



NATIONAL UNIVERSITY OF LESOTHO

A Legal Analysis of Discrimination and Women's Right to Inheritance to the Chieftainship in Lesotho.

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DECLARATION

I, MONYAKE PHILEMON MAHLEHLE, declare that the Dissertation I herewith submit for Masters Degree, Master of Laws (LLM) at the National University of Lesotho is my own, independent, original work, for which I am the author and I have not previously submitted it for qualification at another institution of higher education.

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Chapter One: Introduction

1.1 Statement of the Research Problem

This research is intended to critically discuss the problem of discrimination against Women in Lesotho in the context of their right to succeed and ascend to Chieftainship. The problem arises when a critical view is taken towards the laws of Lesotho, considering that while the *Constitution of Lesotho*¹ declares Acts and acts that exhibit and perpetuate discrimination to be unlawful, the same Constitution permits discrimination that is based on the Customary law of Lesotho, especially when applied to people that are subjects to such customary law. This is despite the fact that Lesotho has ratified numerous international treaties including *the Convention on the Elimination of All Forms of Discrimination against Women*,² that is totally against any form of discrimination, including one based on the customary law and customary practices. This discrimination against women in relation to their right to succession to Chieftainship is also in place despite the fact that the world is geared towards gender equality as the fifth Sustainable Development Goal of the United Nations.

The research problem is therefore, a critical discussion of the discrimination against women in relation to their right to succeed to Chieftainship, versus what ought to be the case in keeping up with the precepts of a human rights-based society, international law and attempts to dilute the patriarchal societies that treat women as inferior.

1.2 Introduction and Background

In recent times, the right of women to succession to the chieftainship has become a center of discussions in various platforms in Lesotho. There is evidence that it was not completely ignored. Lesotho had gone through three (3) phases in which rights of women in general, not only the right to succession to the chieftainship was under scrutiny. The history is traced as far as the pre-colonial era, during the colonial era and the post-colonial era as reflected below.

¹ 1993.

² 1979.

1.2.1 Pre-Colonial Era

The kingdom of Lesotho was initially known as Basutoland and is South African land locked. The country is largely inhabited by Sotho speaking people referred to as Basotho.³ Prior to 1800s, the Basotho were in detached communities set within small chiefdom with no overall ruler. The chief Moshoeshe I was the sole administrator who was supported by all communities, his wealth fed the family and the impoverished as the economy revolved around him.⁴ The Basotho nation became one and unified after the widespread violence between white settlers and Basotho fighting for territorial rights in areas between Caledon, Orange Rivers and some parts of Kwazulu Natal which were known as Basutoland. From the Southern part, the Amazulu king (Shaka Zulu) engaged in to fierce fights with the European imperialist. During that time, multitudes of refugees unleashed towards the north to Moshoeshe who welded from them one nation. His fortress was situated at Thaba-Bosiu.⁵

In this era, Moshoeshe's title was *Morena e Moholo*⁶ (Senior or Paramount Chief) Four (4) sons were born from Moshoeshe, the first was Letsie I, Molapo was the second, the third was Masupha and Majara was the last. As already set out above, Moshoeshe did not accede to power through primogeniture rule but the principle started to gather momentum when his first son Letsie succeeded him through primogeniture rule.⁷

The primogeniture rule was riddled with uncertainties after Letsie's first daughter Senate was born from 'Masenate (the first wife of Letsie I). Letsie did not have a male issue in the first house. From his second great wife 'Mantai, the son Lerotholi was born.⁸ This notwithstanding, Moshoeshe proposed Senate to succeed his father Letsie I and disregarded Lerotholi. What was strange in this process was the performance of rituals by Moshoeshe over Senate; he caused her to mount on a horse back and gave her a horn of rhinoceros which signified power, with the

³Tefetso Mothibe, "State and Society, 1824-1833" (2002) 21(15) *Essays on Aspects of the Political Economy of Lesotho 1500-2000* 21(15) (Neville Pule & Motlatsi).

⁴ Mothibe (Supra). pg 15.

⁵ Mothibe, pg 15.

⁶L.L.B.J. Machobane, "Gender, Succession and Dynastic Politics" (2000) in *The Saga of Senate by Mots'oene Molapo Moshoeshe 1858-1930, Review of Southern African studies* 19.

⁷ Machobane (Supra), pg 24.

⁸ Machobane, pg 26.

purpose of converting her to be a male (female husbandship).⁹ On the basis of this outline, it is apposite that Moshoeshoe did not recognize primogeniture rule, instead he understood succession procedure as an appointment by an authority not by birth. The second important observation was that any child could succeed his father regardless of sex or gender. However, after the demise of Letsie I, sons of Moshoeshoe aborted the plan and appointed Lerotholi as *Morena e Moholo*.¹⁰ All four sons of Moshoeshoe were recognized as chiefs, Letsie only attained status of *Morena e Moholo* and heir to Moshoeshoe's Chieftainship after the death of his father.¹¹

1.2.2 During the Colonial Era

The introduction of colonial rule was paved by the French Missionaries who arrived at Thaba-Bosiu at around 1833, probably a year before Moshoeshoe was officially recognized by British rulers from Cape Colony.¹² Moshoeshoe sought protection from the British over Boers who were threatening to diminish chiefs' control over the land. The Boers preferred individual ownership of land not communal ownership. The cooperation between the Chief and the British was articulated in the Napier Treaty.¹³ By acceding to this treaty, Moshoeshoe undertook to be faithful to British, to arrest and return fugitives to the Cape Colony.¹⁴ This was the end of the traditional chieftainship and the beginning of a new form of chieftainship that operated as a civil service of the colonial administration which was still patriarchal in nature. The process of colonization which was to last for 40 years began soon thereafter.¹⁵

The war between the Boers and Basotho escalated around the years 1865 to 1866 whereat Basotho ceded much of Free State to the Boers.¹⁶ The following year (1867), Moshoeshoe decided to put Basotho under British protection. From that period Basotho became British subjects and their land was British territory. That was when they were placed under Cape Colony

⁹ Machobane (n 6), pg 28.

¹⁰ Machobane, pg 34.

¹¹ Machobane, pg 34.

¹² Tefetso Mothibe and Maria Ntabeni, "The Role of the Missionaries, Boers and British in Social and Territorial Changes, 1883-1868" (2002) 21(15) *Essays on Aspects of the Political Economy of Lesotho 1500-2000* (Neville Pule & Motlatsi Thabane edition) 35.

¹³ *Napier Treaty* of 1843.

¹⁴ Tefetso Mothibe and Maria Ntabeni (n 12), at 46-47.

¹⁵ Motlatsi Thabane, "Reconsidering the Motives for Colonization, 1868-1871" (2000) *Essays on Aspects of the Political Economy of Lesotho 1500-2000*, 79.

¹⁶ Mothibe and Maria Ntabeni (n 12), at pg 47.

Administration.¹⁷ Subsequent to annexation, it was inevitable that Lesotho will be subject to laws that were promulgated by Cape Legislative authority.¹⁸ Thereafter, the governor's agent, Colonel Charles Griffith was introduced in Maseru. He did put in place new rules which were meant to improve status of women in Lesotho and rules that ensured equality between men and women.¹⁹ These laws were only decorations on paper as they were never put in to practice despite judicial power being transacted from chiefs to magistrates.²⁰

As evident above, equality between men and women was introduced as far as during colonial era. The status of women was improved through legislations of Colonel Charles Griffith though it is not easily traceable but there is evidence that he introduced equality laws. It would seem rights of women to equality have been lauded in recent times by human rights activists, as it is a new conceptualization of rights but Charles Griffith is authoritative that women's rights to equality were proposed during the colonial era though never transcended in to practice.²¹ However, women's succession right to chieftainship was still lagging behind because Moshoeshe was the sole ruler. The patriarchal nature of the chieftainship was not challenged even after introduction of civilization by Charles Griffith.²²

1.2.3 Post- Colonial Era

Lesotho was a British colony and subsequently gained independence on 4th October 1966. Post-independence era, Lesotho adopted a new Constitution of 1993 which was subsequently amended in the years 1996, 1997, 1998, 2001, 2004, 2011 (two amendments), 2018 and 2020. The legal system of Lesotho is dualistic in nature. It consists of customary law and common law. Under customary law it establishes hereditary monarchy whereas democratic government is

¹⁷ Proclamation 14 of 1868, by acceding to this Proclamation, Moshoeshe and his subordinate Chiefs had agreed to the allegiance of Her Majesty Queen Elizabeth II.

¹⁸ L.B.B.J. Machobane, "Government and Change in Lesotho 1800–1966: A Study of Political Institutions" (1990) 37.

¹⁹ J Laurence "Chieftainship, The Laws of Lerotoli: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" (2011) 92 *International Law Review, Issue 1*. Pg 105.

²⁰ Machobane (n 6). pg 48

²¹ Machobane. pg 49

²² Machobane, at 49.

circumscribed under common law.²³ The King occupies the positions of Constitutional Monarch and Head of the State as encapsulated in the Lesotho Constitution.²⁴

Correspondingly, the Prime Minister and cabinet are voted into the parliament through a democratic process of elections. In the same vein, chiefs are nominated and appointed in accordance with customary law which is widely respected in Lesotho.²⁵ Chieftainship in Lesotho is recognized under both customary and common law.²⁶ Both the custom and traditions are legitimate sources of law in Lesotho in the Constitution of Lesotho.²⁷ In this dualist approach, customary law and common law had in most occasions operated in harmony and complemented each other except in few specific instances where Lesotho courts have found way to mitigate the inconsistencies.²⁸ The significant paradox between custom and common law pertains to issues of women's equal treatment on the right to succession to chieftainship.

Under customary law a woman may hold a position of traditional leadership as a regent and not in her own right.²⁹ The nature of the office is not clearly articulated, whether it is a public office or family office. In the event that the former is the case, it would be illogical and contradicts common sense to deprive women from holding traditional leadership role on permanently or on their own right. The institution of the chieftainship is therefore perceived as reinforcing patriarchy and male domination with the collaboration of customary law³⁰ and the Constitution.³¹

These two (2) antiquated sets of laws seem to normalize discrimination against women despite the newfangled advancements in global comprehension of rights. There are South African, Botswana and other African states where they had traversed from primitive to renowned adoption of women's rights to traditional leadership, Lesotho is still lagging behind. The

²³ T. Quinlan and M Wallis, "Local Government in Lesotho: The Central Role of Chiefs" (2007) *Grassroots Governance; Chiefs in Africa and the Afro-Caribbean* 145

²⁴ *Constitution of Lesotho* (n 1), Section 44 that establishes office of the King: Section 54 that creates House of Parliament: and Section 86 that establishes the executive arm of government which is still vested in the King subject to the provisions of the Constitution.

²⁵ *Chieftainship Act* No. 22 of 1968, Section 10.

²⁶ T. Quinlan and M Wallis (n 23), at pg 149.

²⁷ *Constitution of Lesotho* (n 1), Section 7 (6) and Section 18 (4) (c).

²⁸ Basutoland National Council Report on Constitutional Reforms and Chieftainship Affairs of 1958.

²⁹ *Chieftainship Act* (n 25), Section 10 (4).

³⁰ *Ibid*, Section 10 (2) Reiterates that first-born male as successor to the Chieftainship, while a woman can only succeed if she is a wife, not an unmarried female child in terms of sub-sections 4 and 5.

³¹ *Constitution of Lesotho* (n 1), Section 18 (4) (c).

constitution is viewed as patriarchal in nature even in the current era of observance of human rights.³² Under Chapter II of the *Constitution of Lesotho*, the principles of equality³³ and non-discrimination³⁴ have been embodied with unnecessary reservations. On the strength of this continuing oppression, women are marginalized or discriminated on the basis of their gender and sex in the Mountain Kingdom.³⁵

The Kingdom of Lesotho has acceded to a plethora of international, continental, regional and sub-regional treaties and has enacted domestic laws aimed at the promotion and protection of human rights. The common understanding is that treaties must first be domesticated before they could be fully recognized and enforceable. Lesotho has therefore pledged to domesticate international treaties or convention where she is a party though some have been signed leaving extremely critical portions. For instance, the government of Lesotho ratified *Convention on Elimination of All forms of Discrimination against Women (CEDAW)*,³⁶ and placed a reservation clause on article 2 of the convention,³⁷ alleging that it conflicts with Lesotho's customary law on succession to the throne and chieftainship. CEDAW was drafted with the purpose of eradicating discrimination and inequalities against women; reservation clause defeats the whole purpose of the convention.

Apart from the above Convention, Lesotho has also ratified the *African Charter on Human and Peoples Rights*³⁸ and its *Protocol on the Rights of Women*.³⁹ The charter seeks to abolish gender inequalities of any kind. *Agenda 2030 for Sustainable Development Goals (SDGs)*⁴⁰ earmarked amongst others to reduce inequality between men and women. *Beijing Declaration for Gender*

³² J Laurence "Chieftainship, Succession and Gender Equality in Lesotho: Negotiating the Right to Equality in a Jungle of Pluralism" (2013) 22 *Texas Journal of Women and Law* 208.

³³ *Constitution of Lesotho* (n 1), Section 19.

³⁴ *Constitution of Lesotho*, (n 1). Section 18.

³⁵ *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (C of A (CIV) 29 of 2013) [2014] LSCA 22 (17 April 2014).

³⁶ CEDAW (n 2), ratified by Lesotho on 21-October 2011.

³⁷ F. Viljoen, *International Human Rights in Africa*, (Oxford University Press 2012) 121; The same was held in the case of *Senate Masupha v Senior Resident Magistrate for the District of Berea*, supra The High Court sitting as Constitutional Court which pronounced that Lesotho has specifically excluded itself from provision of article 2 of CEDAW with respect to customary practices relating to succession to the chieftainship.

³⁸ 1981, Lesotho ratified the Charter on 09 April 1991.

³⁹ 2003; Lesotho ratified the treaty in 2004. The Protocol is known as the Maputo Protocol because it was adopted in Maputo.

⁴⁰ 2015.

*Equality*⁴¹ and its plan of action similarly refute inequality on the basis of sex and gender. Also, other conventions include *SADC Gender Policy*,⁴²*Gender Equality and Woman Empowerment*,⁴³*Vienna Declaration and Program of Action*,⁴⁴ and other treaties vehemently preach abolition of discrimination on the basis of gender and sex. As indicated above, it is evident that gender equality is globally recognized yet Lesotho domestic laws still discriminates women's rights to succession to the chieftainship for the reasons attributed to preservation of culture.⁴⁵ Ratification of all these vital international instruments will forever remain cul-de-sac initiatives if they are not accommodated in national legislative framework. There is a need to repeal and amend laws inconsistent with women succession right to chieftainship.

