

**INTERGRATED ASSESSMENT OF GENDER, LAND AND
WATER AND THEIR IMPACT ON FOOD SECURITY
(LESOTHO)**

**Women's Land and Water Rights in Southern Africa
5 Raleigh Street
Harare
Zimbabwe**

TABLE OF CONTENTS

COUNTRY BACKGROUND	1
Topography:	1
Statistics	1
Communications	1
The Government Structure	1
Introduction to the study.....	2
Food Security	3
Types of farmers.....	3
Commercial farmers	3
Subsistence farmers	3
Home Gardening	3
POLICIES	4
Land Policy	4
Water Policy Provisions	4
Water Resources Management Policy 1999	4
National Irrigation Policy 1999 Revision.....	5
THE ADMINISTRATIVE FRAMEWORK.....	6
Administration of land	6
<i>Minster</i>	6
<i>Local Authorities</i>	6
<i>Commissioner of Lands</i>	6
<i>Deeds Registrar</i>	6
<i>Government Ministries</i>	6
<i>Dispute settlement</i>	6
Administration of Water.....	6
<i>The Minister</i>	6
<i>The Commissioner of Water</i>	7
<i>Department of Rural Water Supply</i>	7
<i>Water and Sewage Authority</i>	7
<i>Department of Water Affairs – Ground Water</i>	7
<i>Lesotho Highland Water Project</i>	7
THE LEGAL FRAMEWORK.....	7
Access To Land.....	7
<i>Introduction</i>	7
<i>Land Holding Under Custom</i>	7
<i>Capacity To Hold Land Under Codified Customary Law</i>	8
<i>Procedure For Land Allocation Under Customary Law</i>	8
<i>Conditions Of Allocation</i>	9
<i>Inheritance</i>	10
The Constitution	12
The Land Act 1979	12
Capacity To Hold Land Under Statute.....	13
The Deeds Registry Act.....	13
Procedure For Acquiring Land	14
<i>Residential lease</i>	14
<i>Procedure for applying for Residential Lease</i>	14
<i>Agricultural lease</i>	14
<i>Procedure for applying for Agricultural Lease</i>	15
<i>Existing Situation</i>	15

<i>Commercial and Industrial Leases</i>	16
Inheritance.....	16
Access To Water	17
<i>Introduction</i>	17
Application Process	18
Lesotho Highlands Development Authority	18
Lesotho Water and Sewage Authority Order of 1991	18
NORMS PRINCIPLES AND STANDARDS ON WOMEN’S LAND AND WATER RIGHTS	
.....	18
Land	18
Water.....	19
THE CASE STUDY	19
Administrative Structure.....	20
Native Land Use	20
Highlights On Water.....	21
Other Factors.....	22
RECOMMENDATIONS	22

COUNTRY BACKGROUND

Topography:

Lesotho is a landlocked country, surrounded by three provinces of South Africa; namely Kwa-Zulu Natal, Free State and Eastern Cape.¹ It is a mountainous country consisting of two mountain range: the Drakensburg on the East and the Maluti Mountain in the central part both running from North to South.² The total area is 11,716 square miles, one third of which is classed as the lowlands and suitable for human settlement while the other remainder is classed as the highlands and not conducive for human settlement and agriculture because of its bitterly cold winters.³

Statistics

Lesotho has a total population of 2.1 million people of which 900 000 are women.⁴ The urban population is 300 000 with urbanization rate of 7-10% including per-urban areas.⁵ 805 of the population in Lesotho live in the rural areas and continue to regard agriculture as an important aspect of their lives.⁶ Like in many Sub-Sahara countries, Lesotho is faced with the HIV/AIDS pandemic, 31% of the total population is infected. Of the population, 54.9% are women and 29% of these women are housewives.⁷

Communications

There are approximately 35,11 main lines use and 101,474 active subscribers of cellular phones.⁸ There are four Internet service providers, which are predominately, used by subscribers located in and around the city of Maseru. Outside, the city schools have access to the Internet through the Highland Initiative.⁹ There are currently six radio stations, with radio Lesotho which is state-owned, having the widest broadcast coverage.¹⁰ There are two television broadcast stations, with very limited coverage.¹¹

Radio and television, telephones and the Internet link the people of Lesotho to the outside world. Information is provided to all sectors of the population including those that cannot read or write, such as provision of the current affairs, politics and news on health and agriculture. Although this is so, only 66.8% of the urban population and 38.8% of the rural population own radios.¹²

The Government Structure

The king is the head of state.¹³ He is the constitutional Monarch vested with executive powers.¹⁴ The King does not however exercise these powers himself instead he does so through the officers

¹ Palmer V. and Poulter S., *The Legal System of Lesotho* 3

² Sheddick V., *Land Tenure in Basutoland* 41

³ Selebalo Q.C., *Creation of Land Inventory for Management of Land Within the Peri-Urban Areas in Lesotho Using GPS* 1

⁴ *Censorship Report 1996*

⁵ *Ibid*

⁶ Sheddick V., *supra*

⁷ *ibid*

⁸ *Lesotho Telecommunications Authority Annual Report 2003*

⁹ *Ibid*

¹⁰ This station has cover in all the ten districts of Lesotho whereas for other stations coverage is limited to the urban areas of the country only.

¹¹ *Lesotho Television (LTV) and Trinity Broadcast Network Television (TBN)*

¹² *Bureau of Statistics 2003*

¹³ *The Constitution of Lesotho 1993, section 44*

¹⁴ *ibid* section 86

and/or authorities of the government.¹⁵ There is the Prime Minister who is the head of the Government.¹⁶ The legislative powers are vested in the Parliament that consists of the Senate and the National Assembly.¹⁷ The Senate has thirty-five (35) members twelve (12) of which are women and the National Assembly have one hundred and twenty-two (122) and fifteen (15) of these are women.¹⁸ Members of the National Assembly are elected whereas the Senate consists of the twenty-two (22) principal Chiefs and eleven (11) other candidates nominated by the King.¹⁹

There is also a judiciary whose main function is to uphold the law²⁰. The judiciary is made up of Court of Appeal, the High Court which are both located at Maseru. There are also the Magistrate's Courts found in the town of the ten (10) districts, the Judicial Commissioner's Court which is also found in Maseru but there are rotational sittings of this Court within the districts. The Land Tribunal and Local courts, which are located, near the villages. With the exception of the Court of Appeal and the Judicial Commissioner's Court which are appellate Courts, all the above court have the power to hear land matters and /or cases

Introduction to the study

Agriculture for a long time was solely in the hands of women because of the migrant labour system although they had no decision-making powers. In recent years however the men have come back from the mines of South Africa due to retrenchments.²¹

Agriculture is a very important aspect of Basotho lives as 80% of them reside in the rural areas and derive some of their livelihood from crop and livestock productions.²² Although so much importance is placed on agriculture, in recent years Lesotho has been cited as one of the Countries affected by food insecurity and among the first to declare a national emergency for food insecurity.²³

Although Lesotho declared a national emergency on food insecurity it is imperative to note there was no drought in Lesotho during this period. In fact rainfall was reported to be higher than other years during this period.²⁴

There are a number of reasons why the agricultural production in Lesotho is in such precarious state. The livestock numbers have declined since 1980's and there are other parts of the country that have problems with overstocking and consequently overgrazing.²⁵ This has unfortunately decreased the already scarce arable land because of environmental degradation.

Agriculture is highly dependent on sources of water, be it rainfall or irrigation systems. Most wetlands in Southern Africa are found in Lesotho and as a result Lesotho abandoned sources of water.²⁶ Like other resources water is regulated, there is the Water Resources Act of 1978, the Lesotho Highlands Development Authority Order of 1986, and the Lesotho Sewage and Water Authority Order 1991.

¹⁵ *ibid*

¹⁶ The constitution of Lesotho *supra* section 87

¹⁷ *ibid* section 54

¹⁸ www.gov.ls

¹⁹ The Constitution of Lesotho *supra* sections 56 and 55 respectively

²⁰ *ibid* Chapter XI

²¹ Hopland Phororo, Home Garderns in Urban and Rural Areas of Lesotho, 27

²² *ibid*

²³ Jo- Abbot care Lesotho, June 2004

²⁴ *ibid*

²⁵ Sechaba Consultant Poverty and Livelihood in Lesotho ,24

²⁶ Land Policy Review Commission 126

The number of people with access to water is currently 62% of the rural population where each person is entitled to 30 liters per day within a walking distance of 150 meters.²⁷ In Urban areas coverage is only 52% whilst water born sanitation services is only about 5%.²⁸ This is despite the relatively abundant water resources nation wide which is about 5.4 billion m³ per year that is translated to about 2400 m³ per capita per year. Although this is the present situation the capita availability decreases with the increasing. Population and environmental degradation. This therefore compounds the already precarious food situation in the country.

