi 2009). As indicated earlier on in the paper most widows of mine workers are unemployed their role in the family being that of home making, and such they have over reliance on the benefits of the husband for maintenance of themselves and the children. And as such to deny them rights to the death benefits from their husband’s estate they are in no doubt destined to poverty. As the Human Rights Watch puts it; when a woman’s property rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women’s lives often resulting in poverty, inhumane living conditions, and vulnerability to violence and disease for women and their dependents (Human Rights Watch 2003: p. 30).

This unfortunate reality was triangulated during the research period when one of the widows told me that during the lifetime of her husband, she had at no point had any formal employment because her husband provided for the family and children. But since the husband died and it turned out that he has left all the proceeds of his employment to his mother she had to stand up and get employment. Unfortunately because of lack of any skill she had to resort to housekeeping jobs in South Africa where there is better pay. This meant that some of her children had to quit school while she went to work just to earn enough for them to have bread on the table and clothes on their bodies.

3.8.3 Health effects that may result from the effect of application of the principle

As Kaori puts it; Food insecurity could drive women to engage in risky sexual behavior of unprotected sex or sex work which increases the risk of HIV infection (Kaori Izumi 2009).
And if it is concluded that depriving a widow who relied on the salary of her spouse to benefit from the death benefits to continue sustenance of the family leads to food insecurity. It is therefore my analysis that such a widow becomes vulnerably to infections while she bargains for food security.

Trauma and stress caused by property grabbing could worsen their immunity, making them more vulnerable to infectious diseases including HIV/AIDS. HIV infection with poor nutrition and living conditions could lead to premature deaths of women, leaving many young orphans behind (Kaori Izumi 2009).

Literature review shows that the potential of property rights and access to economic resources can help prevent the spread of HIV/AIDS by promoting women’s economic security and empowerment and thereby reducing their vulnerability to domestic violence, unsafe sex, and other AIDS-related risk factors. Conversely, the denial of property and inheritance rights drastically reduces the capacity for households to mitigate the consequences should a member be infected with HIV (Strickland 2004). Although none of the respondents (Widows) reflected potential vulnerability to infectious disease because of age, one can only imagine the vulnerability of a younger widow with little education who may opt for sex work to maintain her children.

3.8.4 Psychological effects

“the trauma that results from severe human rights violations often leads to new human rights violations, as conflict intensifies, hatred accumulates and makes restoration of peace more difficult” (Michelle 2004).

The psychological trauma that widows suffer due to this principle is unimaginable. One of the widows interviewed said for a while I thought it is not a serious issue, until I got to TEBA and was told my mother in law had already made a claim and as such there was nothing for me. She said she went numb. The confusion, the fear of the future of her children, how she would make it, for she knew that she would not get even a cent from her mother in-law.
This dilemma she said was eased by a promise from the Master of High Court that she and her children had a right to be maintained from the estate of her late husband. However, even that little hope was shattered by the judgement of the High Court that declared that benefits subject to *stipulatio alteri* do not form part of the joint estate and as such are not subject to the laws of inheritance. How unfortunate!

3.9 KNOWLEDGE OF THE LAW AND THE EFFECT OF STEREOTYPES

According to my forth assumption lack of legal knowledge and information on matrimonial property regime is a result of the persistent stereotypes that is a wife is nominated as death beneficiary she will kill her husband for the money. These are the stereotypes that form the basis of this paper, because the persistence of this stereotypes is seen from the flooding cases that come to the office of the Master of High Court where the wives now claim disinheritance from the estate of the husband to whom they were married in community of property while the other person who has been nominated as beneficiary claims the strict application of *stipulatio alteri*.

Because of some of these stereotypes in Lesotho there is a theory that I have a personal knowledge of that; “*lekoko la motho ha le thakhisoe fatse*” literally translated to mean the skin of a dead person cannot be dried on the ground implying therefore that someone has to be implicated to be responsible for the death of such a person. Unfortunately the widows of the mine workers are easy preys to bear the brunt of this unfortunate stereotype. Whenever there is the issue of the accidental collapse of the mine which is referred to as ‘*Tafole*’ in Lesotho when that occurs, it is normally attributed to witch-craft. For as long as I can remember there have always been speculations that the wife of the deceased is responsible. This is because there is a myth that when a miner dies the mine gives a lot of money as compensation and because of greed a woman would kill her husband for that money.