1.3 Objective of the Research

The overriding objective of this paper is to critically discuss constitutional fundamental rights of women in Lesotho, with particular interest to freedom from discrimination and equality before law when it comes to chieftainship succession. Also, to examine as to whether the court's decisions that deprive women the aforementioned right under the guise of preservation of culture and custom are premised on the correct syllogism.

The main argument of the author is to critique Section 10 of the *Chieftainship Act*,⁴⁶ as it is argued that it is not in line with contemporary comprehension of constitutional democracy, international conventions and treaties that Lesotho is a party to. It is therefore, my proposal to present a challenge on the courts to jurisprudentially reform the *Chieftainship Act* and Constitutional provisions that undermine the fundamental human rights of women to contest the position of traditional leadership role on the basis of their sex or gender. In the event of the courts' self-restrain, there is a call for parliament to modify customary law to be in alignment with the current global comprehension of human rights.

⁴¹1975-1995; It advocates for equality between men and women both in law and in practice.

⁴² 2007.

⁴³ 2013.

⁴⁴ 1993.

⁴⁵ Constitution of Lesotho (n 1).

⁴⁶*Chieftainship Act* (n 25).

1.4 Research Questions

The following research questions will assist to interrogate the main research problem:

4.1. To what extent is the legal framework on chieftainship succession in Lesotho discriminatory against women? Is the discrimination, if any, justifiable?

4.2. To what extent are the reservations on international treaties or conventions on equality and discrimination against women justified?

4.3. To what extent does the overlap between customary law and the *Constitution of Lesotho* promote discrimination of women when it comes to succession to the chieftainship?

4.4 To what extent is the reservation on CEDAW justified under human rights and international treaty laws?

1.5 Methodology

In this study, special attention is on legal framework of Lesotho on discrimination and inequality on issues relating to deprivation of women's right to succession to the Chieftainship and Kingship in their own right. The study also compares Lesotho with African counterparts, including the Republic of South Africa, Botswana and Zambia. The prime purpose of comparison is predicated on their governance striking similarities. These countries are all so-called proponents of cultural practice of chieftaincy. They seem to enervate fundamental human rights, particularly women's right of succession to chieftainship under the pretext of preservation of culture. The pinnacle of discussions is on discrimination against women and need to emancipate women from chains of patriarchy and inequalities.

This study is conducted through the instrumentality of desk top review in which the author uses both primary and secondary sources of information in the form of books, constitutions, treaties, convention, charters and internet research material, case law, government policy statements, legislations, reports, speech presentations and recommendations on reports. Also, data collection is embarked upon through the process of reviewing the relevant literature on human rights, customary law and international law addressing issues of inequality and discrimination. The

author analyzes materials gathered through primary and secondary sources with the object of answering the research questions.

1.6 Literature Review

There is a smorgasbord of authorities that have been utilized which advocates for equality between men and women when it comes to women inheritance rights to chieftainship succession. In contrast, there is a compendium which opposes the existence of this phenomenon. In this ambivalent dichotomy, customary law vehemently resists equality between men and women. There are local and international authorities that expresses predilection for equality between men and women. The Constitution displays divergent gestalt of customary law and principles of equality. The literature review is divided into many different authoritative sources such as statutes, international human rights instruments, journal articles and books.

STATUES

The *Constitution of Lesotho* entails fundamental human rights and freedoms under Chapter II. Sections 18 and 19 provides for freedom from discrimination and right to equality before the law. The two (2) seem to be attenuated by Section 18 (4) (c) of the same Constitution. Fundamental human rights are limited by broad and ambiguous provision of section 18 (4) (c), the section is not specific on the issues of either chieftainship or Kingship. It only refers to customary law. The definition of customary law under section 154 of the Constitution is not succinct. However, in Botswana it is defined as in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.⁴⁷ The feebleness of the Constitution is its otiose impression. Prima facie, it bestows fundamental human rights under section 18 and 19 and retrieves the same under section 18 (4) (c).

The *Chieftainship Act*⁴⁸ and *The Laws of Lerotholi*⁴⁹ epitomized male primogeniture rule. The Laws of Lerotholi which super scribed succession to chieftainship was reduced in to statute

⁴⁷*Customary law Act* 51, 1969, Chapter 16:01.

⁴⁸*Chieftainship Act* (n 25).

through Chieftainship Act. Both pieces of legislations direct that the first-born male child from the first or only marriage shall succeed to the office of the chief. They discriminate against women, illegitimate children and males who are not first born. There is rare intrinsic democratic practice in the event where first born is mentally retarded. The family Council preferred a younger brother in the case of *Chere v Sekara*.⁵⁰ Primogeniture is fuddy-duddy in the contemporary human rights perspective.

Furthermore, the *Lesotho's Inheritance Act*,⁵¹ provides for freedom of testation which is the principle enunciated under common law. In a similar vein, intestate succession prefers male line of succession.⁵² Intestate succession is administered under customary law; women are minors who cannot administer their own affairs without assistance of guardians or parents.⁵³ The Act failed to assist women to administer their own affairs. But this has fortunately been transformed by the *Land Act*⁵⁴ and the *Legal Capacity of Married Persons Act*⁵⁵ which give women the same authority as men over their joint estate.

South African Law Reform Project addresses issues of succession. It articulates the dichotomy of succession; testate and intestate. With testate succession, the deceased expresses his or her wishes through a 'Will' during his or her life time as how his estate or inheritance will be administered. This is usually under common law.⁵⁶ On the contrary, with intestate succession, the heir appointed through family procedures inherits the entire wealth or estate of the deceased. The estate is administered in accordance with customary law.⁵⁷ Under this procedure, succession is agnatic and follows only the male line. The weakness underpinning this reform is that women are totally barred from inheriting under customary law.

⁴⁹ *The Laws of Lerotoli*, Section 2 (11).

⁵⁰ JC 137/47.

⁵¹ *Inheritance Act* No. 26 of 1873.

⁵² K. Mophethe, 'The Women's Legal Initiatives: Inheritance Laws Brochure-Lesotho' (2006) <<http://USAID/gov.pdf/Pnandi/185>> accessed 6 January 2024.

⁵³ South African Law Reform (n 58), at pg 31: *Motsamai v 'Maneo Motsamai and 5 others* CIV /APN/166/2008; "The provisions of *Inheritance Act* NO 26 of 1873 do not affect or alter the laws of inheritance according to customary law."

⁵⁴ No.6 of 2010.

⁵⁵ No. 10 of 2006.

⁵⁶ South African Law Reform Commission Law Project 90, "Customary Law of Succession" (2004) <<http://www.justicegov.za/salrc/reports/project-90-customary-law-succession-2004-pdf>> accessed on 23 May 2024.

⁵⁷ South African Law Reform Project, pg 12: Habitat for Humanity Lesotho, at pg 9.

*Reform of Customary law of Succession and Regulation*⁵⁸ defines it as customs and practices observed among the indigenous African People of South Africa that form part of culture of those people. The purpose of this legislation is modify the customary law to clarify certain matters relating to the law of succession and to amend certain laws in connection with law of property in favor of women. The amendments only encompassed *Administration of Estates Act 66 of 1965*, *Intestate Succession Act 81 of 1987* and *Maintenance of Surviving Spouses Act 17 of 1990*. The frailty of this regulation was its debacle to specifically address issues relating to women inheritance to chieftainship succession.

INTERNATONAL HUMAN RIGHTS INSTRUMENTS

Lesotho is a member to plethora of international instruments which are aimed at protection and promotion of human rights. To mention, but few at the global level; *Universal Declaration of Human Rights (UDHR)*, *International Covenant on Civil and Political Rights (ICCPR)*⁵⁹, *Covenant on Economic, Social and Cultural Rights CESC*⁶⁰, the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*

At Continental level, *African Charter on Human and Peoples Rights (ACHPR)* and *Protocol on African Charter on Human and Peoples rights on Women (Maputo Protocol)*. At regional level, discussion will be on *South African Development Community (SADC) Protocol on Gender and Development*. Paragraph 4 of Article 1 (2) of the *Southern African Development Community Protocol on Gender and Equality*⁶¹ defines discrimination as any differences made, marginalization or limitations as well as differential treatment based on sex and gender, which puts sexes and genders in a compromising situation, the treatment destroys recognition of all as equals, therefore hinders the enjoyment or exercise by women, irrespective of their marital status, their rights and fundamental freedoms in culture, political and economic spheres.

⁵⁸*Reform of Customary Law of Succession and Regulation of Related Matters Bill, 2008.*

⁵⁹1966.

⁶⁰1966.

⁶¹ 2008.

On the strength of the above article, it is indicative that deprivations of women to hold the position of traditional leadership is tantamount to discrimination. The paper will also illustrate later that inequality is a prevalent problem in most of Southern African states.

However, the Protocol did not address issues of how member states could deal with reservations which defy object of the treaty. In the same breath, *Convention on Elimination of All forms of Discrimination against Women* is exposed to the same weakness. The crux of the Convention is on article 2, in which Lesotho elected to reserve. This notwithstanding, despite the beguiling contents of the set out International Human Rights instruments, there is an inevitable dearth of enforcement mechanisms.

JOURNAL ARTICLES

According to ‘Nyane,⁶² succession in order of prior right is against principles of contemporary democratic principles. There are no procedural and substantive rules of succession which are embodied in the Constitution. He opined that the primogeniture rule should be reviewed and fashioned to accommodate recent constitutional democratic principles against discrimination and equality. The focus of this article was however predominantly on the Kingship not Chieftainship.

Kingship relates Constitutional Monarch and Head of state⁶³ and succession to the office is outlined under Section 45 of the same Constitution. Correspondingly, chieftainship set out the office of Paramount chiefs and the subordinate chiefs, succession of chiefs is pursuant to the provisions of *Chieftainship Act*.⁶⁴ The two concepts are similar even though regulated by different pieces of legislations.

The writings of Quinlan and Wallis⁶⁵ are also pertinent to the topic under the discussion. According to these authors, it is difficult to understand a concept ‘Chief’ with attachment of male gender or sex. This is because the Black’s Law Dictionary defines chief as leader, ruler or head

⁶² H. ‘Nyane, “The Constitutional Rules of Succession to the Institution of Monarch in Lesotho” (2019) *PER / PELJ* 22 <DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4461>> accessed 4 February 2024.

⁶³ *Lesotho Constitution* (n 1), Section 44(1).

⁶⁴ *Chieftainship Act* (25).

⁶⁵ T. Quinlan and M. Wallis (n 21).

of people or clan and displaying imminence in power.⁶⁶ On this basis, there is no gender attached to the definition. According to these authors, chiefs were associated with names of ancestors who did hold chiefs' positions in their life time. The authors stressed that Lesotho has 1558 chiefs in total and chieftainship is inherited.⁶⁷ Since ancestors were males, it follows therefore that males named after those ancestors were correspondingly chiefs. However, there is no suggestion why females were barred from holding similar positions with the advent of new names or using the same names as men. This therefore promoted gender inequality which is still rooted in Basotho culture until to the present era.

According to Machobane,⁶⁸ the rules of succession to chieftainship are traced to Moshoeshoe himself as he did not accede to power through primogeniture rule. The positivity in his administration was recognition of women as potential leaders though he still clothed them with male incarnate rituals. However, the author did not critique undemocratic procedures on matters relating to succession by king Moshoeshoe. It was his unilateral decision to propose Senate to the office of '*Morena e Moholo* 'excluding college of his sons (college of chiefs).

Laurence Juma⁶⁹ in his international review journal article of 2011 accentuates on status of codified rules of custom in Lesotho. He highlighted the role of Paramount Chief Lerotholi in the codification process and how his influence has crept in the current Lesotho legal system, in particular, where the right of women to chieftainship succession is sanctioned. The content of his article is invariable equipollent to Nqosa Mahao's⁷⁰ Colonial Rule and Transformation of Chieftaincy in Southern Africa journal article. The two author's articles resemble striking similitude on how colonial rule perpetuated patriarchal rule in Lesotho and effects of dictatorship rule of Paramount Chief Lerotholi which relegated women to subordinate positions. Neither author has illustrated how that that cyclically influenced practices could be best abated.

⁶⁶ BA Garner Black's Law Dictionary (2004) pg 413.

⁶⁷T. Quinlan and M. Wallis (n 21); The 2003 statistics, pg 147.

⁶⁸ L.L.B.J. Machobane (n 6).

⁶⁹ Laurence Juma (n 19).

⁷⁰ Nqosa Leuta Mahao, "Colonial Rule and Transformation of Chieftaincy in Southern Africa: A case Study on Lesotho" (2007) 21(2) *Speculum Juris* 212, pg 206.

BOOKS

Goredema⁷¹ is a feminist author. She describes African feminist theory as epistemology that has provided arguments, which expresses experience of women of Africa and Diaspora. She articulates that prior to colonization, black South African Women fought for positions of leadership and influence.⁷² The author did shortfall to address the reasons why African women did not contest for Chieftainship position prior and during colonization.

As elucidated by Patric Dancan,⁷³ it was Paramount Chief Lerotholi's idea to record succession in a male line in exclusion of women. That was the advent of primordial force behind patriarchy and primogeniture rule. He was not under tutelage or advice of anyone and his decisions were incontrovertible. The author did not critique illimitable egomaniacal powers of Lerotholi to that sickening degree.

Vemon Palmer and Sebastian Poulter⁷⁴ are opinionated that Constitution of Lesotho is outmoded. It was tailor-made over Westminster style as far as 1959. Since then, there is no noticeable abrogation. The Lesotho 1993 Constitution is almost identical to 1959 Constitution except addition of Fundamental Human Rights Chapter. The chapter does not properly fit in the current Constitution. It is contradictory or catawampus to the other sections which provides for women rights. The general section 18 seems to be not in rhythm with its subservient sub-section 4 (c). The two (2) authors are not suggestive as to how the inconsistency could be harmonized as to practicalize realization of women inheritance rights to chieftainship succession.

With the aid of statutes, international human rights instruments, journal articles and books, it logically follows that the rights of women to chieftainship succession is not ingrained in Basotho culture. There are some promising glimpses of change that are perpetuated and sensitized by the feminists.

⁷¹ A. Goredema, *African Feminism: The African Woman's Struggle on Identity*, (African Year Book of Rhetoric 2010) 34.

⁷² Ibid .

⁷³ Patrick Duncan, *Sotho Laws and Customs*, (Cape Town: Oxford University Press 1960) 14.