Food Security

Lesotho is in a dire state of food security. The problem has been existing for quite some time but the first time Lesotho declared a famine was in 2002.²⁹ 24 million Maluti (Lesotho currency 100 lisente = 1 loti) was set aside for intervention. This came in the form of direct food assistance, subsidy of 20% of the market price unsifted maize meal and supplement of an ongoing feeding scheme for vulnerable households.³⁰

There was also a shortage of water for human and livestock consumption, because of drought. In order to address this situation the government has devised a plan to ensure food security.³¹ The plan entails the formation of the to reinforce the ministries such as the Ministry of Agriculture and Food Security and the Ministry of Forestry and Land Reclamation. In addition there is a development of an irrigation master plan that will enable the networking of irrigation throughout the country.³² 59 sites have been identified and are being surveyed to ascertain their suitability for the installation of the simple irrigation equipment.³³ Furthermore block farming for intensive agriculture in rain-fed and irrigation conditions is being promoted.

It is important at this stage to establish the type of farmers that are found in Lesotho.

Types of farmers

There are two types of farmers in Lesotho

Commercial farmers

These comprise a minority group. The reason advanced for the minute figure is unavailability of credit and arguably insecurity of tenure. For example they are not allowed to fence /farm all year round.

Subsistence farmers

They comprise of the majority. They farm for subsistence use but when they have excess produce they sell it. They practice unsophisticated methods of farming. For example, there is no irrigation and farmers practice seasonal farming.

Home Gardening

Another majority group of “ farmers’. These are people who do not have fields to engage in farming at a large scale. The farming is done on residential land. In urban areas, the average plot size is about 450m² whilst in rural areas, there is no limitation on residential site.³⁴ These gardens are watered by water meant for domestic use. In urban areas, the majority group of people who

²⁷ PRSP Department of Rural Water Supply

²⁸ ibid

²⁹ Prime Minister’s Speech, Declaration of state famine 2002

³⁰ ibid

³¹ Prime Minister’s speech , Declaration of emergency and national food security 2004

³² ibid

³³ ibid

³⁴ Physical Planning Department

practice this type of farming is the working class and those who have access to water.³⁵ As for the rural farmers, they depend on communal taps. The amount of water available to each household is largely regulated and restricted. This has made it impossible of difficult for these communities to maintain, their gardens.³⁶ For example, during dry seasons there is no farming practiced.

Land and Water policies and the type of land tenure system that a country has are other factors that need to be considered when looking at the food security. In the same fashion the establishment of the range management which are meant to improve the management of ranges is another important factor to be considered for the improvement of the country's food security. The legal instruments that are in place also needs significant consideration in addressing the same issue. All these will be dealt with in the paragraphs that follow to be able to see how they all impact on the food security, with special reference to women's contribution to food security.

POLICIES

This section covers the provisions of the Land and Water policies regard been had to the impact these policies have on gender and food security in Lesotho.

Land Policy

Currently there is no land policy in Lesotho. This vacuum has existed for a very long time.³⁷ It is for this reason that the Land policy will not be coded in this section. It is nonetheless worth noting that Lesotho instead of developing the land policy engaged in land reform process and consequently the drafting of the Land Bill.³⁸

Water Policy Provisions

There are two policies related to water in Lesotho. These are the Water Resources Management Policy endorsed in 1999 and the National Irrigation Policy revised in 1999. Each policy is analyzed in the context of food security and gender in the below.

Water Resources Management Policy 1999

Water as a resource is the responsibility of the Ministry of Natural Resource. There was no explicit water policy until 1999. Provision of portable water was the responsibility of the WASA in urban areas and the Rural Water Supply Division of the Ministry of Home Affairs in the rural areas where WASA did not provide services³⁹. Serious problems of water shortages and distribution resulted in the government developing the National Water Resources Management Policy, which was endorsed in 1999⁴⁰.

The aims to ensure rational exploitation and management of water resources in Lesotho. The focus of this policy is to ensure sustainable development of water as a resource; adequate supply of portable water at all times. It places emphasis on water infrastructure development and domestic distribution. The policy aims to put in place a system that is aimed at ensuring equitable access by all citizens to portable water "...for basic human needs...". This basic human need is calculated at 30 litres per capita per day.

³⁵ Hopolang Phororo supra

³⁶ Survey conducted at Masianokeng July 2004

³⁷ Land Review Policy supra

³⁸ Draft 12 May 2003

³⁹ Water Resource Management Policy 1999

⁴⁰ *ibid*

Apart from the infrastructure development and domestic distribution, the policy covers protection of environmental aspects related to water. It also states involvement of stakeholders in the planning and distribution of water. While not explicit on gender, this policy can be presumed to be all-inclusive because it aims to provide equitable access to all citizens, which should be taken to include women. The policy, however, does not make an explicit connection between water resource planning and food security. This is the main weakness of this policy.

The use of water for food security is the dominant use of water around the world.⁴¹ The United Nations promotes an integrated water management framework that addresses basic needs, food security, the environment; and water for the industry and energy - Water Security⁴². A Preliminary Assessment of Policy Progress since Rio Source: Water for the industry and energy is important for food security because it caters for industrial farming, both animal husbandry and crop farming. Energy is also important in medium to large-scale farming.⁴³

Another important water policy element closely related to food security, which is not reflected in Lesotho's Water Resource Management Policy of 1999 is the management of droughts. Drought management in an arid country such as Lesotho is important as a way to mitigate the effects of drought, which in turn poses the risk of food shortages⁴⁴ Abrams recommends water conservation and demand management and these should be explicitly addressed in a water policy if water scarcity, which is the cause of famine, can be managed to prevent disasters occurring.⁴⁵

National Irrigation Policy 1999 Revision

The custodian of the National Irrigation Policy 1999 is the Ministry of Agriculture and Food Security. Its main thrust is to support agriculture through irrigation in a manner that is economically, socially, technically and environmentally justifiable.⁴⁶ This moves away from full dependence of rain fed agriculture. This policy is more explicit than the water resource management policy as regards the participation of women in agriculture. The policy aims to ensure inclusion of women in irrigation schemes through initiatives such as public awareness, governance structures and legislation, training programmes and by paying special attention to ensure that female-headed households get services. The policy also aims to remove barriers that prevent women from accessing credit. This is important because unless women have access to credit, they may not benefit from irrigation schemes that are self-funded.

In conclusion, it is clear that the policy framework in Lesotho has shortcomings in addressing the issues of food security, though the two policies have been made to be demographically inclusive. The irrigation policy is more explicit in addressing issues faced by women in irrigation agriculture and it also promises to remove legal barriers such as laws Land Tenure to enable farmers and small communities to use their land and collateral when seeking financing, and to be able to rent or lease plots for limited periods to facilitate investment in irrigation systems.⁴⁷

⁴¹ World Water 2001

⁴² *ibid*

⁴³ http://www.unesco.org/water/wwap/wwdr/water_security.pdf].

⁴⁴ Adams 2000, source- http://www.unesco.org/water/wwap/wwdr/water_security.pdf].

⁴⁵ *ibid*

⁴⁶ National Irrigation Policy 1999

⁴⁷ *ibid*

THE ADMINISTRATIVE FRAMEWORK

There are a number of authorities vested with the powers to administer land and water usage. The purpose of this section is to bring forth this administrative bodies so as to establish the manner in which land and water is regulate and administration of disputes that arise therein.

Administration of land

Minster

The Minister is the overall administer and is responsible for formulation and implementation of land policies. He also has the power to allocate land and grants consent to other land transactions, such as land transfers etc.

Local Authorities

The Local Authorities consists of, Urban Land Committees and Councils as established by the Local Government Act. They are the land allocating authorities. They act in consultation with the Commissioner of lands and the Minister responsible for land. They are also responsible for other land administrative issues, such as prohibition of environmental degradation. The Councils work together with the Chiefs in ensuring that land matters related to inheritance issues are dealt with accordingly.

Commissioner of Lands

The Commissioner of lands is responsible for issuing land and facilitates land registration, custodian of copies of registered titles to land and all other land transactions. He is also the adviser and provides to the land committee.

Deeds Registrar

The Register of Deeds is responsible for the registration of all deeds including registration of land leases etc.

Government Ministries

There are a number of government ministries that are involved in the administration of land. For instance land use in planning is located in Ministry of Agriculture, Cooperatives and Land Reclamation, physical planning and survey in Ministry of Local Government and Chieftainship. Other Ministries involved in land related matters are Ministry of Trade, Industry and Marketing, the Ministry of Public Works and Transport, Ministry of Natural Resources, Ministry of Tourism, Sports and Culture, Ministry of Environment, Gender and Youth Affairs, Ministry of Education and Ministry of Finance.