As a result of these stereotypes and lack of legal knowledge a lot of mine workers when they join the mines often opted to nominate their parents or siblings as beneficiaries of their death benefits for fear that if they nominated their wives they would kill them in accordance with the stereotypes.
The reality is that although the stereotypes may persist to a certain extent with some men, as it emerged from the discussions with some miners, however, it also become apparent that for both the miners and the women who were interviewed there is a level of awareness of the laws regarding the administration of estates and the importance of the nomination either from observation or from information dissemination by different stakeholders in issues of protection of rights of women. But the main problem seemed to be the use of that knowledge to either persuade the man to nominate them or even ask who they have not nominated.

3.10 CONCLUSION

This chapter has basically outlined the realities of the impact of the strict application of the principle on *stipulatio alteri* on the lives of women. It also helped to unpack what the legal position is regarding the individual estates of the spouses and on that basis the next chapter will pay particular focus on what is the impediment between the application of the law and the reality on the ground.
CHAPTER FOUR

ACCESS TO JUSTICE AND THE ROLE OF JUDGES IN PROTECTING RIGHTS OF WIDOWS

4.1 INTRODUCTION

“Law whether it be customary, statute or common law has been used as an instrument of discrimination to deprive women of that which they rightly deserve and to refuse them the recognition otherwise afforded to their male counterparts.” (S.M. Seeiso 1990).

UDHR: Art 1, All human beings are born free and equal in dignity and rights. Article 16 (1), Men and women of full age ... have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

In this chapter I take time to interrogate and analyse the role of the judiciary and legal practitioners as the main actors in the administration of justice. The duty that the legal officers owe to the court to give the court direction in the administration of justice against the duty they owe to their clients. Also I look into the duty that the court/ Judge has to the parties before the court for the upholding of human rights and fair justice. The chapter concludes by giving an outline of the adverse impact of misleading the court and the failure by the courts to be proactive in protecting the human rights of people.

4.2 THE DUTIES OF THE LAWYERS TO THE COURT AND CLIENTS

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

A lawyer’s duty to the court, can be categorized as follows
(a) A general duty of full disclosure owed to the court;
(b) A general duty not to abuse the court's process;
(c) A general duty not to corrupt the administration of justice; and
(d) A general duty to conduct cases efficiently and expeditiously (Martin 2012).

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

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

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

4.3 THE DUTIES OF THE COURT TO UPHOLD HUMAN RIGHTS

Administration of justice is the primary function of the judiciary. By the administration of justice is meant the maintenance of rights within a political community (Farooq 2012). Once the facts have been established, the court proceeds to decide what law is applicable to a particular controversy or circumstance. Herein the judiciary becomes the interpreter of laws, which is the primary function of the judiciary. The judiciary plays an important role in determining what the law is and when two laws apparently conflict, which one shall prevail.
In case the laws made by any of these law-making bodies conflict with the constitutional provisions, the judiciary is empowered to declare the either legislation illegal the judiciaries also act as the defenders of the individual’s right. Such role of the judiciary is important as it prevents the individual's rights from being violated. Judiciary is the watchdog of rights and liberties of the people (Farooq 2012).

In the context of this paper it therefore means that it is upon the judiciary to first pick, mero-muto if not advanced by the parties to the case that there is a clear conflict of laws in this question and instead of overruling the application of the laws of inheritance based on precedence as the courts seem to be doing in the many cases referred to, the court should take it upon itself to pronounce itself on what the relevant legislation should be.

4.4 JUDICIAL ACTIVISM AS KEY TO PROTECTION OF THE RIGHTS OF WIDOWS.

“The point is that neither society nor culture actually does anything for both are abstractions. It is people who act and by acting, create and perpetuate their culture and its society” (Tsanga 2003).

UDHR Art 8, everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

A claim against a deceased estate differs only in the need, for more than ordinary care, a need which arises from the fact that the other party to the alleged transaction is no longer alive to give his or her version (Rens v Esselen & Ors41). According to my understanding this abstract sums up the utmost caution and high level judicial activism with which the judges have to approach the cases of stipulatio alteri in cases of the nature discussed in this paper. However as the Judge did in the case of Mako V. Mako CIV/APN/424/2012 the preceding officer has the liberty to question the application of the principle. In the case of Mako Justice Majara had the following to say;

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

41 1957 (4) SA 8 at 14
The facts in question were the provisions of the DCPFA of 2008, but my contention herein is that the courts are at liberty to use the same question in cases where the principle applies to people not covered by the DCPFA.