⁷⁴ Sebastian Poulter, "The Place of the Laws of Lerotholi in the Legal System of Lesotho" (1972) 71(283) African Affairs 144-162, at pg 150 <<https://doi.org/10.1093/oxfordjournals.afraf.a096224>> accessed 12 December 2023.

1.7 Hypothesis

The laws of laws of Lesotho, customary and common law are expressive as to who the successor to the chieftainship is. These set of laws are indicative that women lack credibility to succeed in their own right. It is therefore hypothesized that women are marginalized because of adherence to concepts such as primogeniture, patriarchy, sex and gender as the reasons behind subordinate status of women in Lesotho. Issues relating to women succession to the chieftainship have never been contested in Lesotho even in post-colonial regime until the Constitutional case of Senate Masupha.⁷⁵ It is in this case wherein Lesotho and their South African counter-parts legal scholars presented a challenge against justification of discrimination on women due to denunciation of antiquated culture.

1.8 Chapter Outline

This dissertation is divided into Six (6) chapters. Chapter One introduces the historical background of succession to the chieftainship in Lesotho from the pre-colonial, during the colonial and the post-colonial era to the present times. The paper trail unfolds how the pertinent legislations that have traversed into the recent laws addressing issues of succession to the chieftainship. The special interest is on whether women were perceived as potential incumbents to chieftaincy.

Chapter Two addresses issues of impediments of women rights in virtually all spheres of life because of patriarchy that is deeply rooted in socio-legal space in Lesotho Communities. It shows that Lesotho's current laws play a pivotal role in marginalizing women when it comes to power, inheritance and succession to the chieftainship. There is also a thin line between sex and gender. Gender equality is over-looked in issues relating to chieftainship. Sex is understood to be a male or female but there is variation in the biological attributes that comprises sex and how

⁷⁵*Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (n 35).

those inherent features are expressed.⁷⁶ A girl who is expressive of a male could not inherit chieftainship on the basis on her sex.

The other marginalized category is transgender women. This refers to gender identity which is opposite from the one assigned at birth. This is based on the physical appearance of the body.⁷⁷ Some transgender people usually opt for medical assistance to transit from one sex to another identity as transsexual (sex change operation). Transgender is also conceptualized as third gender.⁷⁸

It is also observed that women under the three (3); pre-colonial, during colonial and post-colonial the ideology pinned women subordination to male dominance. This triggered the evolution of African feminists to mitigate historical experiences on women domination. The chapter also delves into the concepts of Constitutional Morality and Transformative Constitutionalism as one of the concepts that have been implemented by a few countries to pave way for the recognition and realization of women's rights to equality and non-discrimination.

Chapter Three is primarily indicative on areas where customary law and the constitution are paradoxical in addressing issues of women succession to chieftainship. This chapter also highlights corresponding areas on the same subject. With the spirit of maintaining legal dualism, customary law discriminates against women in various aspects whereas the Constitution recognizes fundamental rights but cements discrimination against women under the auspice of preservation of custom under Section 18 (4) (c) of the *Constitution of Lesotho*. This state of affairs remains a permanent feature within 1993 Lesotho post-colonial Constitution, thus maintaining the status quo of 1966 colonial Constitution.

Chapter Four deals with the fact Lesotho have international relations. That is, despite the sovereignty of Lesotho, it is a member to various international instruments that create obligations

⁷⁶ Risa Aria Schnebly, "Gender Versus Biological Sex: What's the Difference?" (2023) 49(8) *Arizona State University School of Life Sciences* <<https://askabiologist.asu.edu/embryo-theses/gender-and-sex>> accessed 23 November 2023.

⁷⁷ "A glossary: Defining Transgender Terms" (2018) *American Psychological Association*, pg 32 <<https://www.apa.org/monitor/2018/09/ce-corner-glossary>> accessed 25 November 2023.

⁷⁸ S. Stryker & S. Whittle, *The Transgender Studies Reader*, (Routledge 1st ed n 2006). <<https://doi.org/10.4324/9780203955055>> accessed 24 November 2023.

on all member states. It addresses the fact that there is plethora of treaties and conventions that address equality between men and woman in all spheres of life. *Convention on Elimination of All forms discrimination against Woman* (CEDAW) is succinct. However, reservation clause is the focal point of criticism as it defeats the purpose of the convention.

Chapter Five's basis of discussion is the comparative analysis from other states and illustration of how Lesotho is lagging behind when it comes to the protection of rights of women to succession to the chieftainship as compared to its counterparts.

Chapter Six's basic structure and content of this chapter is the conclusion based on discoveries from the preceding chapters and recommendations of the dissertation.

Chapter Two

The Central Theories and Concepts Informing the Study of the Subordinate Status of Women in Lesotho

2.1 Introduction

Chapter two sets an examination on theories and concepts that have triggered discussion on the discrimination against women in Lesotho. The central argument is on discrimination and inequalities when it comes to women succession to the chieftainship. The chapter therefore delves on obstacles facing women's conceptualization rights in disagreement with dominant theories of patriarchy and primogeniture rule. The discussion also covers African feminist theory as it supports women conception of rights in Africa. Furthermore, the chapter explores how sex and gender facilitates women's subordination on chieftainship inheritance. Lastly, theories of Constitutional Morality and Transformative Constitutionalism will be involved as part of theoretical framework. The chapter delves into these concepts of Constitutional Morality and Transformative Constitutionalism to explore and show how Lesotho may want approach the interpretation of the Constitutional provisions with regard to them.

It is worth emphasis to asseverate that most African states are riddled with the prevalence of exceedingly high rate of gender inequalities and discrimination despite decorations of laws destined to curb the same, particularly, Lesotho. The *Constitution of Lesotho* protects fundamental human rights including freedom from discrimination⁷⁹ and guarantees equality before law.⁸⁰ However, the same Constitution is a barrier in accessing the same rights. It alienates rights with one hand and retrieves with another with a claw back clause.⁸¹ The main research question is to what extend is Lesotho's legal frame work on inheritance to chieftainship succession discriminatory against women and whether any such discrimination is justifiable. The chapter addresses the stated research question.

⁷⁹ *Constitution of Lesotho* (n 31).

⁸⁰ *Constitution of Lesotho*, (n 33).

⁸¹ Section 18 of the Constitution guarantees freedom from non-discrimination and retrieves the same right by inserting section 18 (4) (c) which in principle considers discrimination justifiable and not inconsistent with the Constitution when it is based on customary law in relation to indigenous people.

Lesotho gained independence on fourth October 1966.⁸² The *Lesotho Independence Act* of 1966 was the first promulgated Constitution which entered into force just before Independence Day.⁸³ The 1966 Constitution was suspended in 1970 and the new 1993 Constitution was adopted. It has not changed ever since. Both the 1966 and 1993 Constitutions recognized customary and common law. The contents of section 18 (4) (c) of 1993 Constitution were re-introduced in *ipissima verba* from the 1966 constitution. The writings were still on the wall as to whether the 1966 Constitution was still applicable in Lesotho even after the 1993 democratic elections in Lesotho. It can be argued that it was incumbent upon the newly elected government to repeal or amend some of the provisions which were hindrance to the equitable enjoyment of rights, in particular, the inheritance right of women to chieftainship succession.

The main concepts that prompted the investigation and analysis in women's deprivation of the outlined right are patriarchy and primogeniture as well as sex and gender. The examination therefore commences with patriarchy and primogeniture.

2.2 Patriarchy and Primogeniture

Historically, the concept of patriarchy has been understood to mean autocratic rule by the male head of a family, it has also been used to refer to social systems in which power is primarily held by adult men.⁸⁴ Green defines patriarchal as set of ideas, a patriarchal ideology that acts to explain and justify patriarchal dominance and attributes it to inherent natural differences between men and women, or other fixed social structures.⁸⁵

Primogeniture is the right, by law or custom, of the first born legitimate male child to inherit the parents' entire or main estate in preference to shared inheritance among all or some children, any

⁸² *United Kingdom Lesotho's Independence Act* of 1966, Section 1; provides that the colony of Basutoland shall cease to form part of Her Majesty's dominions and shall become independent Kingdom under the name of Lesotho.

⁸³ *Statutory Instruments* 1966, No. 1172 HMSO (Supplement to Lesotho gazette 4 of 4 November 1966).

⁸⁴ Hennessey Rosemary, "Patriarchy" (2012) Harrington, A; Marshall, B.L; Muller, H. (eds.) *Encyclopedia of Social Theory*. Routledge420.

⁸⁵ Green Fiona Joy, "Patriarchal Ideology of Motherhood" (2010) O'Railly, Adrea (ed), *Encyclopedia of Motherhood* 3, Thousand Oaks, Calif. SAGE Publications 969.

illegitimate child or any collateral relative.⁸⁶ In most contexts, it means the inheritance of the first-born son (agnatic primogeniture).⁸⁷

The concepts set out above have been at the realm of female domination perpetuated by male. They operate as the main impediments to the advancement and development of women.⁸⁸ They also program women to believe that they are incapable of contributing anything to their communities due to their inferior status to men.⁸⁹ The domination of men remains fixed despite protest by civil groups and non-governmental organizations which are spear-heading advancement of women's human rights for equal recognition on job appointments and promotion.⁹⁰ Both patriarchy and primogeniture seek to bar women from competing for lucrative positions in civil service despite possessing equivalent qualifications to men.⁹¹ Women are located in subordinate positions by both structural discrimination and ideologies that legitimize and rationalize that situation.⁹² It is the hierarchical organization of social institutions and social relationships that allow men to maintain positions of power, privilege and leadership roles in their societies.⁹³

Primitive authors like Filmer advocated for absolute monarchy at which males are at the fore front in matters relating to chieftainship succession. He argued on the patriarchal grounds that "Kings were fathers and fathers were Kings."⁹⁴ There was absolutely no mention of women. In Lesotho, the traditional government side is inherently gendered. It has gender differentiated effects that perpetuates patriarchy. For instance, composition of the Senate is predominately males. The *Constitution of Lesotho* is explicit that women have a right to political

⁸⁶ Oxford English Dictionary Online, *Primogeniture*, Oxford University Press <<http://www.oedview>> accessed 10 December 2023.

⁸⁷ Ibid.

⁸⁸ A. Sultana, "Patriarchy and Women's Subordination: A theoretical Analysis" (2012) 4 *Arts Faculty Journal* 1 <<https://doi.org/10.3329/afj.v4i0.12929>> accessed 25 November 2023.

⁸⁹ Sultana (n 88), pg 3.

⁹⁰ Sultana, pg 2.

⁹¹ Sultana. pg 4.

⁹² R. E. Dobash, & R. P Dobash, *Violence against Wives: A Case Against Patriarchy*, (Free Press 1979) 300.

⁹³ Dobash and Dobash (n 92). pg 300.

⁹⁴ Sir Robert Filmer B, *Patriarchy of the Natural Power of Kings*, (London: Richard Chiswell 1680) 70.

representation.⁹⁵ However there is a small fraction of women representatives in parliament of Lesotho who could effectively influence women perception of rights.

There is a slight increase of women representation in the current parliament from 23% of previous elections to 25% of the recent elections.⁹⁶ A total of thirteen (13) out of eighty (80) constituencies seats are occupied by women.⁹⁷ In the Proportional Representation (PR) seats, women were allocated just eighteen (18) out of forty (40).⁹⁸ Senate is legally reserved for principal chiefs who are male dominated.⁹⁹ In the current composition of Senate, there are eight (8) women out of thirty-three (33). On the basis of this statistics, it is apparent women are outnumbered in both Senate and General Assembly. Both legislative houses are inherently patriarchal.

The perception that patriarchy was traditionally analogous to paternal rule of the family, the same applied on the origin of leadership in the society.¹⁰⁰ This percipience psychologically instilled detrimental low self-esteem in women to contest leadership roles including succession to chieftainship. For that reason, men are pinned as heads of families, the leadership extent to social structures like chieftainship. Clearly, women were traditionally inconspicuous and incapable of being leaders in societies due to their self-effacing tendencies. The male dominance contributed to their subordinate status which is still ceaseless in the current democratic dispensation era.

During post missionary regime in Lesotho, religion seemed to be prevalent. The *Constitution of Lesotho* provides for freedom of religion.¹⁰¹ Christianity is popular in Lesotho compared to other religious groups. The Christian Council of Lesotho estimates ninety percent (90%) of population

⁹⁵ *Constitution of Lesotho* (n 1), Section 20 (1) (b); Right to participate in government through voting or standing for the election is enshrined in the Constitution without gender distinction.

⁹⁶ Gender Links for Equality and Justice, “Gender Equality in Politics Remains Elusive” (2 December 2022) <<https://genderlinks.org.za>> accessed 3 March 2024.

⁹⁷ Gender links (n 96).

⁹⁸ Gender links (n 96).

⁹⁹ *Constitution of Lesotho* (n 1), Section 55; ‘Composition of Senate.’

¹⁰⁰ Sir Robert Filmer B (n 85), pg 73.

¹⁰¹ *Constitution of Lesotho* (n 1), Section 13, Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

to be Christians.¹⁰² The government fully supports religion, which is observed on recognizing religious national holidays which includes Good Friday, Easter Monday, Ascension Day and Christmas Day. Biblical tradition also associates patriarchy with paternal power. The Bible pronounces men as great achievers. For instance, the Bible describes King Solomon as a wealthy, wise¹⁰³ and powerful man. He is also chronicled as a man of wisdom.¹⁰⁴ The Bible also refers God and Jesus as males.¹⁰⁵ It could therefore be argued that Bible is patriarchic. The other masculine names like Moses, Elisha, Joshua and other males were quoted as great leaders in the Bible. On the other hand, fewer names of women which appear in the Bible are Mary and Ethiopian Queen of Sheba.¹⁰⁶ Women do not earn good reputation in the Bible, they are notoriously narrated as cheap popularis such as betrayers¹⁰⁷ and prostitutes.¹⁰⁸ The logical inference that could be drawn from the content of the Bible is that it is a male drafted book. The Bible also implies that women are not original creatures; Eve was created from the rib of Adam.¹⁰⁹

It is against this background that men are regarded as leaders of women and not the other way around. This reflects linkage between patriarchy and primogeniture. Also, how women are perceived in societies with special interest to the succession to the chieftainship. The two concepts are seen as having instilled the perception that women are inferior to men and are incapable of holding chieftainship roles because of patriarchic influence. In Lesotho, women are still marginalized when it comes to chieftainship inheritance because of their gender or sex as well.

¹⁰² Bryant Hinckley, "Law and Religion in Lesotho" (2023) *International Center for Law and Religion Studies* <<https://www.iclrs.org/blurb/lesotho-country-info/>> accessed 14 March 2024.

¹⁰³ *King James Revised Standard Version Bible* (1971 edn), 1 Kings 3:5-14.