Dispute settlement

The High Court has unlimited jurisdiction to hear all claims including those of land related matters. There is also the Magistrate Courts, which for land related matters has power to hear claims that neither fall in the jurisdiction of the High Court and the Land Tribunal. The Land Tribunal is vested with the power to adjudicate on adverse claims relating to land. Lastly there are Basotho Courts or Local Courts that have power to hear claims relating to unregistered titles to land. The Basotho Courts unlike the others are very unsophisticated, there are no difficult rules of procedure and evidence to be followed and the parties represent themselves. Thus they are relatively cheap compared to other Courts, which require the parties to seek legal representation.

Administration of Water

The Minister

The Minister is the overseer all administrative issues relating to water and formulation and implementation of water policies in the Ministry of Natural Resources.

The Commissioner of Water

The Commissioner is responsible for co-coordinating all water affairs, such as sections and departments dealing with water affairs.

Department of Rural Water Supply

The Department of Rural and Water Supply is a service provider to the rural water committees. The rural water committees are responsible for the maintenance of the community water sources and taps as well as to access applications for individual water connections.

Water and Sewage Authority

Water and Sewage Authority is responsible for regulation and provision of water services to urban population.

Department of Water Affairs – Ground Water

The responsibility of this department is to issue permits for water use. This office is also in charge for granting of permits for access to ground water.

Lesotho Highland Water Project

The Lesotho Highland Water Project has the authority to manage water, including the power to manage and supply water at reasonable prices.

THE LEGAL FRAMEWORK

Access To Land

Introduction

Lesotho has a dual legal system, the customary law and the Roman Dutch Law (the Received law). Both systems are applicable in land matters and/or issues. The statutory law is also a very significant part of the legal system in Lesotho and plays a major role in land matters. The Land Act ⁴⁸ provides that all land allocation made after its commencement be in accordance with the Land Act. It further provides for land holding under the Customary law per provisions of Section 3 ⁴⁹ which states that land holding can be either under Customary law or the Land Act. However customary law has been blamed over the years for its inability to provide security of tenure, hence the enactment of the Land Act. Nonetheless it is still debatable whether even after the Land Act women have security of tenure or any property rights at all.

This Research basically focuses on the analysis of the provisions of the law pertaining to land issues. The important question that arises is whether the law makes any provision for the women's access to land and land holding Also what impact does the law have on the women's contribution to food security?

Land Holding Under Custom

Customary practices and traditions are not static, they change as society changes. The customary rules were initially not written this included even those governing the tenure practices. The fact that they were not written created problems for interpretation purposes, as they are very flexible.

⁴⁸ Act N0.17 of 1979

⁴⁹ *ibid*

The problem of interpretation lead to their codification into the laws of Lerotholi.⁵⁰ This subsection however attempts to thoroughly examine codified customary land tenure, special emphasis being placed on women's rights to hold land, the purpose being to determine whether it ensures landholders with security of tenure.

Capacity To Hold Land Under Codified Customary Law

Under sesotho custom there are no individual rights to land, it belongs to the nation and the King is the trustee.⁵¹ The administrative rights are vested to the Chiefs and Headmen.⁵² But only gazetted Chiefs or Headmen are responsible within their area of jurisdiction to allocate land for residential, business, agricultural or burial purposes.⁵³ In exercising this powers the Chiefs and/or headmen are expected to act fairly and impartially.⁵⁴

Not everyone qualifies to hold land under custom. Only married Basotho men are capable of land holding under custom.⁵⁵ Therefore an adult Mosotho male who is not married will not be allocated land because he is regarded as a minor. In the same vein women whether married or not sink in the same boat. Women are perpetual minors under the care of their father's for those not married and that of their husband for those married.

There are other conditions that a married adult male must fulfil before land can be allocated and these include amongst others the following;

- Be a bona fide Mosotho, that is born of Basotho parents
- Pledge allegiance to the King and the local chief or headmen in whose area of jurisdiction one is residing or intending to reside
- Observe and perform social obligations expected of him by the community, such as attending public gatherings, and doing voluntary work like tree planting.⁵⁶

Once the above requirements have been met, the applicant is entitled to be allocated a piece of land depending on the use for which it is required. If land is required for residential purposes one chunk of land will be allocated.⁵⁷ Where land is required for agricultural purposes three fields will be allocated. One for growing maize, the other for sorghum and the third for wheat.⁵⁸ However this practice of allocating three fields was done away with in the last version of the laws of Lerotholi. Instead it is provided that land should be allocated fairly and equitably.⁵⁹

Procedure For Land Allocation Under Customary Law

The procedure for land allocation is less complicated under customary law compared to the legislative procedure as prescribed by the Land Act. This may be one of the reasons people still go to chiefs for land allocations even though they no longer have the power to disburse land.

⁵⁰ Franklin A Supra

⁵¹ Shedrick V., Land Tenure in Basutoland 6

⁵² ibid

⁵³ Laws of Lerotholi 1952 Part I section 7(1)

⁵⁴ Sheddick V. Supra

⁵⁵ ibid

⁵⁶ Vusi Israel Mashenene, Land Tenure and Agricultural Development in Lesotho 3

⁵⁷ Makhele T., Land Delivery System in Lesotho and Tanzania Mainland: Comparative study 16

⁵⁸ Sheddick V., Supra

⁵⁹ Laws of Lerotholi Supra

Under Customary law, the applicant fills in an application form obtainable from the chief or headman's office.⁶⁰ The applicant in the form describes in detail the location, size and reasons for which the land is sought.⁶¹ The applicant will then be given opportunity to make representations motivating his application before the Allocating Committee.⁶²

If it is in the Advisory Council's and the Chief's opinion that the applicant is deserving of the land applied for, the Chief will appoint an assistant to take measurements of the area requested and thereafter issue a Form C in the names of the applicant. The minutes of the hearings and the allocations are supposed to be properly recorded and kept by the chief. But in practise there is no such record keeping and where it is done it is very poorly maintained.⁶³ The end result is allocation of land to people who do not meet the set standard and many other contraventions committed are all made difficult to detect and prove because of the almost non-existent record keeping.

Conditions Of Allocation

It has already been stated that no one owns land in Lesotho; as a result allottees have use rights only and they cannot sell nor transfer their title to land.⁶⁴ One enjoys these rights as long as he owes allegiance to the Chief or Headman, and once he leaves the area to reside in another area he forfeits all the land allocated to him. In practise however the opposite happens with the result that many move from their chief's area and re-settle in another, and at the end of the day it would be found that one has lots of land allocated to him leaving other people landless.

Under customary law agricultural land is not subject of a title. It is regarded as communal land and only use rights are given to the allottee. The allottee can use the land seasonally. As a result rotational cropping is not accommodated under customary law because in winter after harvesting the land rights ceases and the community can use the land for communal purposes such as life stock grazing.⁶⁵ This therefore means that after harvesting the holder is to remove only his produce and leave the remains on the field for communal use. This has been criticized as discouraging farmers to practice commercial farming.

Customary law has further been criticized as constrained to development and promotion of commercial farming because of the fact that arable land could not be sold mortgaged or sub-let. In addition the Chief now the Councils has the power to revoke titles to land if in their opinion the land holder has more land than is necessary for subsistence use.⁶⁶

The fact that the Chiefs have the power to revoke land if they are of the view that the allottee has more land than necessary for their subsistence provides allottees with no security of tenure. It is for instance, places widows (on death of their husband are allowed to use land) at risk because their land can be expropriated on the pretext that they have more than necessary.

⁶⁰ Mashenene Israel Vusi, supra

⁶¹ ibid

⁶² Urban Land Committee in urban centres and Village Development Councils in rural areas

⁶³ Interview with executive chieftainship June 2004

⁶⁴ Mashenene Vusi, The Proposed Land Reform Policy for Lesotho in the 21st century: A critique

⁶²

⁶⁵ Sheddick V., supra

⁶⁶ laws of Lerotholi supra sub-section 3

Inheritance

In customary law the heir is the first male child.⁶⁷ In a polygamous marriage the heir is the first male child of the first married wife.⁶⁸ If there is no male issue in the first house the first male child of the next married wife shall be the heir, but each house inherits property acquired and used by that household during the lifetime of the head of the family, the husband.⁶⁹

According to custom when the head of the family dies the heir inherits all the property in that household, amongst which are fields and buildings.⁷⁰ The heir is required to use the property to take care of all the minors and needy members of the family as well as to discharge other family obligations such as to bury the dead and negotiate and pay lobola. He is also expected to share the inheritance with his junior brothers.⁷¹ If on death of the husband the heir is under age the widow is to use the property until the heir becomes of age.⁷² Therefore the widow holds the property in trust for the heir and administers such property on the advice of the husband's family. Thus she cannot dispose of the property or lease the land without the approval of the whole family and their consent.

Daughters do not inherit anything except for the personal belongings, for example, clothes,⁷³ of their mother. The rationale for the discrimination being that they are going to get married and become members of their husbands' families. Their husbands will take care of them and allowing them to inherit in their parental families would result in unfair enrichment of their husbands because they would get to inherit twice. The exclusion of women and other males from inheriting their husbands' and fathers' property led to many being destitute because most heirs use the inheritance to pursue their own selfish needs and ignore those of the needy members of the family. Widows however, have the right to use land in their own name when they have not had any children.⁷⁴ They only have to consult with senior members of the family regarding its use and also demonstrate that they do not possess more land than necessary for their subsistence needs.