One of my research assumptions was that failure by the courts to be judicially active in protecting the rights of widows contribute to the violation of women’s rights to inheritance. On the ground I found that in fact there is lack of judicial activism, due to heavy reliance by the judiciary on precedence and the evidence brought by the lawyer before court. In an interview with one of the judge’s clerks she made emphasis on the fact that they rely on the evidence brought before court and if the defence fails to convince the court that despite the principle that they are still entitled to inherit then the hands of the court are tied.

My critical mind was then turned to the case of Rens v Esselen & Ors wherein Ludorf J. pointed out that; *Courts have to be careful of potential beneficiary to deceased’s' estate who claim that deceased people made statements favourable to them. Courts have to scrutinise statements with care as it is easy to conceive of attempts by potential heirs being made to dishonestly gain advantages.* It became apparent from my findings that the judges in the courts of Lesotho when faced with cases where there is an allegation of *stipulatio* against the widows never invoke the necessary scrutiny regarding either the nomination itself or the effects it may have on the depends of the deceased.

### 4.4.2 EFFECTS OF FAILURE TO BE JUDICIALLY ACTIVE BY THE COURTS:

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

- As I looked into the different judgements that upheld the principle of *stipulatio* particularly with regard to benefits of employment from deceased mine workers I observed that there is considerable wrong judicial precedence which is entrenched by the continued reference to those cases.
• It has also been my outlook into the future that there is potential likelihood of ultimate lack of trust and confidence in the judicial systems by vulnerable people. If all the widows who came to court seeking protection of their estates based on what they have been thought through various legal education strategies by NGOs and various ministerial personnel who have the stake in the issues of women empowerment if the court fails to protect those rights how can they trust the system for anything?

• I also observed, through the enlightenment of a colleague that the heavy reliance of the judiciary to only the evidence brought by the parties before court opens for easy manipulation by unscrupulous lawyers. From the literature review and analysis of human rights of women it can be concluded that by right the application of the principle in the manner in which it has been trending in Lesotho is wrong it means that the scrupulous lawyers have been taking advantage of the wrong precedence to mislead the court. And if the judge fails to recognise the mistake and correct it the position remains and widows continue to be prejudiced.

4.5 IMPACT OF THE FRAGMENTED LAWS

Frequently, States parties have constitutional provisions, laws, regulations, procedures, customs and practices that are based on traditional gender-stereotypes and norms and are therefore discriminatory and deny women full enjoyment of their rights (CEDAW 2015).

According to the last assumption the laws of Lesotho regarding what constitutes matrimonial property are fragmented leasing to ambiguity and discrimination of the rights of widows.

There are various national legislations that can be used to protect the rights of women dating as far back as 1935 the Administration of Estates Proclamation to the 2006 Legal Capacity of Married Persons Act which both abolishes the marital power of the husbands over the person and property of the wives and the legal requirement of consultation of the spouses married in community of property to anything that will affect the joint estate. However, it is
my personal experience that with all those laws that come in between 1935 to 2006 it takes a very diligent lawyer to bring all those pieces together to defend a case of inheritance, particularly because these laws are not all found within one legal regime of family law but encroach also in the labour laws as well.

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

I have also come to realise that without first taking the women’s law approach and analysing all the laws that seek to protect the rights of women and analyse them against those that have the negative impact it is impossible to deduce the potential prejudice of gender neutral laws. As such it took me the use of this methodology to realise that the fragmented laws of Lesotho although they are designed to protect women they also have the potential to be abused and as a result be prejudicial to women. Meaning there is need for comprehensive consolidation of all acts which clearly stipulate for instance as to at what point a salary forms part of the joint estate, and also just as the DCPFA does for the employment benefits of public servants there should also be regulation of benefits of those who are not public servants in line with the Labour Code but in one Legislative Act that is easily accessible.

5.6 IDENTIFIABLE GAPS

“Information dissemination cannot be centred on legal remedies alone but must of necessity also put very strong emphasis on the psychology of self and critical empowerment socially economically and politically if women’s empowerment is perceived as an ultimate” (Tsanga 2003).

From the finding it emerged that in fact to a considerable degree women are aware that the salaries of their husbands belong to both of them and that they have to decide jointly how the salary is administered. However, failure to use the legal knowledge by most women because of cultural attitudes is the main gap. Because of the sensitive issue revolving around the employment benefits which id death in the context of this paper, women seem to be unable to ask their husbands as to who they have nominated in their employment files for
fear of being accused of greet or affirmation of the stereotypes about them. This is a gap because there is knowledge which people are failing to use.