¹⁰⁴ *Ibid*, 1 Kings 4:29-34 and Proverbs 4: 7-9.

¹⁰⁵ *Ibid*, John 1:14 and 1 Timothy 2:5.

¹⁰⁶ *Good News Bible* (1976 edn), 1 Kings 10:1-12 and 2 Chronicles 9:1-13.

¹⁰⁷ *King James Revised Standard Version Bible* (n 94), Judges 16:1, where Delilah betrayed Samson.

¹⁰⁸ *Ibid*, Proverbs 23:27-28 and 1 Corinthians 7:1.

¹⁰⁹ *Ibid*, Genesis 2:21, where God caused Adam to fall into a deep sleep and removed one of his ribs to create a woman.

2.3 Sex and Gender

There is a thin line between sex and gender. Often times, the two terms are used interchangeably despite having divergent meanings. Sex and gender are used to denote the “biological” and “natural” differences between males and females. The distinction between the two became crucial in order to dispute arguments in favor for biological determinism.¹¹⁰

Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy.¹¹¹The Canadian Institutes of Health Research posit that “sex is usually categorized as female or male but there is variation in the biological attributes that comprise sex and how those attributes are expressed.”¹¹² It is the status that doctors assign at birth. However, with the current studies, it is insufficient to describe sex as biological determinism. It has become problematic to determine sex through biological characteristics due to naturally occurring differences between males and females. This is because of ascertainment of genetic makeup in humans, some humans are born with both genitalia as well as males born with XX chromosomal configuration and females born with XY chromosomal configuration.¹¹³ This therefore wiped off the perception that at all times X connotes female while Y symbolize a male. This epitomizes the assertion that sex is not easily determined feature.¹¹⁴

On the contrary, gender refers to the socially constructed roles, behaviors, expressions and identities of girls, women, boys, men, and gender diverse people.¹¹⁵ It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and

¹¹⁰ Mikkola Mari, “Feminist Perspectives on Sex and Gender” (2024) *The Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/archives/sum2024/entries/feminism-gender/>> accessed 14 March 2024.

¹¹¹ European Institute of Gender Equality Glossary and Thesaurus, “Sex and Gender” (2023) <<https://eige.europa.eu/publications-resources/thesaurus>> accessed 23 November 2023.

¹¹² Canadian Institutes of Health Research, “What is gender? What is sex?” (2023-05-08) <<https://cihr-irsc.gc.ca/e/48642.html>> accessed 23 November 2023.

¹¹³ Johnson and Reptar, “Sex and Gender: Beyond the Binaries” in JL Oliffe and L Greaves (eds.) pg 19; It is explained that if the egg receives another X chromosome from the sperm, the resulting individual is XX, forms ovaries, and is female; if the egg receives a Y chromosome from the sperm, the individual is XY, forms testes, and is male. The Y chromosome carries a gene that encodes a testis-determining factor.

¹¹⁴ Raja Halwani, “Sex and Sexuality” (2018) *Stanford Encyclopedia of Philosophy* <<https://philpapers.org/rec/HALSAS-12>> accessed 18 November 2023.

¹¹⁵ European Institute of Gender Equality- Glossary and Thesaurus (n 102).

resources in society.¹¹⁶ Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society.¹¹⁷ In institutions such as culture and custom, gender roles are assigned to specific sex groups.¹¹⁸

Gender is not necessarily perceived as biological sex. A person's gender may or may not correspond to their biological sex.¹¹⁹ Gender is about identity and how one feels about themselves. Unlike sex, gender is determined by roles, expectations and responsibilities. It is the consistent repetitiveness of actions that creates gendered identity.¹²⁰ The actions that are repeated and which subsequently influence gendered identity are usually not voluntarily chosen, but are intuitively enforced to the specific chosen group.¹²¹ It is possible that one could not be born a man but rather chooses to be a man.¹²² At birth, boys are not born with manhood, masculinity and paternal instinct naturally occurring, they are taught and enforced to them.¹²³ It is imperative to conclude that it is the societal behavior that creates gender not sex.

Culture also plays a pivotal role in gender determination. Cultural normative expectations are modeled and instilled into children from the young age, until they observe exceptions to their true being.¹²⁴ These cultural normative expectations are glued in the children's psyche through instrumentality of schooling and usage of language.¹²⁵ Some scholars argue that since gender

¹¹⁶ Ibid.

¹¹⁷ Patricia Yancey, "Gender as Social Institution" (2004) *Florida State University, the University of North Carolina Press* <<https://research.gate.org.com>> accessed 23 November 2023.

¹¹⁸ Joan L. Bottorff et al, 'The Gender (s) in the Room' (2012) 22 (4) *Qualitative Health Research* 435 <DOI:10.1177/1049732311430949> accessed 24 November 2023.

¹¹⁹ Gender Equality Glossary, Council of Europe (2016) <<https://coe.int/en/web/gender-matters/sex>> accessed 22 March 2024.

¹²⁰ Judith Barter, *Gender Trouble: Feminism and the Subversion of Identity*, (London: Routledge 2006) 179.

¹²¹ Ibid, pg 180.

¹²² S. De Beauvoir, *The Second Sex*, (London: Vintage Classics 2015) 330.

¹²³ Ibid, pg 343.

¹²⁴ Milton Diamond, "Sex and Gender: Same or Different?" (2000) *Feminism and Psychology* 46. <<https://doi.org/10.1177/0959353500010001007>> accessed 24 February 2024.

¹²⁵ Ibid, pg 47.

roles are taught and learned, they may similarly be unlearned for creation of more equal societies.¹²⁶

Gender and sex are at the center of discussion in arguments which underpin this dissertation. These concepts have been instrumental to justify women subordinate status in the public domain. The *Chieftainship Act* pronounces that the first male from the first or only house qualifies to succeed to the chieftainship role in exclusion of other categories of potential successors like first female.¹²⁷ Even in the instance where a girl was couched to be male or chooses to be male, she still does not qualify to inherit chieftainship according to the Act. As set out above, gender can be chosen not necessarily what the doctor assigned at birth.¹²⁸

As reiterated in chapter one, Moshoeshoe performed rituals which were meant to convert Senate's female gender to a male. He caused Senate to mount on horseback and gave her rhinoceros signifying power and declared her successor to Letsie I.¹²⁹ Unquestionably, that explicitly imply that Moshoeshoe had wisdom which other anachronistic leaders were short of. It seems he did fathom out the concept of gender within the context that it is comprehended in present times. However, customary law (that protect customs and culture or traditions)¹³⁰ and the *Constitution*¹³¹ of Lesotho deprive daughters' inheritance to the chieftainship on the basis of their gender.¹³² Article 2 of CEDAW mandates state parties to "embody the equality of men and women within their national Constitutions or other pertinent legislations and prohibit all discriminations against women." Section 26 (1) of the *Constitution of Lesotho* similarly advocates for adoption of policies aimed at promoting equality regardless of race, color ,sex ,

¹²⁶ Mikkola Mari (n 101).

¹²⁷ *Chieftainship Act* (n 25).

¹²⁸ S. De Beauvoir (n 113), pg 331.

¹²⁹ H. 'Nyane, "The Constitutional Rules of Succession to the Institution of Monarch in Lesotho" (2019) *PER / PELJ* (22) 6 <<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4461>> accessed 3 November 2024.

¹³⁰ *Chieftainship Act* (n 25).

¹³¹ *Constitution of Lesotho* (n 1), Section 18(4) (c).

¹³² There could still be an argument that Moshoeshoe understood patriarchy and still believed men are the only creatures to be appointed to leadership position. That is why he performed rituals to a female in an attempt to covert her gender to be a male. He did not just recommend her to succeed his father Letsie I as female. On the contrary, it would seem he favored first born child regardless of the sex or gender. The other perception could be that he did not undermine women capacity to perform leadership roles. If the same logic could have been applied to Senate Gabasheane case (Cont. No.5/2010), she would have been a Principal Chief of Thupa-Kubu.

language , religion and other status. It has been argued that this other status accommodates gender.¹³³

The inadequacies of Lesotho laws were demonstrated in the case of *Senate Gabasheane Masupha v Senior Resident Magistrate of Berea*.¹³⁴ In this case, the applicant was the only unmarried daughter of the late Principal Chief of Mamathe, Jorotane and Thupa-Kubu. After the chief's demise, he was succeeded by his widow. After the death of the widow, a family meeting was convened and appointed David Masupha to the office of the chief. He was born from the chief's subsequent marriage. The appointment was effected pursuant to the provisions of Section 10 (3) of the *Chieftainship Act*.¹³⁵ The section edify that if there is no male issue in the first marriage, male issue from the subsequent marriage is entitled to be appointed to the office of the chief. The applicant, being the only child from the first marriage, presented a constitutional challenge on the provisions of section 10 of the *Chieftainship Act* on the ground that they discriminated against her on the basis of her sex. She confronted the Act with constitutional provision of Equality¹³⁶ before the law and Freedom against discrimination.¹³⁷ The Court pronounced that discrimination is permitted under section 18 (4) (c) if it is meant for preservation of customary law. Clearly, the court deprived the applicant to inherit chieftainship because of her sex. The decision of this case is one of the factors that triggered the author's legal investigation on the extent in which the Constitution and customary positions protect women inheritance rights to chieftainship succession.

Gender and sex have been relied upon from time immemorial as justification for relegating women to subordinate status in the public sphere. In spite of this oppression, there is evidence that Basotho women are working tirelessly to mitigate effects of male domination. The obvious examples are their participation in Federation of Women Lawyers Lesotho (FIDA) which

¹³³ Southern Africa Litigation Centre, "Legal Gender Recognition in Lesotho" (05 November 2020) <<https://www.southernafricalitigationcentre.org>> accessed 12 January 2024, It articulates that the United Nations Human Rights Committee stated that the phrase 'other status' should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

¹³⁴ *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (n 35).

¹³⁵ *Chieftainship Act* (n 25).

¹³⁶ *Constitution of Lesotho* (n 33).

¹³⁷ *Constitution of Lesotho* (n 31).

influenced Inheritance Act Amendment of 1992 which gave women right to inherit land.¹³⁸ Their impact was also noticed in their involvement in advocating for enactment of Legal Capacity of Married Persons Act of 2006.¹³⁹ Some other women in Lesotho participated as amicus curiae in *Senate Masupha's*¹⁴⁰ case. This is interpreted as a feminist movement.

2.4 African Feminist Theory

There is no synonym to the word feminism in all African countries.¹⁴¹ African feminist theory is the aftermath of the European and the American influence.¹⁴² It therefore lacks its independent identity. This dissertation chapter seeks to expose inadequacies of African feminism theory paying special attention on the women exclusion from chieftainship inheritance and how the exclusion adversely affects their inheritance rights. The discrimination emanates from constitutional provision that protects customary law.¹⁴³ The African feminist theory is engaged to critique exclusion of African women from succeeding to chieftainship and that African women are lagging behind compared to their American and European counterparts.

According to Goredema, African feminism is a feminist epistemology and a form of rhetoric that has provided arguments, which validates experience of women of Africa and Diaspora.¹⁴⁴ She further referred to it as justice that aims to create discernible difference between women who were colonized and those who were deemed colonizers. Also, social movement that aims to raise a global awareness which sympathizes with African women's histories, present realities and future expectations are in her package for feminism distinctness.¹⁴⁵

¹³⁸ This publication was produced for review by the United States Agency for International Development. It was prepared by the Federation of Women Lawyers (FIDA-Lesotho) in partnership with Chemonics International Inc. and the Centre for Development and Population Activities (CEDPA), (March 2007), at page 5 <<http://usaid.gov.les.com>> accessed 24 December 2023.

¹³⁹ Ibid, pg 16; It is important to note that *Harmonization of Rights of Customary Widows with Legal Capacity of Married Persons Act* are both projects of Millennium Challenge Corporation. The participants are Women rights organizations such as FIDA and WILSA. That means women directly participated in the enactment process of those pieces of legislations.

¹⁴⁰ *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (n 35).

¹⁴¹ A. Goredema (n 69) pg 34.

¹⁴² Ibid pg 34.

¹⁴³ *Constitution of Lesotho* (n 31).

¹⁴⁴ Goredema (n 69), pg 35.

¹⁴⁵ Goredema (n 69). pg 35.

As history unfolds, European and American feminist social movements originated from female struggle for equality which was carried out through imperial march across the globe.¹⁴⁶ In both social and academic spheres, there is consensus that African feminist theory founded over European and American (western) definitions. This is because the western provided strategies for feminist disposition and movements.

In respect of African women feminism, the comprehension could be drawn on the temporal scale scoped by three (3) political eras. These are the pre-colonial, the colonial and the post-colonial era in Africa. It is worth noting that experiences from this shaping approach differ from one region to another or from one country to another within Africa.¹⁴⁷ In countries like Nigeria and South Africa, feminist history is hard to trace due to their multiple ethnic groups, usage of different language and divergent culture and traditions.¹⁴⁸

Prior to colonization, black South African movement was interpreted as feminism movement because a large number of black women fought for positions of leadership and influence.¹⁴⁹ Even during the liberation in apartheid struggle, black South African movement could still be classified as feminist gesticulation because women were seen carrying fire-arms fighting white oppressors. This notwithstanding, African women are shy to be labeled feminist; instead they prefer the term to be associated with the western women struggle's movements.¹⁵⁰ Bucha Echemta, the African feminist puts it as thus:

The African feminist theory is supported by all black women but it is predominately applauded by middle class educated black women who initiated strategies set up by middle class white women. The majority of those who are uneducated and poor subscribe to the idea that feminism is western design.¹⁵¹

¹⁴⁶ O. Oyewumi, *African Woman and Feminism: Reflecting on the Politics of Sisterhood* (Trenton New Jersey: Africa World Press Inc. 2003)

¹⁴⁷Goredema (n 135).

¹⁴⁸ S. Ardent, *The Dynamism of African Feminism: Defining and Classifying African Feminist Literatures* (Trenton New Jersey: (Africa World Press Inc. 2002) 35.

¹⁴⁹Goredema (n 69), pg 36.

¹⁵⁰ M. Kolawole, "The Dynamism of African Feminism: Defining and Classifying African Feminist Literatures" in S Arndt (eds), *The Dynamism of African Feminism: Defining and Classifying African Feminist Literatures*, (Trenton New Jersey: Africa World Press Inc. 2002) 31.

¹⁵¹ C. Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1988) 30 *Feminist Review* 67.

It is therefore safe to conclude that African feminist will continue to be behind times if black African women persist to completely reject western women feminist epistemology and rhetoric techniques to combat effects of male domination.