There have been instances whereby there are heirs who are selfish and disregard the needs of their mothers, they expel them and prohibit them from using agricultural land on the ground that they are heirs and entitled to use of the fields.⁷⁵

Under codified customary law land cannot be inherited.⁷⁶ Upon death of the allottee and his spouse land reverts back to the state and is available for re-allocation. The reason being that no one can own land as it belongs to the whole nation and one is entitled only to usufruct rights and these rights terminates on death. This is to avoid a situation whereby land ends up being concentrated in the hands of the few. However on re-allocation priority is given to the adult son or sons of the deceased if residing in the chief's area.⁷⁷

⁶⁷ *ibid* section 11

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ Likhapha Mbatha Reforming the Customary Law of Succession 260

⁷¹ Laws of Lerotholi *supra* section 12(3)

⁷² *ibid* section 12(1)

⁷³ reasons given by all stakeholders interviewed

⁷⁴ Laws of Lerotholi *supra* section 7(4)

⁷⁵ Chief Majara Theko and Hlathe Majara, Interviewed July 2004

⁷⁶ Mashenene Israel Vusi *supra*

⁷⁷ Laws of Lerotholi *supra* section 7(7)

It should be noted that sons of the deceased regardless of their line of birth as long as they reside in the chief's area are as of right entitled to be confirmed to their deceased parents' land. This protects men who were not born as heirs. In practice however such land is allocated to the heir even if he no longer stays in the chief's area. As long as he maintains good relations with the chief, he gets the land no matter how many fields he already has. Protection of the law is also extended to men whose parents die when they still minors in that the guardian is entitled to use the land which was used by the deceased to take care of the minors. When such minors become of age the male ones shall be confirmed on the land.⁷⁸

Despite the principle that land belongs to the whole nation and no one can inherit it, codified customary law makes provision for inheritance of land used for growing vegetables, tobacco, trees and residential purposes.⁷⁹ This implies that land not available for inheritance, is that used solely for agricultural purposes. The heir is entitled to inherit residential land to enable him to carry the responsibility of taking care of the minors.

It is evident that girls and women do not have access to land. They are to depend on the mercy of other family members if they want access to land. Custom dictated that women and girls be treated as perpetual minors who shall always be under the care of their husbands, fathers or brothers. With in social behaviours and attitudes women are expected to seek employment and take care of themselves. The law however has been static and continues to discriminate against this group of people. Failure of the law to change with social needs has left many women poor and stranded because they are evicted from their homes by the heirs who with protection of the law believe that the inherited property is theirs.

To guard against the abuse of women by heirs a practice has been developed whereby parents, especially the elite, acquire sites in their children's names so that they can use them when they become of age.⁸⁰ This innocent act by parents seems to have landed their daughters into more trouble because they are now being evicted on the grounds that they are illegal occupants of land. Those who were able to maneuver about the law acquired multiple sites, developed them and bequeathed them to their children. Some communities in recognition of the unfairness of the laws towards women go the extend of creating fictitious husbands for women who want to acquire land.⁸¹ Only a few are privy to this practice so as to ensure that probing questions by authorities are avoided, but women must comply with the community's rules and regulations. Failure to comply may result in their title being terminated.

Codified customary law treats women as minors and such are neither regarded competent to hold land, inherit nor make any major decisions regarding land under their control. The eldest sons as discussed above have the right of inheritance and when they do exercise this right the women in occupation of or using the land inherited are left in dependent situation. This is so because if allowed to use the land they have to use it on conditions set by the heir. Also there is the possibility of them being denied access to the land. This leaves them with no security of tenure.

This is an unfortunate situation because social values have changed so much since codification of the law. For instance women head most families and these women are professionals, civil

⁷⁸ *ibid* section 7(5)(b)

⁷⁹ Laws of Lerotholi section 7 Notification

⁸⁰ this information is extracted from some of the explanations given by people charged with illegal occupation of land at Lerapeng and By-Pass Area

⁸¹ Selebalo Q., Creation of Land Inventory for Management of Land Within the Peri-Urban Areas in Lesotho Using GPS 1

servants or farmers whom the men have left to manage the families when migrating to the mines and yet are still seen as unfit to hold title to land. Instead men even if incompetent to manage their own property are given the right to inherit and access more land and illegally sell it or subject it to soil erosion through incorrect use. The time has come and gone of having men administer the productive resources because the way of African family as perceived by our ancestors and the role played by women in the county's economy has changed drastically. Codified Customary law is inadequate in addressing these problems and thus needs to be reformed.

The Constitution

The Constitution further culminates the discrimination against women⁸² It provides for freedom from all forms of discrimination but qualifies this right by further providing that discrimination will be allowed if it is carried out in furtherance of the customary law principles⁸³. The effect of this is to continue the outdated practice of regarding women as perpetual minors and consequently denying them access to land. This does not only have negative impact on women but also gives the Chief's who hold dear to custom lee way to perpetrate the discrimination against women under the pretext that the constitution supports them.

These provisions are obviously unfair against women and since they deny women the opportunity to be equals with men, it stifles the economic development of the country because women are incapacitated and hence unable to contribute economically on the same footing as men.

The Land Act 1979

Land in Lesotho belongs to Basotho Nation, and the King holds it in trust on behalf of the Nation⁸⁴. Access to land under the Land Act is by way of the leasehold, allocations and licenses⁸⁵. Land registration was introduced on the belief that it provides certainty of ownership and security of tenure and also it promotes investment in the land. Similarly the leases are regarded as a more secure tenure system because it vests on the individual certain rights that did not exist before such as transfer of rights on the land as well as using it as a collateral. Furthermore it gives the leaseholder certainty as to how long the land is going to be used and is also an easier form of proof for entitlement.

Leases are issued for residential, agricultural, industrial and commercial purposes. The period of the lease depends on the purpose for which it was given. For instance, period of lease for agricultural purposes would depend on the discretion of the issuing authority. For residential, the period is ninety (90) years and for commercial and industrial purposes is for a period of sixty (60) and thirty (30) years respectively⁸⁶. All leases have the option of renewal on expiration.

With regard to licenses, there were issued only for occupational and use rights only. Their purpose was merely to allow flexibility in expropriating land from holders for developmental use. However, licenses were done away with in 1986⁸⁷.

Today land in Lesotho can be held by way of lease or an allocation. It is thus imperative at this stage to establish the people who have right to hold land in Lesotho.

⁸² Lesotho Constitution of 1993, Section 8(4)

⁸³ *ibid*

⁸⁴ *Ibid* Sections 3 and 4

⁸⁵ Land Act Supra Section 20

⁸⁶ *ibid* Section 39

⁸⁷ Land (Amendment) Order NO. 27 of 1986

Capacity To Hold Land Under Statute

It is not everyone who has right to hold land in Lesotho; only citizens of Lesotho who are Basotho are capable of holding land under the Land Act⁸⁸. Further companies whose major shareholding is in the hands of Basotho as well as friendly societies and partnerships are eligible for land holding⁸⁹.

The classification of candidates eligible for land holding does not in any way seem to discriminate against any gender group. All that is needed for one to qualify for land allocation is prove that he or she is a Mosotho and a Lesotho citizen. It is not important whether one is male or female, married or unmarried. The only group that may seem to be sidelined in this case are foreigners and Lesotho citizens who are not Basotho. However it is important to note that in practise this provision has been interpreted to mean that only adults can hold title to land.

Nonetheless women married in community of property are regarded as minors. They are deemed incapable to contract on their own without their husband's assistance and consent. This implies therefore that they are unable to acquire land on their own. In practise not all men allow their wives to acquire land in their names. Thus they fail or refuse to assist their wives to acquire land because, some fear this would undermine their status as men⁹⁰. Others fear that women would be independent and be no longer obedient.

It can be argued that this practise is not only discriminatory but makes it impossible for women to exercise their property rights. For instance, some women have been disserted by their husbands and yet are still required or expected to have their consent and assistance to acquire land. The difficulty also arises when women initiate the process for acquisition of land and then find that their husbands are not willing to sign documents on their behalf⁹¹. Furthermore, there are only a few ante-nuptial contracts registered in Lesotho, which means that the majority of women are married in community of property⁹². In the nutshell it can be said that the chances for women to acquire land hinges primarily on their husbands' willingness or sanction.

This practice hard-hitting on women as it is, is made worse by the provisions of the Deeds Registry Act and the Constitution that further complicates the ability of women to hold title to land.