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

This gap is detrimental to women because by failing to deliver such benefits to the Commissioner for administration in line with the laws of Lesotho TEBA rather leaves the decision to be made by the courts thus exposing women to the brunt of the strict application of the common law principle of Stipulatio alteri or to the vulnerability of having no money to defend their rights in the courts.

It emerged from the research that there is a plethora of enabling legislation both international and national laws, however there is failure by the lawyers (defence lawyers) to engage this enabling legislation to protect the rights of women against the principle of stipulatio alteri. As one lawyer said it also depends on what the defence lawyers say in advancing the rights of the widow to persuade the court to rule in their favour. On the same note the other gap is the failure as well by the courts to use those enabling laws to advance protection for the rights of widows.

From all the case that I read where the application of the principle was contested none of them raised the international instruments as the starting point, none raised section five of the LCMPA which provides for consolation of spouses in their dealings and further in neither of the cases was the application of common law rebutted for application of a more specific statutory provision is accordance with the rules of interpretation (Botha 1998). This means that the judicial precedence that upholds the application of a common law principle of stipulatio alteri is overwhelming while on paper there is enabling legislation to contradict the application of the principle.
4.7 CONCLUSION

It is clear from this chapter that the responsibility of the protection of human rights for everyone lies heavily on the lawyers and the judiciary and obviously without the intention to protect the rights of widows by a judicially active judicial system; vulnerable widows will always suffer in the hand of the scrupulous lawyers who misuse the misdirected precedence. The next chapter will provide general conclusions and recommendations based on the research findings.
CHAPTER FIVE

CONCLUSIONS, RECOMMENDATIONS AND INTERVENTIONS

5.1 INTRODUCTION

“African government’s failure to develop comprehensive programmes that raise people’s awareness of state law means people are often oblivious of the nature of state law even though it is generally applicable to them. This means that the bulk of the population who live in the rural areas are often unaware of the substance and operation of the laws which affect them” (Tsanga 2003).

Even where family property remains undivided, it cannot assure subsistence for long when a family loses a provider through unemployment or death. For majority of families, traditional assets of real property cannot take the place of income (Glendon 1981). As I immersed myself in interrogation the laws of Lesotho and whether there is need for the expansion of the definition of community of property came to realise that, on the basis of the findings in chapter three and four there might not be a need for the expansion but rather what is require is the consolidation of all laws in the light of the apparent existence of enabling legislation with regard to administration of deceased estates and the use of such laws by both the judiciary and women. It is on this basis that the following conclusions have been made:

5.2 CONCLUSIONS AND RECOMMENDATIONS FROM FINDINGS

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

5.2.1 Does community of property extents to employment benefits of the spouses? On this question my conclusion based on the findings is that indeed community of property extents
to employment benefits (Weitzman 1985). And as such on that basis any contract entered into by the miner and employer that has the effect of excluding the spouse from benefiting from the benefits of employment is in fact not only unreasonable but is it also highly prejudicial, unfair, lacks proper business ethics, and is without legal merit (Case of Senti v. Total).

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

5.2.2 Does the strict application of the principle of stipulatio alteri designed to disinherit widows constitute violation of their human rights in accordance with the provisions of international law? In line with the provisions of the international instruments with particular reference to Maputo Protocol at Article 21 it is my conclusion that indeed the strict application of the principle in this regard, violates the widow’s rights to property both under domestic and international laws and as such should be regarded as property grabbing. It is evident from the findings above supplemented by the case study that there are quite a number of women who have been prejudiced by the application of the principle of stipulatio alteri in high courts of Lesotho and elsewhere in the world.

On the basis of the conclusion it is my recommendation that the legislature in Lesotho should define and address property grabbing perpetrated against a widow by her in-laws and/or other community members or even the fraudulent disbursement of property by the spouse (Case of Shozi v. Minister of KZN supra) by either adopting a specific and comprehensive offense which encompasses even property in the form of employment benefits for property grabbing or address it through other related offenses.
A specific offense of property grabbing should define it as the taking of property of a deceased person from the surviving wife and/or children to whom it stands to be distributed pursuant to inheritance laws prevailing in the country at the time (Advocates for Human Rights 2014). This will help secure the rights of widows. Legislation should outline aggravating factors, such as where the property taken is valuable or important to a widow’s livelihood, the taking causes significant loss to the widow in light of her circumstances, the perpetrator takes advantage of the victim’s status as a widow or other vulnerability (Advocates for Human Rights 2014).