Unlike in other African countries, there are few gesticulations that could be perceived as feminist movements. The discourse that could be remembered was the feminist movement spearheaded by Lesotho women lawyers duly assisted by their South African counterparts as *amicus curiae* in the Constitutional case of *Senate Masupha*.¹⁵² As previously stated, in that case, the applicant challenged the provisions of *Chieftainship Act* which permits only male to succeed to the chieftainship.¹⁵³ The relief sought was to declare those provisions as unconstitutional due to their discriminatory effect. Also, that exclusion of women from chieftainship inheritance conflicts with international obligations and jurisprudence from comparable countries on equality and non-discrimination. However, the court was not convinced with the arguments presented, it pronounced that differentiation which is necessary to regulate the affairs of the community does not constitute discrimination.

The applicant and *amicus curiae* movement were intelligibly feminist women. Women observed a need to step up for liberation against male oppression in patriarchy dominated society. Unlike, in South Africa where there is a preponderance of ethnic groups with eleven (11) official languages and diverse culture and traditions, Lesotho is homogenous country in which its population shares similar cultural values. Religion and culture are major impediments against women liberation in male dominated environment in Lesotho.

Lesotho women had also stepped up for their human rights by instigating abolition of marital power through promulgation of *Legal Capacity of married Persons Act*¹⁵⁴. The purpose was to ensure that they influence decisions that affect their lives. This was realized through the assistance of Ministry of Gender and Youth, Sports and Recreation in conjunction with FIDA. They had also prompted the enactment of *Inheritance Act Amendment* of 1992 which chiefly gave women right to inherit land. These women sensitized human rights awareness to the public

¹⁵² *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (n 35).

¹⁵³ *Chieftainship Act* (n 25).

¹⁵⁴ *Legal Capacity of married Persons Act* (n 64).

through basic legal education in several districts.¹⁵⁵ FIDA observation was that Laws of Lesotho (Customary law and Common Law) were outpaced by the changes in Basotho Social lives.¹⁵⁶ These laws had lost practicability in many aspects and fell short of meeting the positive legal aspiration of the current society.¹⁵⁷

FIDA's advocacy and awareness for women rights could also be explicated as feminist movement because it changed primitive status of women to align with the current human rights perspective. The feminist theory's main objective is to transform women experiences,¹⁵⁸ criticize and reform the law on behalf of women.¹⁵⁹ The feminists perceive the current legal systems to be patriarchal because these laws often favor men over women.¹⁶⁰ However, despite the Amendments and statutory modifications¹⁶¹ to the *Laws of Lerotholi*, inheritance to the chieftainship is still left unshaken. There is still a long way to go for Basotho women to realize this right. This precept could be desisting with promptness if the Constitution is interpreted along the lines of Constitutional Morality and Transformative Constitutionalism. These values and their relevance are discussed below.

2.5 Constitutional Morality and Transformative Constitutionalism

Constitutional Morality doctrine originates from the work of an English Historian, George Grote, in his book titled 'A History of Greece.'¹⁶² According to Grote, Constitutional Morality is the upholding of the core values which the Constitution seeks to protect.¹⁶³ He highlighted exercise of the freedom of expression. He contended that citizens should feel at ease to criticize the

¹⁵⁵ FIDA Lesotho, "Educate, Advocate and Empower Women in Lesotho" <<https://fidalesotho.wordpress24.com>> accessed 24 December 2023.

¹⁵⁶ Ibid.

¹⁵⁷ *Laws of Lerotholi Amendment Bill* of 2012 <<https://laws.gov>> accessed 30 December 2023.

¹⁵⁸ C. Smart, *Preface Sociology of Law and Crime: Feminism and Power of Law*, (New York, Routledge 1989) 20.

¹⁵⁹ CA. Littleton, "Book Review: Feminist Jurisprudence: The Difference Method Makes" (1989) 41 *Stanford law Review* 751, pg 725.

¹⁶⁰ Mulela Margaret Munalula, "Women, Gender Discrimination and the law: Case and Materials" (2005) *University of Zambia Press for School of Law* (2005) 74.

¹⁶¹ There are several areas where the customary law is modified, such introduction of *Land Act*, 2010 which permits women to own land, *Legal Capacity of Married Women Act*, 2006 which removed marital in favor of equality, Administration of the Estate and Inheritance Act (2024), *Harmonization of the Rights of Customary widows with the Legal Capacity of Married Persons Act* (2022) and other pieces of legislations.

¹⁶² Constitutional Morality, How the Principle Evolved- <https://consitutionalmorality.org.com> accessed 1 June 2024

¹⁶³ George Grote, *History of Greece*, (Oxford University Press 2010) <<https://gutenberg.org>> accessed 30 May 2024.

government and public officials without anticipation of adverse consequences. The criticism is predicated on the notion that public officials must respect the Constitution.

The doctrine of Constitutional Morality has been notably ingrained in the *India Constitution*.¹⁶⁴ It was introduced by Dr. Bhim Rao Ambedkar.¹⁶⁵ He described the doctrine as the solution to inequality in the society. He stressed that the public must respect Constitutional Democracy as a form of governance and administration. The doctrine has been mentioned in Indian Supreme Court judgments including in *Kesavananda Bharati v State of Kerala*.¹⁶⁶ In that case, the Indian court restrained Parliament from amending basic structure of the Constitution. The court reiterated that the *Constitution of India* is amendable to the extent that the basic structure is not affected. The core values that it seeks to protect are not amendable. The case is also known as fundamental rights case because of the reasoning enshrined in the arguments, that fundamental rights are similarly basic fulcrum to the Constitution.

In Lesotho, the doctrine of the Constitutional Morality has not been spelled out by the courts. The core value of Constitutional basic structure was addressed in the case of *Lejone Puseletso v Speaker of National Assembly and Others*.¹⁶⁷ In that case, the Applicant challenged the Constitutionality of the 9th Amendment of Lesotho's Constitution. In the 9th Amendment, the parliament had exercised its Constitutional obligation envisaged under section 85 of the Constitution to amend section 83 of the Constitution to oust the Prime Minister's option to dissolve or prorogue the parliament. The purpose of the Amendment was to stabilize the Parliament and reduce the State expenditure by reducing the opportunities of Prime Ministers ousted by a vote of no confidence to recommend fresh elections to the King.¹⁶⁸ That was subsequent to the aftermath of three (3) snap elections from 2012, 2015 and 2017. The applicant's argument was that the Amendment undermines the basic structure of the Constitution. He contrived his arguments on two grounds, first that the Amendment impact democratic process in that role of electorates in choosing their desired government was

¹⁶⁴ [As on 26th November, 2021].

¹⁶⁵ Ishika B Prahakar, "An Analysis of Essentiality of Constitutional Morality in Contemporary India" (2023) *International Journal of Law and Social Sciences* <<https://reasearchgate.net.conatitutionalmorality>> accessed 1 June 2024.

¹⁶⁶ Writ Petition Civil, 135 1970- 1973).

¹⁶⁷ *Democratic Congress and 2 others v Lejone Puseletso and 6 others* C of A (CIV) No. 13/2024.

¹⁶⁸ *Lejone Puseletso* case (n 167) pg 6.

compromised. Secondly, that excluding the Prime Minister's power to advise the King to dissolve the Parliament, without public participation, undermines the principles of democracy as envisaged in the Constitution. Majority decision was incongruent with the Applicant and confirmed that 9th Amendment undermined basic structure of the Constitution of Lesotho.

However, at the High Court,¹⁶⁹Justice Moilola, in his dissenting judgment, pointed out that challenging the Constitutionality of Constitutional Amendments has been overtaken by the events. His direction was to the effect that the Amendment has already been applied to force former Prime Minister Thabane to resign. He relied on the judgment in the case of *Boloetse*,¹⁷⁰ where the Court of Appeal professed that once a Bill is adopted as Amendment, it becomes part of the supreme law and its Constitutionality can no longer be challenged. He quoted plethora of authorities that direct that there has to be clear procedure upon which Amendment could be carried out.¹⁷¹ Only the deviation from prescribed procedure should be challenged. According to Moilola J, the procedure prescribed under section 85(3)(b) of the Constitution was observed. The section asserts that the Bill shall not be submitted to the King for his assent unless the votes of not less than two-thirds in each House of Parliament have been casted.

The author is respectively opposed to pronouncement of K.E. Mosito P. to the extent that dissolution of Parliament by National Assembly's choice, without public participation, undermines the principles of democracy enshrined in the Constitution. The argument is predicated on the Schmitt comprehension of constituent power. Schmitt elucidates that people plebiscitary advice government and execute their mandate through their elected

¹⁶⁹ *Puseletso v Speaker of the National Assembly and Others* (Constitutional Case No. 0020/2023) [2024] LSHC 10.

¹⁷⁰ *Boloetse v Speaker of National Assembly and 7 Ors* C of A (CIV) 62/2023 [2023] LSCA, para 15.

¹⁷¹ Karabo Mohau, "Constitutionalism and Constitutional Amendment in Lesotho" (2014) 1 *Lesotho Law Journal* pg 32; The author reiterated that one of the substratum of the Constitutionalism is underpinned by structural, procedural and substantive limitations on the exercise of power by the government. He further emphasized that Supremacy of the Constitution and Bill of Rights should be amongst untouchables. Same sentiments were echoed by Professor Ronald Dixon and Laudau, 'Transitional Constitutionalism and Limited Doctrine of Unconstitutional Constitutional Amendments' 1 (2015) 13 (3) CON 60, the emphasis was that the doctrine of unconstitutional Constitutional Amendments must be limited amongst others by procedure. In the Lejone case, Justice Moilola indicated that the procedure of amending powers of the legislature followed as prescribed under section 85 (3) (b) of the Constitutions. The procedure demands two-thirds majority from each House of Parliament, which were successfully satisfied. However, at the time of writing this paper court of appeal has not pronounced itself yet but the author fancies dissenting judgment.

representatives.¹⁷² The constituent power remains with their delegated elected representatives. Professor Richard Albert echoed identical sentiments in his erudite book titled *Constitutional Amendments*.¹⁷³

It is against this backdrop that the author is opinionated that the Court of Appeal misconstrued the concept of public participation. The Constitutional interpretation of Sections 83 (4) and 87 (5) was outlandish. Section 88 of the Constitution empowers the Cabinet to execute its mandate guided by Principles of State Policy under Chapter III. Section 29 provides for opportunity to work. The Constitution also asserts that Lesotho shall adopt policies aimed at achieving high and stable level of employment. Section 29 (2) (c) focuses on achieving steady economic, social and cultural development and productive employment under favorable conditions. Section 34 advocates for economic opportunities. It could be argued that the Principles of State Policy could be realized through a thrifty and frugal expenditure of government budget, not by trifling splurge on frequent snap elections. It logically follows that sections 29 and 34 are values in the Constitution that requires attention. This proposition refurbishes linkage between government extravagance on snap elections and Constitutional Morality which seeks to uphold core values of the Constitution. The other Constitutional interpretation theory that will be discussed is Transformative Constitutionalism.

Transformative Constitutionalism on the other hand, has no single juridical definition. Albertyn and Goldblatt define Transformative Constitutionalism as the complete reconstruction of the state and the society, including redistribution of power and resources along egalitarian lines.¹⁷⁴ The achievement of transformation requires eradication of the systems of domination on the basis of sex and gender amongst others, to achieve equality.¹⁷⁵ Adherence to Transformative Constitutionalism will eradicate obsolete rubric interpretation of Sections 18 and 19 of the Constitution. The theory is the exponent of equality and subscribe to reforming the Constitution to be in line with principles of equality and non-discrimination.

¹⁷² Carl Schmitt, *Constituent Power*, (Cambridge University Press 2020) <<https://doi.org> accessed on 1 June 2024.

¹⁷³ Richard Albert, *Constitutional Amendments: Making, Breaking, Changing Constitutions*, (Oxford University Press 2019) pg 217.

¹⁷⁴ Albertyn and Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248, pg 249.

¹⁷⁵ *Ibid.* pg 249.

The endeavor to achieve Transformative Constitutionalism is visualized in South Africa more than in Lesotho. In the context of South Africa, Transformative Constitutionalism was popularized through transition from racial discrimination and gender inequality during the apartheid era to Constitutional Democracy post 1994 general elections.¹⁷⁶ According to Albertyn and Goldblat, Justice Langa's interpretation of Transformative Constitutionalism in line with judicial activists, requires the judges to change the law and bring it in consonance with the rights and values which the Constitution stand to protect.¹⁷⁷ The hindrance for Transformative Constitutionalism application in Lesotho is attributed to the fact that customary law of Lesotho is discriminatory on the basis of sex or gender. Discrimination and equality are aspects which attract intervention of Constitutional Transformation. The case of Senate Masupha is exemplary for substantiating stagnancy in Lesotho legal system. The applicant was denied right of succession to chieftainship on the basis of her sex.

On the contrary, Justice Steyn strongly refuted invasion of fundamental rights in the case of *Attorney General v Swissbrough Diamond Mine*.¹⁷⁸ In that case, Swissbrough Diamond Mines was a company registered under the laws of the Kingdom of Lesotho. In 1987, Swissbrough had submitted applications first for prospecting leases and then for five mining leases in five different regions of Lesotho: the Matsoku, Motete, Rampai, Orange and Patiseng. During Swissbrough's application in 1986 for mining leases, Lesotho and South Africa entered into a large-scale commercial joint venture being the Lesotho Highlands Water Project (LHWP). Subsequent to this, the Lesotho Highlands Development Authority (LHDA) was created to implement, operate and maintain the LHWP. Thereafter, the expropriation without compensation disputes between Lesotho and Swissbrough commenced.

In 1991, Lesotho's Commissioner of Mines issued notices to Swissbrough alleging that it had breached its obligations under the Mining Leases. The Commissioner thereafter ordered Swissbrough to remove their property from the mining areas and proceeded to cancel the mining licenses. Swissbrough obtained an order in 1995 from the High Court to set aside the cancellation of Mining Leases in 1991. Swissbrough obtained an order in 1995 from the High

¹⁷⁶ Section 9 (2) the Constitution of South Africa provides for equality before Law.

¹⁷⁷ Albertyn and Goldblatt (n 164), pg 252

¹⁷⁸ LAC 1995-99 at 214.

Court to set aside the cancellation of Mining Leases in 1991. On 20th March 1992, the Kingdom's Military Council passed the *Revocation of Specific Mining Leases Order*,¹⁷⁹ which revoked the mining leases. That was in contravention of the Applicant's human rights which enshrines in Human Rights Act.¹⁸⁰ The Act guarantees and safeguard against the following rights; under section 2 (g), it provides for the right to own property alone or in association, (j) the right to equality before law without discrimination and (k) the right to an effective remedy by the competent national court. The 1992 Order conflicted with the section 2 (g) and (j), it was therefore declared *null and void* by the High Court and the decision was confirmed by the Court of Appeal.