The Deeds Registry Act

The Deeds Registry Act⁹³ provides unfavorably against women in as far as the registration of deeds is concerned. For instance, the Registrar of deeds is authorized by the Act to refuse to register any deed in favour or any woman governed by customary law⁹⁴. For those women not governed by custom, conditions are imposed on them before a deed can be registered on their behalf. For example, it is required that a married woman produce full proof of her conditions of marriage. Thus women married out of community of property must disclose fully their marital status, the contractual conditions of their marriage and full disclosure of their husband's status. Otherwise women married in community will only be allowed to register a deed upon the consent and assistance of their husband.

⁸⁸ Land Act Supra Section 6

⁸⁹ *ibid*

⁹⁰ Interview with stakeholders June 2004

⁹¹ *ibid*

⁹² Mamashela, Family law Through Cases in Lesotho 198

⁹³ Act NO.12 of 1967

⁹⁴ *ibid* Section 14

Sadly, none of the above requirements are necessary for a male person to register a deed. It is also important to note that even where a woman is able to provide all the relevant information, it is not a guarantee that her lease would be registered. The Registrar of deeds at the end of the day makes a decision whether to register the deed or not at his own discretion.

The current application of the law therefore is that women married in community of property are refused the opportunity to register land in their names instead joint titling is forced on them and yet the same does not apply for men. The net effect of this is the absolute impossibility for women to acquire land or hold title to land as the Land Act mandates registration or leasehold for one to have access to land.

Procedure For Acquiring Land

The power to grant title to land is vested in the land committee or councils depending on the location of the land to be allocated⁹⁵. The decisions of the land committee or council are by majority and the land committee is at all times expected to act under the directions of the Minister⁹⁶.

Residential lease

Titles to land used for residential and commercial purposes in urban areas in existence prior to the land Act are deemed to have been converted into leases⁹⁷. But allottees must apply to the commissioner of land for issue of a lease. However research has shown that most people in urban areas have not made use of this section⁹⁸.

Procedure for applying for Residential Lease

For new allocations when sites are available for allocation they shall be advertised and applications must be made to the Land Committee for grant of title. The applicants are called in for an interview to make submissions why land should be allocated to them. Successful applicants will be issued a FormC3 that is used for proof of title.

The Land Act requires that in three (3) months after the issuing of FormC3, the allottee must apply for a lease. The procedure for acquiring a lease is very complicated hence why leases are very few in Lesotho. First of all, the applicant has to apply to the commissioner of land for a lease and fill in an application form. This is the stage where it's determined whether one is eligible to hold land or not. It would be required that applicants produce proof that they are Basotho nationals, their current titles and to disclose their marital status.

Thereafter an advertisement shall be published in a national newspaper in order to allow adverse claims to be lodged by persons who wish to challenge the issuing of a lease.⁹⁹ If no adverse claims are lodged then a lease shall be issued and registered in the Deeds registry¹⁰⁰

Agricultural lease

The Land Act in an attempt to promote security of tenure and to encourage commercial farming brought changes in the law by introducing agricultural leases and selected agricultural areas.¹⁰¹

⁹⁵ Land Act Supra Section 12

⁹⁶ *ibid*

⁹⁷ Land Act Supra Section 9 and 20

⁹⁸ Land Policy Review Commission 47

⁹⁹ Franklin A., Land Laws in Lesotho; The Politics of 1979 Land Act 47

¹⁰⁰ *ibid*

¹⁰¹ Land Law supra Section 11

Customary rights in agricultural land can be converted into lease title. The lease vests certain rights on the allottee, for instance, an agricultural leaseholder can dispose of his interest in the land, sub-let the land or encumber it by mortgage, that is use is as a collateral. The Land Act does not provide for a fixed period in which the lease can be held, therefore the time frame of a lease is determined by the Minister depending on the type of project the applicant is going to be engaged in.

Procedure for applying for Agricultural Lease

The procedure set by the Land Act and regulations make it difficult for ordinary Basotho to apply for leases.¹⁰² Applicants for agricultural leases are expected to, when lodging the application, file a business proposal with their application. The business proposal must be an outline of what project or activity the applicant is going to be engaged in, setting out in detail the size of the project, the type of farming and the cost implications.

The Minister on the advise of the District Agricultural Officer (DAO) and the Commissioner of lands is to approve or reject the application. The outline of the agricultural activity one is intending to engage in works also as a determining factor with regard to the time frame within which the lease will run. One of the requirements to obtain lease is to survey the land.

For one to qualify to hold an agricultural lease he must first be issued with a certificate of title by the allocating authority currently a Form C, this serves a clearance by the land committee that the holder of the certificate is granted, the application supported by a motivation by the committee is send to the DAO for the area. The DAO is to review the application form from a professional point of view, for instance to see whether the application complies with policy requirements as well as land use. Once the DAO has considered the application it is referred to the Minister for his or her consideration. Finally if approved the Commissioner of Lands is to issue a lease subject to conditions set out by the Minister.

Once the lease is issued the lessee can use the land as collateral, dispose off his or her interests in the land or sub-let the land but all these can be done subject to the Minister's consent. The Minister can withhold the consent and her decision is final and cannot be question by any Court.

Existing Situation

As a result of the long procedures set out above there is lack of enthusiasm on the part of agricultural landowners to apply for agricultural leases. There are several reasons that have brought disinterest on the part of farmers to exhaust the law. One of them is lack of information on the system. Most of the farmers do not even know of the existence of agricultural leases whilst some are of the view that it is applicable only in urban areas. People have not been educated about agricultural leases. The agricultural lease has now been available to the urban elite who want to engage in commercial farming and the rest of the urban people are poor the majority of which are women.

Another issue that discourages the few that know about this system is that the security of tenure that it provides is not that an advantage vis-à-vis the fees it attracts. For instance, besides surveying the land at a high cost, the holder of the lease has to pay ground rent, stamp duty and other fees that may be charged by the government. These fees are to the majority unaffordable bearing in mind the view that Lesotho practices subsistence farming.

¹⁰² *ibid* Section 34

Also, it takes a long time for a lease to be processed, for instance, one applicant lodged the application in 2001 and it has not been issued three years down the line¹⁰³. Furthermore, though the agricultural lease was introduced to encourage commercial farming the opposite has been achieved because of the fear of people to lose their land in the event they take a loan, use the land as a collateral and subsequently fail to service the bond. Despite the fear of losing land women farmers are to some extent restricted by the law to obtain loans hence no enthusiasm on their part to apply for agricultural leases.

Commercial and Industrial Leases

Land available for commercial purposes is tendered for and tender applications are considered by the Urban Committee but the Minister for Trade and Industry as well as the Minister for Local Government have to approve the allocation.¹⁰⁴

Title held by way of lease can be terminated only when the lessee has breached the conditions of the lease or when land is required for developmental or public purposes. Termination is not done arbitrarily, it is only done after giving the lessee proper notice.

Inheritance

Under the Land Act land is inheritable.¹⁰⁵ Parents have the right to choose amongst the family members who can and who cannot inherit their property. All that they have to do is to make a will regarding the distribution of their property. However in so doing it is necessary to note that the heir is not disinherited. This improves the chances of daughters and widows to receive title to land as they may be bequeathed some immovable property.

The problem arises when both spouses die interstate leaving no male issue but girls in this instance the family has to appoint the heir. Usually when appointing the heir the guiding principle is customary law. This essentially means that the uncles will inherit the property because girls under custom are perpetual minors. This is discriminatory and very unfair, as often children regardless of their sex would help their parents by amongst others improving the property and to give their parents property to the uncles means that they are left with nothing. The heir is to be appointed within twelve months of the allottee's death. Failure to appoint the heir will result in the land reverting back to the state.

The Land Act initially retained customary law by providing that a widow shall not inherit her husband's property but remain in occupation during her lifetime. The position was changed in 1992.¹⁰⁶ Women now have the same rights as their husbands. On the death of her husband the woman gets to inherit the matrimonial property.¹⁰⁷ However this right is not absolute. If the woman chooses to remarry the inherited property shall not form part of the joint estate and would pass to the male heir upon her death.¹⁰⁸ Although this provision seems to improve the women's status in inheritance it is still discriminatory against women because men are treated differently.

One may argue that this clause was enacted to guard against the social problem of heirs being disinherited on re-marriage. But this argument is flimsy because heirs can still be disinherited if

¹⁰³ Interview with stakeholders in July 2004

¹⁰⁴ Act N0.17 of 1979 Section 22

¹⁰⁵ *ibid* Section 8 as amended by Order N0.6 of 1992

¹⁰⁶ Order N0.6 of 1992

¹⁰⁷ *ibid* Section 5(2)(a)

¹⁰⁸ *ibid*

the man in question decides to sell the property. On this note therefore it is contended that this provision is simply unfair and discriminatory and it should be repelled.

Access To Water

Introduction

Lesotho has plenty of water.¹⁰⁹ Though Lesotho has plenty of water most of this water is lost to the Atlantic Ocean as there has been no action taken to reserve it.¹¹⁰ This has unfortunately led to a situation whereby most communities in Lesotho do not have access to drinking and irrigation water.¹¹¹ There has been efforts to curb this problem, for instance the introduction of Rural Water Supply project (LHWP) and policies. This Section is meant for the analysis of the legal provisions of the water laws.