5.2.3 Is the nomination of another person other than the spouse as the beneficiary by most mineworkers based on stereotypes and lack of informed implications of their acts? From the findings it is apparent that there are a number of factors that contribute to the nomination. Some nominations were made while the employee was still a bachelor and there may have been an omission to replace the nomination to include the wife, other nominations are essentially designed to disinherit the wife in that the husband may delete the wife to include a concubine, while others are purely based on stereotypes and ignorance on the implication.

For this conclusions it is my recommendations that the government of Lesotho through all relevant line ministries on issues of law and women’s rights embark on a huge campaign to sensitize the communities on the effects of stereotypes particularly on the issue in question. Also, it is recommended for the human resource officers that they constantly advice employees to update their files and to mandatorily include their spouses and children. Furthermore, because the persistence of stereotypes of this nature are common knowledge in Lesotho, when cases on this nature come to the courts, the courts should mero-muto afford women wider protection to their rights rather than taking an armchair approach. This is judicial activism.

5.2.4 Does lack of legal education and information dissemination on matrimonial property regime result in persistent stereotypes that if a wife is nominated as death beneficiary she will kill her husband for the money. The findings on the ground revealed that the bulk of mine workers as indicated in chapter three are illiterate in terms of formal education which factor together with location and the influence of actors and structure can easily lead to the strong believe in some of the stereotypes.
However, it emerged from the conversations with some of the widows and miners that the basic knowledge of matrimonial property regime is there, as some of the women indicated that they get the information from either the NGOs that disseminate information within the communities or from television and radio programmes. However, what seems to be the problem for women is now the use of the knowledge either before the husband dies by asking who is nominated and insisting that they be nominated or after the death due to expenses of securing a lawyer to defend them or in the worst case being barred due to the application of *stipulatio alteri*.

It is therefore my recommendation that while the government embarks on a campaign to eliminate all forms of stereotypes against women and girls in line with the international provisions of the rights of women, that the women are empowered to use their knowledge of the law from the family setting to the court systems. The empowerment in this sense can come in the form of wide spread information dissemination which extends to men and is such that it opens up conversations easily. If the information is wide spread although it is a sensitive issue due to the stereotypes that surround it is easier to make reference to what was said on radio and continue from there by asking who the spouse has nominated.

For purposes of access to the courts; the is paramount to afford decentralised legal aid services in Lesotho and maybe to a certain extent to give jurisdiction to the magistrate courts to deal with cases of this nature because the magistrate courts are found country wide making them to majority of people and also because the cost of approaching the magistrate court is lesser than going to the High Court.

5.2.5 Is the failure by the courts to apply judicial activism to protect the rights of women against the principle contributing to the violation of women’s rights to property? From the findings it became apparent that indeed there is tremendous level of failure to exercise judicial activism. This was triangulated by the confession of the judge that they rely solely on the evidence brought before court to make their decision. Further triangulation is seen in the case of Mako V. Mako CIV/APN/424/2012, wherein the Justice N. Majara faced with a case of stipulatio where she had the opportunity to afford wide spread jurisprudence that would protect the rights of others, limited her judgement exclusively to the Defined Contribution Pension Funds beneficiaries. It is my own analysis that had she left the decision open the implication of her decision would have far reaching protective benefits for
many more vulnerable widows and children who are constantly prejudiced by the application of the principle but unfortunately are not covered by the DCPF rules.

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

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

Dedicating part of the court system to domestic violence issues sends a message to the community that violence will not be tolerated. Because all domestic violence cases are dealt with by the same group of judges or prosecutors, these individuals are able to gain expertise in the issues and to ensure more consistency in the treatment of these cases. They will be more sensitive to the needs of victims and be able to direct them to additional community resources (Minnesota Advocates for Human Rights 2003).

Capacity building for the judges, judges clerks, lawyers labour commission, NGOs, Master of the High Court and media for reporting and information dissemination and help in the elimination of stereotypes and empowerment of women.

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

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

It is my recommendation therefore that; there is need for comprehensive consolidation of the fragmented laws that deal with laws of inheritance, the matrimonial property regime, and administration of estates at the time of death of the other spouse. Clarity on what constitutes the joint estate so that it is not left for the court to infer. It is important that national legislatures enact protective legislation around the property rights of widows (Kaori Izumi 2009). A suitable legal and policy framework is fundamental to protecting women’s property and inheritance rights. Succession, family and land laws need to be complemented by government policies that support the rights of widows.
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