Justice Steyn in the Appeal Court held as follows:

No government, however powerful, be its military arsenal, however awesome its police power and, indeed even however popular be its actual or perceived support among the populace at any given time in its history, dare be permitted to invade such fundamental rights, however humble, however impotent, be the victim of such transgressions; that the courts will fiercely protect such a citizen against the invasion of his rights...¹⁸¹

On the strength of the above quote, it is imperative that the courts should have developed the jurisprudence and protected rights of the applicant. Lesotho is lagging behind in as far the protection of fundamental right to equality and freedom from non-discrimination is concerned. In the same spirit, the then acting South African Chief Langa, asserted as follows;

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.¹⁸²

Discrimination and inequality are critical areas at which Lesotho systems of laws require urgent Constitutional Transformation. The support which the women civil societies like WILSA and

¹⁷⁹ No. 7 of 1992.

¹⁸⁰ Human Rights Act 24 of 1983.

¹⁸¹ *Attorney General v Swissbourgh Diamond Mine* (Supra) pg 224.

¹⁸² *Bhe v Magistrate Khanyelitsha and Others* 1997 (3) SA 1012 para 91.

FIDA accompanied by part of Berea Community in court attracted Constitutional Transformation. The situation has not survived the test of time.

2.6 Analysis of Theoretical Framework

The renowned global theme is the protection of women against unjust inequalities and discrimination that relegates them to subordinate status to men. The idea is to place women in the same wave length with men on equality. The stumbling-block to achieve this splendid idea is the unwillingness of the states to adopt policies and laws oriented towards promotion women's rights. It is a common phenomenon in western dualist states to domesticate international human rights laws into national laws. In African states, particularly in Lesotho, there is an undertaking that international obligation to protect women's rights will be realized, but seems contrary is the case. The government has not fully domesticated equality laws.¹⁸³

In the domestic domain, the *Constitution of Lesotho* provides that every person in Lesotho is entitled to fundamental human rights regardless of their race, color, religion, language, sex, national or social origin and other status.¹⁸⁴ Section 18 provides for freedom from discrimination, sub-section 3 defines discrimination as affording different treatment to different persons attributable to their descriptions by sex or other status.¹⁸⁵ In unequivocal terms, the Constitution pronounces that 'no law shall make any provision that is discriminatory either itself or its effect' subject to the provisions of sub-sections (4) and (5).¹⁸⁶ The right to take part in public affairs directly or through freely chosen representatives is accorded by the Constitution.¹⁸⁷ Intriguingly, the Constitution approves discrimination against women in favor of applicability of customary law of Lesotho.¹⁸⁸ For the purposes of this dissertation, customary law relates to *Chieftainship Act*.¹⁸⁹

¹⁸³ Article 2 of CEDAW; *Article of African Charter on Human and Peoples Rights*, *Article of International Covenant Civil Political Rights*, Article 2 of *Maputo Convention* and so on.

¹⁸⁴ *Constitution of Lesotho* (n 1), Section 4 (1).

¹⁸⁵ *Constitution of Lesotho* (n1).

¹⁸⁶ *Constitution of Lesotho* (n1), Section 18 (1).

¹⁸⁷ *Constitution of Lesotho* (n1), Section 20 (1) a).

¹⁸⁸ *Constitution of Lesotho*, (n 31).

¹⁸⁹ *Chieftainship Act* (n 25).

Basotho social lives have already outpaced customary law. Discrimination and inequalities perpetuated against women under the guise of adhering to customary law is perceived as anachronistic and ridiculously old-fashioned. The study will therefore delve into the extent in which the Constitution protects customary law and how they together relegate women to subordinate status to men. It also encapsulates reliance on relevant international instruments which protect and promotes rights of women.

World states, including Lesotho, have undertaken an obligation to subscribe to international human rights treaties, convention, agreements and covenants which are specifically destined to promote and protect rights of women. The *African Charter on Human and Peoples' Rights* (ACHPR) advocates for equality before law.¹⁹⁰ The same sentiments are addressed in *Protocol to the ACHPR*.¹⁹¹ The *SADC Protocol on Gender and Development* also mandates state parties to repeal and amend laws that are discriminatory on the basis of gender and sex by the year 2015.¹⁹² It also obliges member states to ensure equal access to justice and protection before law.¹⁹³ Similarly, Article 2 of CEDAW¹⁹⁴ specifically addresses issues which are of interest for the intent and purpose of this dissertation. The article mandates state parties to abolish laws, regulations, customs and practices that constitute discrimination against women.¹⁹⁵

As set out above, Lesotho is not opposed to international law because the country has ratified the abovementioned international instruments. However, the government exercises its sovereignty¹⁹⁶ by ratifying international agreements which are in consonance with the Constitution¹⁹⁷ and other domestic legislations. All above tabulated international instruments conflict the provisions of Section 18 (4) (c) of the Lesotho Constitution. They all advocate for equality and non-discrimination which are expressly sanctioned by the Constitution to the extent of their inconsistency with the supreme law of the land. Constitutional Morality and Transformative

¹⁹⁰*African Charter on Human and Peoples' Rights*, 1981, Article 2.

¹⁹¹*Protocol on African Charter on Human and Peoples' Rights*, Article 2.

¹⁹²*SADC Protocol on Gender and Development*, 2008, Article 6 (1).

¹⁹³ *SADC Protocol* (n 192), Article 6 (2).

¹⁹⁴ 1979, Lesotho ratified the Convention in 1995.

¹⁹⁵ CEDAW, Article 2 (f).

¹⁹⁶ *Constitution of Lesotho* (n 1), Section 1; Lesotho shall be Sovereign democratic state.

¹⁹⁷ *Ibid*, Section 2; The Constitution is supreme and any law that is inconsistent with the Constitution shall be void to the extent of its inconsistency.

Constitutionalism are principles that seek to cure impediments which impede enjoyment of equality and non-discrimination right to chieftainship succession in Lesotho. Transformative Constitutionalism focuses on transforming society by eradicating systems that favored discrimination and inequalities, while Constitutional Morality is destined to interpret the Constitution along the core values of which it seeks to protect.

2.7 Conclusion

In conclusion, patriarchal ideologies shaped and scoped the law to be masculine favored. Culture and traditions have massively influenced inequality and discriminative effect of law against women when it comes to chieftainship succession. Even though discrimination against women in various aspects of law derives the validity from the constitution and customary law in Lesotho, feminist theory's impact has yielded fruitful reverberation in propelling change in some aspects of law as evident on changing position prior to promulgation of *Inheritance Act Amendment* of 1992 and *Legal Capacity of Married Persons Act* of 2006.

The feminist theory has a strong potential, if adequately utilized to change anguish of inequalities and discrimination against women in Lesotho. Also, interpretation of the Constitution with the lens of Constitutional Morality and Transformative Constitutionalism could propel repeal of section 18 (4) (c) of the *Constitution of Lesotho* because the section clearly undermines fundamental rights of equality and freedom from non-discrimination which are core values which the Constitution is committed to protect.

Lesotho is a member to a plethora of international instruments inclusive of treaties, conventions, agreements and covenants which are intended to combat discrimination and inequalities perpetuated against women and will be discussed in depth in chapter four (4). Despite this vital international persuasion, Lesotho still subscribes to discriminative customary law owing to preservation of Basotho culture and traditions, whereas the same Basotho have outpaced those inequitable legislations. There is possibility that plenitude bannock views of Basotho plead for equality and non-discrimination promulgation of laws except few that benefit from those unjust pieces of legislations.

In the next chapter (chapter 3), the investigation and discussion will predominately be customary law (*The laws of Lerotholi* and *Chieftainship Act*) and the *Constitution of Lesotho*. The focus will be to explore their relationship with women's subordinate status in Lesotho's society. The fulcrum argument of the author is that there is a direct link between the two (2) pieces of legislations in relegating Basotho women to subordinate status to men even though they seem to be paradoxical. The Constitution seems to be deeply protecting fundamental human rights whereas customary laws seem to be protecting Basotho traditions and customs. The two pieces are intertwined in women oppression, they are not divergent.

Chapter Three

Paradox of the Laws of Lerotholi and the Constitution on Primogeniture Rule and Equality on Women's Succession to Chieftainship in Lesotho.

3.1 Introduction

In Lesotho, succession to the office of the chief is governed by customary law.¹⁹⁸ The *Constitution of Lesotho* has a provision which regulates succession to the office of the King¹⁹⁹ but there is no specific section ear-marked for chieftaincy. Chieftainship is largely regulated by customary law and the *Chieftainship Act* which is largely the reiteration of the customary law, entirely based on the principle of primogeniture. Recently, the primogeniture principle is under fierce scrutiny when confronted against equality and democracy. The democratic credentials of chieftaincy are rooted in prescriptive norms of birth and patriarchy, the same is perceived to be contrary to modern democracy.²⁰⁰ Virtually, not only Lesotho but most African countries have fought against any attempt to dilute the institution of chieftainship to accommodate any post-colonial democratic modification.²⁰¹ The proponents of the institution of chieftaincy argue that the relevance and democratic disposition of that office should not be determined by alien norms but rather through experiences of the people. However, the place and relevance of chieftainship institution in contemporary society is under cursory look.

It is indicative from the above that the investigation is primarily on women's inability to succeed to the chieftainship. In this chapter, the examination is set on paradoxical application of customary law and the Constitution and how they are intertwined in relegation to women to subordinate position to men. This is in an attempt to respond to the third research question, being to what extent the overlap between customary law and the Constitution of Lesotho promotes discrimination against women when it comes to succession to the chieftainship. The chapter is divided into five parts. The first part delves into customary law involvement in denying women the rights to chieftainship inheritance. The second part focuses on the constitutional impediments

¹⁹⁸*Laws of Lerotholi*, Section 2; The Lerotholi Code was drafted into Statute in Section 10 of the *Chieftainship Act*.

¹⁹⁹*Constitution of Lesotho* (n 1), Section 45.

²⁰⁰Nqosa L. Mahao (n 70) pg 206..

²⁰¹ Nqosa Mahao (n 70), pg 208.

in relegating women to subordinate position. The third is on analysis of paradox of the customary law and the Constitution and their complicity in depriving women the rights of inheritance. The fourth part pinches holes in the ability of women to hold the same office in their own right through regency. The last part dwells on conclusion.

3.2 Customary Law of Lesotho

Custom connotes a widely unique traditional way of behaving by particular society as law.²⁰² For tradition to be recognized it should have passed down from generation to generation and it should be observed by majority of people.²⁰³ The traditions and customs are beliefs that have gradually developed over time and the only difference is the length of time observed.²⁰⁴

According to the general law of the country, Sesotho customary law is the country's indigenous law as it remains practiced by the people, and in so far as it is not repugnant to 'justice or morality' or inconsistent with legislation.²⁰⁵ In 1903, the British Resident Commissioner appointed a council which codified customary law in a fashion that will be best for Basotho in terms of laws that would govern them. The code is known as *Laws of Lerotholi*.²⁰⁶ Customary law derives from customs of Basotho which are written and codified in the *Laws of Lerotholi*. Research unveils that women were not part of public gatherings (*Pitso*) which suggested and codified customary law.²⁰⁷ Virtually, in most societies if not all, power revolves around men and serves their interest to the exclusion of women, thus relegating them to subordinate positions to men.²⁰⁸

²⁰² Gibbon Rangel, "Characteristics of Culture, Customs and Traditions" (2022) 5(5) *J. Anthropology Reports: Statute of the International Court of Justice*, (1945), Article 38(1) (b).

²⁰³ *Ibid*, pg 137.

²⁰⁴ E. K. Braybrooke, 'Custom as a Source of English Law' (1951) 1 *Michigan Law Review* 50, 71–94, at 77 <<https://doi.org/10.2307/1284899>> accessed 29 April 2024.

²⁰⁵ *Central and Local Courts Proclamation No. 62 of 1938*, Section 9.

²⁰⁶ Laurence Juma (n 19), pg 95.

²⁰⁷ Laurence Juma (n 19), pg 108.

²⁰⁸ Ndulo, Muna, "African Customary Law, Customs, and Women's Rights" (2011) *Cornell Law Faculty Publications* 187 <<http://scholarship.law.cornell.edu/facpub/187>> accessed 29 April 2024.

The principles of customary law are largely unwritten, informal and difficult to ascertain in most African countries.²⁰⁹ For instance, in the Kenyan case of *Kimane v Gikanga*,²¹⁰ the court pronounced that as a matter of necessity, customary law must be accurately and definitely established. Also, that it is within the wide judicial discretion as how it should be fared. The onus rests upon the party who relies on customary law provisions. As set out in this case, for customary law to be applicable, it has to be accurate and there should be a provision for courts' discretion to interpret customary law not only Acts of parliament.

3.3 Codification of Basotho Customary Law

The codification process of Basotho customary law played a large part towards oppression of women's rights, especially inheritance rights to chieftainship. In Lesotho, codification of customary law was effected around 1903 during the reign of Paramount Chief Lerotholi. At that time, there was no trace of any written customary law. Basotho customs and laws were passed down from successive generations through oral tradition and practices.²¹¹ The Basotho National Council (NC) which consisted of hundred members, twenty (20) members were principal chiefs, five (5) members were appointed by Resident Commissioner and the rest of other members were appointed by *Morena e Moholo* (Paramount Chief), taking into account a fair representation of Basotho society.²¹² The Resident Commissioner (Sir Marshal Clarke), who was a president of the NC, took part in the codification process.²¹³

It was at this point when the paramount chief Lerotholi took advantage to legitimize rules of succession which were shaken by King Moshoeshoe 1's preference to Senate. His aim was to stamp legitimacy of his succession to Letsie1.²¹⁴ The codification's very first version was on succession and it articulates as follows;

²⁰⁹ A.N. Allot, "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20(3) *Modern Law Review* 244-263 <<https://doi.org/10.1111/j.1468-2230.1957.tb00442.x>> accessed 30 April 2024.

²¹⁰ (1965) E.A.L.R 753.

²¹¹ B.A. Dube, 'The Law and Legal Research in Lesotho' (2008) *Global Law and Justice* <nyulawglobal.org/glogalex/lesotho.html> accessed 12 December 2023.

²¹² Sebastian Poulter (n 72) pg 150.

²¹³ Laurence Juma (n 69), pg 96; Nqosa L. Mahao (n 70); James E. Brdill and Cobbe, 'Lesotho: Dilemmas of Dependence in Southern Africa' (1985) 22.