Water like land is regulated by various statutes, but the main legislation involved therein is the Water Resources Act (the Act).¹¹² The Act vests ownership of all water within Lesotho in the Basotho Nation.¹¹³ Like the Land Act it kept the spirit that all natural resources must be shared equally and this is attainable by making it a property of all and sundry.

Regulation and control of use of water is exercised by the Minister.¹¹⁴ The Minister exercises these powers through officers appointed to carry out the duties and functions imposed by the Act.

Interms of the Act any person who needs water for other use other than domestic use has to have a permit to access the water.¹¹⁵ The permits commonly referred to as licenses and are issued by the water officer.¹¹⁶ These permits are usually granted for a period not exceeding five (5) years and can be renewed for a period not exceeding three (3) year or for non-use of the permit for a period not exceeding one (1) year.

The Act does not seem to discriminate against any gender group. In fact because of the abundance of water because customary law too did not regulate it in anyway.

Termination of permits is the responsibility of one person, i.e. the water officer. It is important to note that land can be set aside for the protection, conservation and distribution of water. The Act acknowledges that for some reason water; might be insufficient and thus grants the Minister powers to vary and /or suspend the water used or to declare water emergency.

Construction of wells and boreholes requiring the use of mechanical drilling equipment needs to be approved by the Minister.¹¹⁷ Permission to construct a well or borehole shall be granted only if its construction or use will not interfere substantially with the use of other wells and or boreholes.

¹⁰⁹ Land Review Policy Commission supra 126

¹¹⁰ *ibid.*

¹¹¹ Lesotho Statistics Report 1998

¹¹² Act N0. 22 of 1978

¹¹³ *ibid* section 5

¹¹⁴ *ibid* sub-section 1

¹¹⁵ Water Resources Act N0.22 of 1978 Section 3

¹¹⁶ *ibid* Section 4

¹¹⁷ *ibid* Section 8

Any person whom without lawful authority uses water for other purposes other than domestic use, irrigation and /or construction of a well or borehole is guilty of an offence and attracts a fine and imprisonment.¹¹⁸

Application Process

A person requiring a water use permit must lodge application with the water officer upon receipt of such an application. All people who might have objections are invited to lodge their objections failing which the permit shall be granted with or without conditions.

The procedure is simple and uncomplicated. The only disadvantage is that the administrative structures, offices are highly centralized. That is people have to travel to the towns to lodge applications and check progress thereon. This attracts unnecessary costs on the rural poor

Lesotho Highlands Development Authority

The complications or confusion in the regulation of water is brought about by Lesotho Highlands Development Authority Order of 1986. This Order gives the authority and power to control and manage water. For instance, the authority is vested with the power to secure and supply water at reasonable prices. Further, the authority is to promote and encourage efficient use of water especially the use thereof for domestic and agricultural purposes.¹¹⁹

Lesotho Water and Sewage Authority Order of 1991

Overlap of powers is further perpetuated by Section 41 of the Lesotho Water and Authority Order of 1991 (WASA).¹²⁰ It gives the authority powers identical to those held by the Highland Authority.

It should however be noted that, practically there has been no clash or duplication of powers as the Lesotho Highland deals only with the project area whilst WASA is concerned with management, control and supply of water in urban areas only.

It should however be noted that despite introduction of statutes and creation of authorities dealing with water affairs, water is still unaffordable to many. This is well illustrated below.

NORMS PRINCIPLES AND STANDARDS ON WOMEN'S LAND AND WATER RIGHTS

Land

Despite the fact that under codified customary law and statutory law women are treated as minors and as such incompetent to hold land, inherit nor make any major decisions regarding land under their control. Women have in most instances been allowed to hold titles to land and exercise other rights in the land either through inheritance rights, fresh allocations or through joint titling even though on this one they are usually forced on them by the Deeds Registry.

Some individuals in an attempt to guard against the abuse of women by heirs developed a practice of acquiring sites in their children's names so that they can use the land when they become of age. Land Committees and Chiefs cognizant of the fact that women are discriminated against even though they contribute largely in the fight against food insecurity and other developmental issues have turned blind eye on this practice. Some of them aid and abet by creating fictitious husbands for women who want to acquire land.

¹¹⁸ *ibid* Section 12

¹¹⁹ Water Resources Act *supra* Section 19

¹²⁰ LWSA Order N0.29 of 1991

In principle land is supposed to revert back to the state on death of the allottee, however in practice this does not happen instead land passes from the allottees sons(s) or the widow. Without reverting to the Chief for reallocation.

Further land, which has been allocated for agricultural; purposes should be cultivated within three (3) years otherwise the land, must be repossessed by the state. However has never been done. Furthermore, the only way the allottee of agricultural lease can dispose of his interests in the land is by subletting it or encumbering it by mortgage. The leaseholder in this instance must first seek the permission of the Minister. However informal subleasing, tendering of agricultural land and sharecropping has become the order of the day. It has been observed that households involved mostly in these activities were elderly women and widows who had no factors of production other than their land and labour.

Water

The law provides that all individuals who require water use other than for domestic use need permits. Which permits shall be granted by the water officer. The standard of conduct however is that people are able to irrigate and bore water without obtaining permission from the water authority; ground water affairs. No one seems to wonder why the situation is as it is. Rather when the individual is in need of water use for agricultural purposes such an individual goes to the irrigating company(s) and starts with the project. Unlike under the land administration these individuals are not prosecuted or fined despite the provisions of the Section 12 of the Water Resource Act.

Water laws do not discriminate against women; the only barrier is that like it has already been stated, women are the poorest members of the community in Lesotho hence do not afford installation of water pipes etc.

THE CASE STUDY

Masianokeng village has a small population of four hundred people, although it has been in existence for over thirty years.¹²¹ People migrate out of the villages to seek better living conditions in the towns and cities.¹²² The records kept in the chief's office do not reflect any gender or age distribution. However interviews with the chief revealed that most of the population is widowed women.¹²³ However the National statistics revealed that the dominant age group is from ages nineteen – forty nine.¹²⁴

There are about thirty-two fields in the Masianokeng area.¹²⁵ These fields are owned by men and women. Women however have the larger number of fields because they have inherited from their late husbands.¹²⁶ Most of these women have little or no income at all. The fields are as a result used for subsistence production. Those who cannot afford to cultivate their fields hire and/or lease them out to commercial farmers.¹²⁷

¹²¹ Interview with the chief of Masianokeng

¹²² *ibid*

¹²³ *ibid*

¹²⁴ Bureau of National statistics 2003

¹²⁵ Revealed at an Interview with Chief of Masianokeng July 2004

¹²⁶ Interview with different stakeholders June/July 2004

¹²⁷ *ibid*

When a field is used for subsistence purposes the crop that is planted is maize, sorghum or wheat. Whilst cabbage is usually planted for commercial purposes.¹²⁸ In this commercial farming one hectare yields about fifty thousand cabbages.¹²⁹ Fields that are used for commercial purposes are irrigated whereas those used for subsistence farming are not irrigated.

Administrative Structure

Administrative issues at community level are the responsibility of the District Secretary (DS), whose main function is to assist with issuance of death certificates, marriage solemnization, management and distribution of resources to the chiefs and local authorities. That is the DS works as a coordinating body between government and local communities.¹³⁰

At local level, local administrative issues are exercised by the Community Councils.¹³¹ These Councils consists of nine to fifteen elected members and not more than two gazetted chiefs.¹³² In Masianokeng Ha Jimisi, only one member of this community serves as its representative in the Council. The area Chief is not a member of the Council, as she was not elected.

The Council is responsible for regulation, control and administration of natural resources, land or site allocations, grazing control, water supply in villages (maintenance), water resources, agriculture and control of building permits.¹³³ The Chief currently has no administrative powers, it being in allocation, management and control of land and all other resources.¹³⁴

Despite this changes, Chiefs do play a very important role in administrative matters as they are an institution well known, accessible and trusted by the communities. Thus, the Chiefs are still involved in land allocation, confirmation of heirs and administration of other resources. For instance, in Masianokeng – Ha-Jimisi despite there being a local representative in it, invitations to the chief are made in all its sittings whereby issues involving that community are discussed.¹³⁵

Apart from this, the chief endorses sub-lease or renting or agricultural lands, contracts, informal though they are in law. Furthermore, land and other disputes are referred to the chief for conciliation.¹³⁶ Conciliation process is regarded to be important as it reduces likely legal costs, bearing in mind that there are no Basotho Courts nor Civil Courts in this area.

Native Land Use

Masianokeng – Ha-Jimisi fall outside the urban boundaries but within the planning are.¹³⁷ That is, the land use in this area is not strictly governed by the development and structural plans as developed by the Chief Physical Planner. Rather, the local authority before allocating land or engaging in any development with the likelihood of impairing in land must seek the advice of the Chief Physical Planner.¹³⁸ However, there are no physical plans developed for this area.