²¹⁴ Nyane, Hoolo, "The Constitutional Rules of Succession to the Institution of Monarch in Lesotho" (2019) 22 *Potchefstroom Electronic Law Journal* <<https://ssrn.com/abstract=3421322>> accessed 6 January 2024.

...the succession to the chieftainship shall be by right of birth; that is, the first-born male child of the first or only wife married, if the first wife has no male issue then the first born male child of the next wife married in succession shall be the chief; provided that if a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses.²¹⁵

It was Lerotholi's influence to record custom of descent through a male line to the exclusion of women.²¹⁶ Lerotholi was the elder son from the second wife of Letsie I. Letsie I did not have male issue from the first house. The personal circumstances that surrounded him at that played a role influencing him to commence the code with the above stated section. He portrayed exactly what happened with his succession. It can be argued that Lerotholi is the pioneer of female marginalization when it comes to chieftainship inheritance. With this advent, his first son Letsie II succeeded him through primogeniture rule. Until the present date, there is no dispute that succession to the chieftainship is regulated by Basotho customary law and traditions pioneered by Lerotholi and codified as *Laws of Lerotholi*. The courts of Lesotho apply these laws when presiding over disputes relating to succession to the chieftainship.²¹⁷

Apart from succession to the chieftainship, the code also comprised of the supremacy of Paramount Chief (*Morena e Moholo*), procedure of appeals from lower chiefs as well as appeals from the Paramount chief to Resident Commissioner. The code also included property rights, land allocation, family law (seduction and abduction of unmarried women), responsibilities of heir (*Mojalefa*), rights of widows and children. There was also provision that covered compensation to physical injuries, the use of firearms and commissioner's courts (Assistant and Resident commissioners). The code contained twenty-one (21) laws, which were later reduced to eighteen (18).

Notwithstanding the above, the president of the council (Resident Commissioner) expressly pronounced that the council was not a legislative meeting, it was not empowered to make laws and that authority rests on the High Commissioner.²¹⁸ The council's role was merely to consult

²¹⁵*Laws of Lerotholi*, 1903, Part 1, Section 1.

²¹⁶ Patrick Duncan (n 71) pg 14.

²¹⁷*Joel Mots'oene v Sir Edward Harding* 1954 HCTLR; This is the land mark case which addressed this issue under consideration.

²¹⁸ Philip Edmond Wodehouse was the Governor of the Cape Colony and British High Commissioner for Southern African from 1861 until his death in 25 October 1887, according to Lesotho Archives of 30-01-2016.

and advice the Commissioner of the opinions and desires of the people.²¹⁹ However, the code seemed to have reflected interests of male chiefs who were in attendance and not necessarily the will and desires of the general public. Since women were totally not represented, it is assumed that the situation would have been otherwise had they been represented in the council. Sturrock JC observed that council members had one thing in their mind when suggesting what should constitute law, their own rights and positions.²²⁰

It is safe to conclude that patriarchal nature of the *Laws of Lerotholi* was drafted to serve the will and desires of Paramount Chief Lerotholi and other Chiefs who were all males. The Resident Commissioner was vested with powers to either accept or disapprove the draft of laws from the NC. The impression was they were *sui generis* laws which were not legislated through democratic principle of voting.²²¹ The procedure adopted was that members of the Council suggested customs which were to be included in the code, they were subject to scrutiny by the Paramount Chief Lerotholi. It was within his prerogatives to either validate or negate any suggestions according to his interests.

With the anguish experiences of Lerotholi, he would definitely opt against relinquishing power to the women. His grandfather Moshoeshoe 1 intelligibly pronounced Senate as successor to her father (Letsie 1), he completely ignored Chief Lerotholi. That could have psychologically impacted Lerotholi to completely ignore women in his administration. Other than that, his uncle Jonathan and his two (2) half-brothers (Masupha and Maema) attempted to overthrow him from the Paramountcy.²²² This state of affairs was enough to surreptitiously orchestrate the code which reflects his personal experiences. The rights of women had no place in the code solely because they were not part of codification process. The Paramount Chief did not encompass women representation in the NC.

²¹⁹ Report of the proceedings of the Basutoland National Council, 1908, Lesotho (Government Archives).

²²⁰ Resident Commissioner JC Sturrock, quoted by Edgar Prophets with Honous (1985) at page 5.

²²¹ Ngosa Mahao (n 181), pg 212; Lawrence Juma (n 194), pg 107; *Pitso* (public assembly) were conducted in the manner that invites all counselors' opinions in the spirit of freedom of speech and openness. Subsequently, the Paramount chief will voice his opinion which will be adopted as position of *Pitso*. No voting or checks and balances to contest the chief. *Pitso* were to regularize chief's opinion.

²²² Sebastian Poulter (n 72) pg 16.

The other aspect of utmost importance is the purpose of codification of customary law. As asserted above, customary law is largely unwritten in most African countries.²²³ It was difficult for colonial authorities to detect customs and traditions which constitute law. Thus, they demanded to be presented with a definite formal source of customary law to clear uncertainties of what is and what is not law.²²⁴ In the similar vein, Chanock argues that the purpose of reducing customs and traditions to a code was to serve the interests of British colonists and Basotho elites men who were male chiefs.²²⁵

As reiterated by Sturrock and Chanock above, codification process was not in the best interests of the Basotho people but it was meant to serve desires of the chiefs and colonists who participated in the codification process. On the other hand, it is argued that British colonists viewed customary law through lenses of imported law. Lawrence Juma indicate that they supported the codification and restatement projects which were meant to distil customary rules and make them applicable to judicial mainstream system, but the exercise was in vain.²²⁶ The percolation failed because Lerotholi Code is still the main source of customary to date.²²⁷

The ever-unchanging rules of customary law hindered the development in African Countries along the ethos of democracy and human rights.²²⁸ The inheritance rights of women to the chieftainship still do not form part of the law in Lesotho. Despite several piecemeal legislative actions and transformative judicial pronouncements by activists' judges, women's succession rights to chieftainship are still in abeyance.

Furthermore, Makoa opines that codification of customary law was the British colonist's strategy to debilitate African customs and traditions and make them vulnerable to imported law through

²²³ A. N. Allot (n 190), pg 20.

²²⁴Diala, Anthony, "The Concept of Living Customary Law: A Critique" (2017) 49(2) *Journal of Legal Pluralism and Unofficial Law* 143-165 <<http://dx.doi.org/10.2139/ssrn.2992007>> accessed 7 April 2024.

²²⁵ M. Chanock, 'Neither Customary nor Legal: African Customary Law in an era of Family Law Reform' (1989)3(1) *International Journal of Law, Policy and the Family* 72-88, at 76 <<https://doi.org/10.1093/lawfam/3.1.72>> accessed 8 April 2024.

²²⁶ Laurence Juma (n 19), pg 94; T.W. Bennet & T. Vermeulen, 'Codification of Customary Law' (1980) 24(2) *Journal of African Law* 24: 206-19 <<http://www.jstor.org/stable/744883>> accessed 25 February 2024. ; William Twining, "The Restatement of African Customary Law: A Comment" (1963) *Modern Law Journal* 221 at 228.

²²⁷ Q. Letsika, "The Place of Sesotho Customary law Marriage within Modern Lesotho Legal System" (2005) *Botswana Law Journal* 73 at 74.

²²⁸Laurence Juma (n 19), at 96.

the process of reinventing customary law.²²⁹ This was evident in their exclusion of chiefs from formal administrative and legal structures of the government. They denied them the political power.²³⁰ The colonists were the incumbents of the actual political power and restricted chiefs to chieftainship roles only. The system of governance was still patriarchal. Women were denied lucrative positions in formal British administration and roles to assume in chieftaincy under customary law.

Inevitably, the remark of Resident commissioner above unfolds, the NC did not have legislative powers and was not authorized to make binding laws. The code was merely guidelines for consultative and advisory purposes.²³¹ This quote simply ignores the enforcement mechanisms and recognition of the *Laws of Lerotholi* simply because they were not crafted by legislators. For the same reason, Lansdown J shrugs off the provisions of the Lerotholi Code in the famous case of *Bereng Griffith v 'Mantšebo Seeiso Griffith* ²³²(regency case). In this case, Bereng expostulated that Basotho customs barricaded 'Mantšebo from succeeding to chieftainship as a regent because she was a woman. She was therefore incompetent to succeed her husband.²³³ Had the court applied customary law rules as circumscribed in Part 1 of the *Laws of Lerotholi*, it would have denied 'Mantšebo the right to succeed.

Interestingly, Section 3 (1) of the *Laws of Lerotholi*, version of 1959 postulates that when the Chief dies leaving a minor son, either a widow or younger brother could succeed for duration of minority of the rightful heir. It was not specific as to whom procedurally, was to be considered before the other. The court pronounced that contrary practice has crept in and is in force; it is difficult to follow Part 1 of the *Laws of Lerotholi* with the understanding that it has the force of law.²³⁴ Poulter also shared the same sentiments; he asserted that Lerotholi Code was not a

²²⁹ F. K. Makoa, "Electoral Reform and Political Stability in Lesotho" (2004) 4(2) *African Journal of Conflict Resolution* 79-96 <<https://doi.org/10.4314/ajcr.v4i2.39379>> accessed 1 May 2024.

²³⁰ Ibid. pg 82.

²³¹ Report of Basutoland and National Council, 1908 (Lesotho Government Archives).

²³² 1926-53 HCTLR 50.

²³³ P. Duncan, *Sotho Laws and Customs*, (Cape Town: Oxford University Press 1960) pg 4; *Laws of Lerotholi* 1903, Section 1.

²³⁴ Bereng Griffiths (Supra) pg 60.

reflection of a valid Basotho custom and that it was not true legislation as Resident Commissioner did not confer legislative powers on the NC.²³⁵

As set out in instances above, invariably Lansdown J, Resident Commissioner and Poulter did shoot down the recognition of the Lerotholi Code under the auspice that it was drafted by people who lacked legislative powers. One would have a thought that is the squelch to Lerotholi Code but it remained resilient notwithstanding. It is imperative to also note that Lansdown J, as repository of protection and preservation of Human Rights, failed to address issues of equality and discrimination of women when it comes to chieftainship inheritance. He emphasized on none-recognition of the code. The positivity of his decision was disregard to primogeniture and patriarchic prevalence in chieftainship inheritance, snubbing women who are equally capable to do what a man could do in the same office.

Subsequent to the decision in regency case, protracted discourse ensued until 1950s.²³⁶ The reverberation infuriated the Council, in 1951; the consensus was to re-codify the entire customary law and have it re-enacted as part of colonial Proclamations.²³⁷ The Resident Commissioner refused to endorse the suggestion; it was an obvious truth that he did not prefer customary law to be part of the Proclamations. It was not in the interest of colonists to accord customary law same status as imported laws as they had completely divergent values. Even at this point, the commissioner did not denounce customary law on the ground of none observance of equality rights of women; it predominantly reflected power egocentric favoring NC members.

Be it as it may, the point of interest would be the position of Lesotho customary law post-independence, after both the 1966 and 1993 Constitutions. The distinctive feature will be on how women's inheritance rights to succeed to chieftainship fared after emancipation from colonial self-obsessed administration. Perplexingly, the 1993 Constitution does not make mention of the *Laws of Lerotholi* despite being the cornerstone of Lesotho customary law. It only makes reference to customary law.²³⁸

²³⁵Sebastian Poulter (n 72), pg 78.

²³⁶ Lawrence Juma (n 19), pg 120.

²³⁷ Machobane L. B. B. J. (n 18) pg 199.

²³⁸*Constitution of Lesotho* (n 1), Section 18 (4) (C), 45 (1), 154.

3.4 The Constitution of Lesotho

The Constitutional exploration is spearheading debates on how the 1993 Constitution fared towards addressing issues of women's inheritance rights to succession to the chieftainship in the Mountain Kingdom. The constitutional perception is traced from pre-independence and post-independence Constitutions. The expectation from post-independence Constitutions was to reflect of democratic dispensation era (constitutional democracy); transformative and developmental content aspirations in the Constitution. It could be argued that there is no huge or clearly noticeable difference in terms of content between these Constitutions.

Before independence, the cooperation of Paramount Chief Moshoeshoe (*Morena e Moholo*) and the British was sketched in *Napier Treaty*.²³⁹ Between 1865 and 1866, there was a fierce war between Moshoeshoe 1 and the Boers which culminated into Lesotho ceding much of its land to the Boers, which is now Free State Province in the Republic of South Africa. Subsequent to this usurpation, Moshoeshoe 1 was quick to put his people under British protectorate through the *Annexation Proclamation*.²⁴⁰ Lesotho was under British protectorate until 1966 when it had its first democratic elections. The Constitution was drafted pursuant to a British Royal Decree in January 1965.²⁴¹ After the elections which were won by Basotho National Party (BNP), Lesotho gained independence on the 4th of October 1966 and immediately thereafter, adopted a new 1966 Constitution heralded by *Independence Order*²⁴² passed by Lesotho parliament.²⁴³

The 1966 Constitution was the mirror face of British 1965 Constitution with the only addition of fundamental human rights and freedoms (bill of rights). Surprisingly, most laws which have been passed by Colony of the Cape of Good Hope were still part of 1966 *Constitution of Lesotho*. Even though some laws from Cape were gradually phased out, some were still cornerstones in Lesotho's Constitution.²⁴⁴

²³⁹ 1843; Tefetso Mothibe and Maria Ntabeni (n 12).

²⁴⁰ 14 of 1968; Proclamation Rule 14/1986 (South Africa).

²⁴¹ M. Khaketla, *Lesotho 1970: An African coup under the microscope*, (Berkeley, University of California Press 1972) pg vii.

²⁴² 1966

²⁴³ W. C. M. Maqutu, *Contemporary Constitutional History of Lesotho*, (Mazenod Printing Institute 1990) pg 17.

²⁴⁴ Vernon Palmer & Sebastian Poulter, *The legal system of Lesotho* (Cambridge University Press 1972) 42 <<https://www.cambridge.org>> accessed 19 January 2024.