¹²⁸ *ibid*

¹²⁹ *ibid*

¹³⁰ District Planning Unit

¹³¹ Local Government Act 1996, section 5

¹³² *ibid* section4

¹³³ *ibid.* section 5(1) First schedule

¹³⁴ Land Act (Amendment) Order of 1992

¹³⁵ Interview with her chieftainess Mamothepane Makhobalo 16 July 2004

¹³⁶ Motlatsi Thabane, Who Owns the Land in Lesotho? Land Disputes and Politics of Land Ownership, ISAS Seminar Paper 1997

¹³⁷ Chief physical planning

¹³⁸ Physical Planning Act

The predominant land use types in the area are agricultural and residential. Agricultural land occupies greater area. The types of farming practiced in this area are commercial and subsistence farming.

Land use for residential is largely governed by the customary law.¹³⁹ It is unregistered and the majority of occupants have old Form C's (Form C3 as provided by the Land Act)¹⁴⁰ Agricultural land is governed by customary law.¹⁴¹ It too is not registered and allottees do not have any form or title or documentation to prove title thereof.¹⁴² The fields are fragmented as they were allocated long time ago when the laws of Lerotholi were the only piece of legislation governing land.¹⁴³

This form of land holding has not prohibited field owners to sub-lease or rent their fields. Almost a third of the fields in the area are rented-out to commercial farmers. The sub-lessees pay rent of approximately 225 US dollars. The agreements uncomplicated and the periods range from one year to three years.¹⁴⁴ The problem caused by this type of land holding is the fragmentation of the fields. This hinders investment in agriculture and consequently leading to food insecurity in that it becomes expensive on the farmer to buy irrigation implements. Furthermore, the field owners can terminate the lease contracts at any time, irrespective of the investment the sub-lessees have made in the land. Since most of the people who have sub-let or rented out their land are destitute widows they seldom cancel the contracts before the expiry dates. In the event one party decides to cancel the contract the chief acts as a conciliator, with the aim of bringing justice between the parties.

Highlights On Water

Everyone in Lesotho has the right to water. The department of the Rural Water Supply provides water in Masianokeng-Ha Jimisi. It is distributed for domestic purposes through community taps. This taps responsibility lies in the hands of the water minder who is a member of the village water committee.¹⁴⁵ These committees are made up of elected members of the community. The responsibility of the committee is to make sure that the tap is not vandalized. They also make sure that it is maintained and everyone who draws water from these taps pay monthly fees.

Typically water costs about 3 US dollar per household per month. This is from low cost gravity water supplies.¹⁴⁶ From pumping systems, water costs 4 US dollar per household per month.¹⁴⁷ Private connections from low cost gravity water supplies cost range from about 2 US dollar to 8 US dollar per month. Although this is the situation the initial connection cost is about 23US dollar.¹⁴⁸

Water for agricultural purposes is the responsibility of the Water Affairs Department. However, as things stand, the commercial farmers use river water and have no prescriptions from the Water Affairs.¹⁴⁹ The irrigation system erected from here is the responsibility of the High Value Crop

¹³⁹ Interview with the Lands Office 21 May 2004

¹⁴⁰ Land Act Supra

¹⁴¹ Ibid and Interview with chieftainship

¹⁴² Ibid

¹⁴³ Interview with Monaheng Seutloali, Commercial Farmer 30 June 2004

¹⁴⁴ Ibid

¹⁴⁵ Interview with Mr Lebeko Department of Rural Water Supply Maseru, June 2004

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Interview Department of Water Affairs Maseru July 2004

Project.¹⁵⁰ People who use this irrigation system pay a subscription fee of about 16 US dollars per year.¹⁵¹ In order to power this system electricity is needed and the costs of the electricity installation range from 69 US dollars to 70.¹⁵² Not everyone can afford this price and consequently this causes limitation on the number of people who can use the system. Furthermore in order to use the irrigation system, one has to install pipes from the source. These pipes cost between 415 US dollars to 570.¹⁵³ Once again this limits the number of people who can use this system.

Other Factors

Maize and cabbage are the products grown in Masianokeng, Ha-Jimisi. Maize is mostly grown by subsistence farmers whilst commercial farmers grow cabbage.¹⁵⁴ The owner of the field wholly owns the produce unless other arrangements have been made. One such arrangement is the case of joint venture. In this case the two parties are involved and they share the produce according to an agreed formula on labour and input costs.¹⁵⁵

As in the case in most Basotho Villages, the division of labour is as follows, ploughing and sowing are done by males.¹⁵⁶ Women do thinning and both men and women do harvesting.

Subsistence farmers store their produce in their homes while the commercial farmers who grow cabbage have no storage facility.¹⁵⁷ The cabbage is sold directly from the field. As far as commercial farming is concerned, commercial farmers face serious problems because they have no continuity of production. As a result buyers prefer to buy agricultural produce from South Africa where they are guaranteed constant supply.¹⁵⁸

The Ministry of Agriculture and Food security has a department that deals with crop promotion. This department advises farmers as to what to plant and when depending on the market demand. Such information is disseminated through the radio, agricultural shows and through extension officers.¹⁵⁹

Subsistence farmers, who on a good year have surpluses, sell their produce and use this money to send their children to school.¹⁶⁰ Commercial farmers on the other hand use the income they get from selling their produce to re-invest the money by acquiring more land for hire.¹⁶¹

RECOMMENDATIONS

The water laws do not discriminate nor favour any gender over another and as a result the opportunities afforded therein are equal for both men and women. However, as it has already been stated women are the poorer members of the community in Lesotho and hence are unable to use even the favorable provisions of the water law for their benefit and contribution to food security. For these reasons our recommendations focus highly on the Land laws which has created hazards for women's property rights.

¹⁵⁰ Interview with Monaheng Seutloali supra

¹⁵¹ ibid

¹⁵² ibid

¹⁵³ ibid

¹⁵⁴ Interview with commercial farmer supra

¹⁵⁵ ibid

¹⁵⁶ Hopolang Phororo supra

¹⁵⁷ Interview with Commercial farmer supra

¹⁵⁸ Interview with Molapo Leluma Assistant Manager Shoprite June 2004

¹⁵⁹ Interview with Lisebo Mosite Crop Promoter Maseru July 2004

¹⁶⁰ Interview with Chieftainess supra

¹⁶¹ ibid.

It was submitted that the lack of security of tenure and inequality in land distribution needed the most urgent attention. This is due to the fact that once people feel insecure in their land holding they are inclined to engage in illegal dealings. These vary from selling their land in the illegal market to developing it in an unplanned manner to avoid government interference or even engaging in land speculation. For example, since the law prohibits women acquiring and registering land in their own names, many of them acquire land illegally and this has increased the number of double allocations as well as the number of illegal allottees and occupants of state land.

The land problems identified and discussed can be dealt with by inter alia reforming the land laws. It is perhaps prudent to reiterate the importance of adopting a clause specific or clause focused approach in dealing with these matters, as it is with certain clauses that drastic change is required. Discussed below are the laws in need of reform.

CUSTOMARY LAW

Customary law was generally found to be the most insecure form of tenure and a source of the bulk of the land problems identified hence the proposal that it should be done away with.¹⁶² The discussion however revealed that whilst customary law contributed a large share of the problems, in practice, it has evolved to be more accommodative and adaptive to current social issues. For instance, most families no longer regard first male sons as sole heirs. Other considerations now come into play when making decisions pertaining to inheritance.

There has also been a noticeable growth in the practice of having fictitious husbands for women who want to acquire land but are disempowered by law.

Customary law allows sharecropping, land borrowing and pledging. This aids government efforts to address poverty, which is increasing drastically as a result of the HIV/AIDS pandemic in that people in an endeavour to save their lives, or those of their relatives are not compelled to sell their land to cover medical expenses or pay for funerals. They would instead exercise the option to engage in sharecropping or loan their land to those who have the money to farm.

Whilst it is agreed that customary law has its advantages, the fact remains that codified customary law in its current state needs reform.

First, Section 7(2) of the Laws of Lerotholi which give the chief the power to revoke titles to land from farmers who have more land than necessary to meet their subsistence needs, has to be done away with. The reason being that even though there are no records of people losing their land under this section,¹⁶³ it is still believed that it causes insecurity amongst farmers who may then be incentivised to sell the land in the informal market out of fear of losing it.

Secondly, the customary practice that land is not inheritable must be done away with. This will enable people to invest more in their land holding and hence reduce the incidences of illegal allocations and land speculation. Also the customary law providing for only first-born sons to inherit their fathers or uncles immovable property has to be done away with. The landholders must have the right to choose their successors. Sex must not be a determining factor as to whether a person will inherit or not. If the parents die interstate all the siblings' regardless of their sex must have equal right to inherit. This may be done on merit and need. Only those who do not

¹⁶² Report of The Land Commission Report 2000 81

¹⁶³ Section 7(2) of the Laws of Lerotholi

already possess more land than they need and have the resources to utilize it adequately should get preference. Women must also have the right to inherit their spouses' property and should not be regarded as trustees of the male heirs. It is therefore submitted that all Sections of the Laws of Lerotoli that prefer male issues to females must be abolished, namely, Sections 7(5), 7(7), 11, 12, 13 and 14.

STATUTORY LAW

Women are not discriminated against under customary law only. Statutory laws also discriminate against women in a fundamental way and this has led to the problems mentioned in Chapter 4. Women are discriminated against under the Land Act 1979, Deeds Registry Act as well as the Constitution and these laws need urgent reform to afford women the right to equal opportunities and same treatment as their male counterparts.

THE CONSTITUTION

The Constitution as the supreme law of the country has to provide for fundamental human rights to protect citizens from abuse and discrimination by politicians. Unfortunately this is not the position in Lesotho when it comes to women's rights. The Constitution provides for equality and equal protection of all individuals before the law.¹⁶⁴ The right to equality and equal protection before the law is regarded as the fundamental right as it protects people from discrimination and unfair treatment. The right not to be discriminated against is provided for again under Section 18 of the Constitution, which, provides that all people are free from all forms of discrimination it being based on race, religion, colour, language and sex. However the right not to be discriminated against merely by the fact that one is a man or a woman has been qualified under Section 18(4)(c) which justifies discrimination if it is done whilst giving effect to customary law. This justifies the outdated customary practice, which discriminates against women in that under customary law women are regarded as perpetual minors. There is no justification for discriminating against women and thus section 18(4) needs to be amended and deleted to provide women with equal protection of the law in so far as land matters are concerned. The amendment of this Section will allow women to have access to land resources and get to inherit in the same way as their male counterparts.

THE DEEDS REGISTRY ACT

Sections 14 and 35 (c) of the Deeds Registry Act is discriminatory and makes it difficult and at times impossible for women to register titles to land in their own names. This is so because they are required to produce evidence that they are spinsters or are in possession of their husbands consent before title deeds to land can be registered in their own names. These sections must be repealed forthwith and women must be entitled to own land and register it in their own names. It is also proposed that title deeds for people married in community of property must be registered in the names of both spouses.

THE LAND ACT

The Land Act seems to be a fair piece of statute and does address gender issues related to land holding even though not adequately covered. For instance, the Land Act gives women the right to acquire and hold land in their own names as well as the right to inherit. It however does discriminate against women in that widows though they have the right to inherit their late husbands' property, they are stripped of that right on remarriage. This is unfair to the women because they may have worked hard to acquire and accumulate that property and yet are not free

¹⁶⁴ Section 19 of the Constitution of Lesotho

to dispose or deal with it in the manner they see it fit. Also their social life is restrained because even if of they are of the view that it is for their well being to re-marry may decide not to out of fear of loosing their land or other immovable property to unwanted heirs. It is therefore submitted that Section 8 as amended by Order No.6 of 1992 be amended to do away with the qualification that women must forfeit their property on remarriage.

Section 24(2) needs to be amended to include area chiefs in the Urban Land Committees. This will guard against the problem of double allocations thus enhancing security of tenure. Chiefs will not be inclined to sabotage government by engaging in illegal allocations because their powers in land allocations would not be under threat. This will also facilitate the smooth transition to the dispensation when urban boundaries are extended. Women's interests will be protected by this move because they would not be sold or allocated illegal land as is now the case because chiefs will be members of the urban land Committees hence not interested in illegal dealings.

Furthermore, the Land Act must have a provision that disposal of land and immovable property of couples married in community of property must be done after consent of both spouses has been secured. Men should not be granted sole power to dispose off the matrimonial property without the consent or even consultation with their wives. It is also not necessary that consents to sublease or mortgage property be approved by the Minister responsible for Local government. Ministers are seldom available to sign leases let alone consent to small transactions. This will reduce the number of illegal land dealings, as people would be motivated to register their titles. It will also make it easier for the Government to collect revenue. Thus Section 35 of the Land Act needs to be revisited.

The Land Regulations also need to be revised. For instance, Regulations, 24 and 25, which limit the amount of landholding, need to be revised and be implemented accordingly so as to address the problem of concentration of land in the hands of a few when the majority are landless. In addition to this, a higher tax may be levied on people who are in possession of land in excess of a predetermined number of sites. This will also address the problem of hoarding of sites. It is also essential that the procedures for applying and obtaining a lease be simplified.

It would also be appropriate if the Land Regulations can outline the compensation procedures and the way the compensation package is calculated. Likewise this will enhance security of tenure as landholders would know exactly how they would be compensated and this will consequently reduce the number of illegal landholders and construction on unplanned areas. This will also encourage people who no longer need their agricultural land to freely surrender it to the government in return for the compensation money.

ADMINISTRATIVE ISSUES

The research has established that inequitable land distribution is at times a result of ignorance on the part of women. Government needs to educate people especially women about their rights under the Land Act. This is a essential given the fact that the Land Act even though it came into effect in 1979 most people are still not familiar with its provisions. Land Committees as well as the chiefs need to be educated about this law. There is also a need to create awareness to government officials about the land administration system and the fact that women are disadvantaged in an unacceptable manner in the land delivery system and that their situation can be improved by having registered titles.

Furthermore the government needs to decentralize its services. This will help in reducing population pressure in the capital city, Maseru. Decentralization will also help increase the number of registered titles, as the applicants would not have to travel to the Capital City or Regional offices to lodge their applications.

The problem of illegal occupants and allottees can be also be solved by making serviced and properly planned sites available on time. The sites must importantly, be affordable to encourage the poor to acquire land. Government can use the money from its revolving Land Bank Account to acquire land and sell sites. With better management this account will be able to finance land acquisition projects.

To avoid double allocations and backdating of form C's the Commissioner of Lands must give effect to Section 30 which provides that upon notice published in the Government Gazette all people within a specified area shall apply for leases. There is no reason why after twenty years since the Land Act¹⁶⁵ came into operation there are landholders within the urban areas who use old Form C's and affidavits and not leases as evidence of their title. In addition to this, there must be provision of a cut of date after which the old Form C's shall cease to operate. As soon as Section 30 is given effect to Section 29 which provides for evidence of title by other means other than a lease has to be abolished. This will incapacitate the chiefs from allocating land illegally in that they would not be able to fraudulently use affidavits as prove of title for illegal allottees as is currently done under Section 29 (1) (iv).¹⁶⁶

WATER POLICY

It is suggest that Lesotho have only one policy instead of two, encompassing domestic (basic use), industrial and energy generation, and covering issues relating to water conservation and drought management. But as regards gender its all encompassing in that all gender groups are catered for, for example irrigation policy highlights issues faced by women in accessing water and also provides solutions.

CONCLUSSION

The research has established that there is inequity in the way land resources are distributed in Lesotho. Whilst men are also prejudiced by the law, women are the group most disadvantaged. This is due to the fact that under codified customary law they are not recognized as majors and thus cannot contract. This makes it impossible for them to acquire land. They are also prohibited to inherit. This have resulted in many of them especially the poor engaging in illegal land dealings and are currently inevitably being evicted. It should however be noted that uncodified customary law, which represents the way society feels and sees life does not regard women as minors. Many people even those who are governed by customary law would like to see their daughters and wives inherit their property. Women are no longer viewed as procreating objects only but as individuals with needs just like their male counterparts. They also contribute immensely to the economy of the country both as workers and business people. The codified customary law thus needs to be changed to accommodate the modern day society by affording women the same treatment as their male counterparts.

Changing codified customary law is however not the only solution. Statutory laws that discriminate against women need to be repealed. This refers to Section 18 of the Constitution,¹⁶⁷

¹⁶⁵ Act No.17 of 1979

¹⁶⁶ Ibid.

¹⁶⁷ 1993 Constitution of Lesotho

Sections 14 and 35(c) of the Deeds Registry Act 1967 as well as Section 8 of the Land Act as amended.¹⁶⁸

Reform in the land laws will not help if the people who the law is aimed at are not properly informed of their rights. This is why it is recommended that awareness campaigns should be held to educate women, government officials and the general public about women's status in land holding both historical and current.

Government must also improve its service delivery to the public. Sites must be made available on time and leases issued within a reasonable time. Whilst it is agreed that the law must take its course against people who violate it, it is however felt that the government's use of Section 87 of the Land Act to evict people from land earmarked for developmental purposes is not justified. Government has failed to avail land to the people in time and cannot punish people for its inefficiency. The evictions must be avoided in future and this will be possible if all the recommendations could be carried out field owners and unscrupulous chiefs would be stripped off the chance to engage in illegal land dealings, as they would have no clientele.

¹⁶⁸ Act No.17 of 1979 and Order No.6 of 1992