Following the 1966 general elections, the second democratic elections were held in 1970 and the Basotho Congress Party (BCP) came out victorious. The Prime Minister Leabua Jonathan did not accept the results. He declared state of emergency on account that the elections were not free and fair. He pronounced that his followers were subjected to torture at the voting stations. As a result, even though the elections results were not attributable to inability to vote nor ascribable to torture,²⁴⁵ he suspended the Constitution through the *Constitutional Suspension Order*.²⁴⁶ Subsequent to the suspension, Prime Minister established the Council of Ministers who were Ex-ministers of the former cabinet to draft new laws, the cabinet assumed legislative status.²⁴⁷ On the 12 March 1973, the Prime Minister Jonathan established Interim National Assembly (INA). The state of emergency was lifted on 24 July 1973.²⁴⁸ Several laws were passed by INA including *Parliament Act*.²⁴⁹

There was hope that INA will set election date in its session in 1983 but it came to an end without mentioning elections.²⁵⁰ According to Maope, INA convened a session again in 1984 with the keenness by the opposition, that elections date will be set for the supposed 1985 elections but there was still no discussion about the elections taking place. Instead, the Prime Minister thanked members for their loyal service from 1973.²⁵¹ King Moshoeshoe II dissolved INA on the 1st of January 1985 and called for elections.²⁵² The elections were held in August to September 1985, Basotho National Party won sixty (60) of sixty (60) constituencies.²⁵³ The opposition political parties boycotted the elections.²⁵⁴

²⁴⁵Maqutu (n 223), pg 44.

²⁴⁶ No. 2 of 1970.

²⁴⁷Mothibe, Tefetso, "Lesotho: The Rise and Fall of Military-Monarchy Power-Sharing: 1986-1990" (1990) 20(4) *Africa Insight* 242-246, at pg 243 <<https://www.academia.edu/77342076>> accessed 24 January 2024.

²⁴⁸ W. J. A. Macartney, 'The Lesotho General Elections of 1970' (2007) 8(4) *Government and Opposition*:473-494 at pg 482 <[10.1111/j.1477-7053.1973.tb00872.x](https://doi.org/10.1111/j.1477-7053.1973.tb00872.x)> accessed 8 January 2024.

²⁴⁹ 1983; Maqutu (n 223), pg 14.

²⁵⁰ K. A. Maope, "Internal Self Determination in Lesotho in the Eighties" (1984) 16 *Zambia Law Journal*: 1-20 <<https://Heinonline.org.com>> accessed 20 March 2024.

²⁵¹ Ibid pg 18.

²⁵² Lesotho (1966-Present) <<https://uca.edu/poiliticalscience>> accessed 4 May 2024.

²⁵³ K. A. Maope (n 230), pg 15.

²⁵⁴ K. A. Maope pg 15.

In the year 1986, Royal Lesotho Defense Force (RLDF) under the command of General Metsing Lekhanya launched a *coup d'état* against Leabuoja Jonathan's government.²⁵⁵ The military regime did not hesitate to repeal *Parliament Act*²⁵⁶ and introduced the *Lesotho Order*²⁵⁷ which operated in place of the Constitution. Colonel Phits'ane Ramaema, together with the military group of the 'Captain' ranks similarly toppled Lekhanya in 1991 and immediately repealed the 1986 Order and put in place *Lesotho Order*²⁵⁸ which operated as their power instrument.²⁵⁹ During their tenure in the office, Colonel Ramaema and the colleagues promised to restore civilian rule. It was in 1992 when preparations for the elections and adoption of the new Constitution (1993) were successfully effected.²⁶⁰

The content of the 1966 Constitution and other material aspects were re-introduced in *ipissima verba* in the 1993 Constitution. Supremacy of the Constitution was notable in both Constitutions; however, in both military regimes (1986 and 1991), constitutional supremacy did not see the light. When meticulously observing power change from the 1966 Constitution until the 1993 Constitution, the interchange of governments was purely megalomania antics. The recognizable feature in all the Constitutions is failure to incorporate international human rights which specifically address rights of women, in particular inheritance rights to chieftainship succession. It could be argued that the *Constitution of Lesotho* is outmoded. On the practical perspective, customs have gradually changed. Some customs are no longer in force.²⁶¹ Basotho ways of leaving have outpaced some of the provisions of non-discrimination in the Constitution.²⁶² The section is no longer addressing current women's rights. The synopsis of inequality and discrimination of women still exists within our democratic Constitution.

²⁵⁵ K A Maope pg 19.

²⁵⁶ 1983.

²⁵⁷ 2 of 1986.

²⁵⁸ No. 2 of 1990.

²⁵⁹ J. A. Kalley, E. Schoeman & L. E. Andor, *Southern African Political History: A Chronology of Key Political Events from Independence to Mid-1997*, (Westport, Conn.: Greenwood Press 1999) 149.

²⁶⁰ I. Shale, "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy" (2019) 19 *African Human Rights Law Journal*: 193-218 at 207 <<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a10>> accessed 2 April 2024.

²⁶¹ *Bereng Griffith v Mantšebo Seeiso Griffith* 1926-53 HCTLR 50, pg 60.

²⁶² *Constitution of Lesotho* (n 31).

From the inception of the first 1966 Constitution until the current, heads of governments have been predominately males. In the similar fashion, the fraction of women in Senate is extremely low compared to male counterparts. This is countenanced to incapacities of the Constitution²⁶³ and *Chieftainship Act*.²⁶⁴ It is a sad truth that women will continue to be subordinate to men because of their insufficient participation in matters affecting their lives. This assertion substantiates the contention that the Constitution does not express genuine intentions to assist women to realize their rights of equality and none-discrimination as enshrined in the very Constitution.²⁶⁵

3.4.1 Discussion of the Bill of Rights on Women's Rights

The first amendment of Lesotho's Constitution in the post-colonial era introduced Chapter II with the title 'Fundamental Human Rights and Freedoms.' The chapter consists of sections 4 to section 24 in the Constitution.²⁶⁶ This Bill of Rights is eidetic image of 1966 Lesotho Constitution. Section 2 is a supremacy clause and, it asserts that "the Constitution is the supreme law of the land and any law that is inconsistent with the Constitution, shall be void to the extent of its inconsistency."²⁶⁷

It is worth noting to highlight that the Bill of Rights was the first development in the British 1965 Constitution. In as much as the move to accommodate the Bill of Rights is commendable, sections conflicting with the fundamental human rights were not re-visited either by repeal or amendment to ensure compatibility with the rest of the Constitutional provisions. Failure to safeguard against that anomaly has brought irreconcilable contradictions in the Constitution. The rights of women are compromised in honor of customary law. In particular, women's inheritance rights to chieftainship.

²⁶³ There is no provision in the Constitution which addresses succession to the chieftainship issue. This is because it was never developed post-colonial patriarchic influence. The constitution does not make mention of the *Laws of Lerotholi* and *Chieftainship Act*, yet the Constitution came to life after both pieces of legislations. It also failed to deal with the inheritance rights of women chieftainship succession despite the feminist movements like the one visualized in the case of *Senate Masupha* (n 35).

²⁶⁴ *Chieftainship Act* (n 35); Unmarried women cannot succeed to Chieftainship.

²⁶⁵ *Constitution of Lesotho* (n 1), Section 18 on freedom from non-discrimination and Section 19 on equality before the law.

²⁶⁶ *Constitution of Lesotho* (n1), Sections 4 to 24.

²⁶⁷ *Constitution of Lesotho* (n1), Section 2.

The right which is the fulcrum of this dissertation is not in the Constitution, the Constitution only addresses succession to Kingship and chieftainship is totally ignored.²⁶⁸ This is the case despite the fact that the rules governing succession to the office of the King are virtually similar to rules governing succession to the chieftainship. The content of section 45 of the Constitution is in unison with section 10 of *Chieftainship Act*²⁶⁹ and the provisions of the *Laws of Lerotholi*.²⁷⁰ The customary law rule is the regulatory body in both instances.²⁷¹ The omission of chieftainship in the Constitution is misconstrued. Customary law discriminates against women in the context of succession to the office of the King and Chiefs respectively. There are no concrete substantive reasons other than to avoid conflict with customary law.

The *Constitution of Lesotho* postulates that Lesotho shall be a sovereign and democratic state.²⁷² Being that as it may, there are other sections within the same Constitution that could be characterized as serving the purpose for which they were not intended. Section 19 provides for equality before law and equal protection of the law. The basis of this section is to provide equal treatment to both men and women. However, when it comes to succession to chieftainship, equality is compromised. Similarly, section 18 of the same Constitution prohibits discriminatory laws either in themselves law or effect.²⁷³ The essence of the section is to eradicate discrimination, including discrimination on the basis of sex or gender. Contrary to this precept, the Constitution retrieves the same right with a claw-back clause with section 18 (4) (c). The section instructs that freedom from discrimination could be justified if is consistent with customary law.

The above principles were discussed in the case of *Senate Masupha v Senior Resident Magistrate for the subordinate court of Berea*.²⁷⁴ In casu, the High Court sitting as Constitutional Court and Court of Appeal shared the same sentiments that a female could not succeed to chieftainship

²⁶⁸ Constitution of Lesotho (n1), Section 45.

²⁶⁹ *Chieftainship Act* (n 25).

²⁷⁰ *Laws of Lerotholi*, Section 1 of 1903 version and section 3 (1) of 1959 version.

²⁷¹ *Laws of Lerotholi* (n49), Section 2; *Chieftainship Act* (n25), Section 10.

²⁷² *Constitution of Lesotho* (n 1), Section 1 (1); *Concise Oxford English Dictionary: Democracy*, (Oxford University Press 2006 11th edn); 'Democracy is a system of government by the whole population or by all eligible members of a state, typically through elected representatives.'

²⁷³ *Constitution of Lesotho* (n 31).

²⁷⁴ *Senate Masupha v Senior Resident Magistrate for the subordinate court of Berea* (n 35).

owing to customary law. The principles of equality before law and freedom from discrimination were over-shadowed by customary law. On the strength of this decision, it could be argued that Lesotho's Constitution is patriarchal. Women are still at tail end even after 57 years of independence. The Constitution still reflects perception of Chief Leretholi on succession to the chieftainship despite renowned learning of constitutional democracy theories.

3.5 The Paradox or Conflict of Laws between the Customary Law and the Constitution on the Rights of Women to Chieftainship Inheritance

Lesotho does not have a single instrument encompassing all domestic laws. There are several sources of laws which include amongst others; the Constitution, statutes, judicial precedents, common law, authoritative texts and customary law. For the purposes of this dissertation, the focal point is customary law and the Constitution. Customary law operates side by side with the Constitution. The Constitution is the product of the British colonists; they drafted the Constitution as a government structure leading Lesotho to the first national elections of 1960 which was won by Basutoland Congress Party.

The 1959 Constitution was drafted by Professor Cohen and came in to force in 1960.²⁷⁵ It was tailor-made on the Westminster model.²⁷⁶ The Constitutional Commission was appointed in 1963 by the British officials, it included few Basotho Nationals. The Commission enacted the 1965 Constitution²⁷⁷ and recommended that it should resemble or be similar to Westminster style.²⁷⁸ Both the 1965 and 1966 Constitutions are in principle similar to 1960 and 1965 Constitutions.

The *Regulation 12 of Proclamation* No. 2B issued by High Commissioner on 29 May 1884 represents the foundation of Legal dualism in Lesotho.²⁷⁹ It provided for the continued operation of the Cape Colonial Common Law in the Basutoland, which has been applied in the territory during the period of annexation to the Cape Colony (1871-1883), and for the retention

²⁷⁵ L. B. B. J. Machobane (n 18), pg 292.

²⁷⁶ Basutoland Report on Constitutional Discussion of 1959.

²⁷⁷ Keesing's Contemporary Archives, pg 17318.

²⁷⁸ L. B. B. J. Machobane (n 18), pg 292.

²⁷⁹ Sebastian Poulter (n 72), pg 2.

of customary law administered by the chiefs.²⁸⁰ The proclamation was construed as the law for the time being²⁸¹ though it operated for decades in Lesotho. Lesotho's first Constitution was drafted with the influence of colonial government.²⁸² Therefore it could be argued that the present Constitution still reflects British Westminster model. The only noticeable addition since independence is the incorporation of Chapter II (Bill of Rights) reflected in both 1966 and 1993 Constitutions respectively.

On the other hand, customary law derives authority from the Proclamation. The second objective of the Proclamation was for retention of customary law which is administered by the chiefs.²⁸³ This customary law is currently administered in local, central and judicial commissioner's courts for preservations of Basotho customs and traditions. Both the instruments (customary law and the Constitution) aid in upholding the rule of law in Lesotho. It appears that the Constitution is congruent to customary law particularly where women's rights to chieftainship succession are adversely affected.

Women are prohibited to succeed to chieftainship under both pieces of legislations but there are specific areas where they are divergent in addressing the women rights. The Constitution provides for equality and non-discriminations amongst state subjects, including women, whereas customary law is patriarchal when it comes to women's rights to chieftainship succession. Customary law does not subscribe to the principles of equality and non-discrimination against women. There are specific areas where customary law conspicuously discriminates against women and those areas are discussed below.

3.5. /Minority

According to the customary law, Basotho women occupy subordinate status to Basotho men. This pandemic is not only realized in Lesotho but across several world states.²⁸⁴ A woman occupies a position of perpetual minor from her birth until death on the authority of customary

²⁸⁰ Sebastian Paulter (n 72), pg 3.

²⁸¹ Sebastian Paulter (n 72). pg 3.

²⁸² 1965 Constitution was drafted by the British authorities in preparation of the first national elections of 1966.

²⁸³ Sebastian Poulter (n 72).

²⁸⁴ World Economic Forum, 'The Global Gender Gap' (2015) <<https://reports.weforum.org/global-gender-gap-reports>> accessed 22 January 2024.

law.²⁸⁵ Independent senior women with successful careers, who also command respect in their respective communities, and were historically not exceptions to attainment of minority status according to the custom. From her birth, a woman is under the guardian of her father even after 21 years of age.²⁸⁶ In the event that she gets married, minority status continues and the husband becomes the guardian.²⁸⁷ In the instance where a husband pre-decease the wife, the guardianship is transferred to the elder son.²⁸⁸ She may also not validly enter in to a contract without assistance of her guardian.²⁸⁹

3.5.2 *Inheritance*

Under custom, a woman cannot be appointed as successor to the chieftainship position.²⁹⁰ The *Laws of Lerotholi* pronounce that the heir to succession and inheritance to the chieftainship shall be the first-born male child. There is no mention of a daughter.²⁹¹ The code further indicates that if there is no male issue in any of the houses, the senior widow shall be the heir and consult with deceased male relatives.²⁹² Clearly, customary law does not recognize the rights of women to chieftainship succession. Even in the instance where the son and the widow pre-decease the father and the only surviving child is a daughter in a family, customary law preclude her from inheriting her father's estate.²⁹³ This was the case in the case of *Lethaha v Lethaha*,²⁹⁴ the case was instituted in the local court. The father died leaving his only daughter. The wife and the son had already predeceased him. The family appointed the daughter as heir to her father's estate. Brother to the deceased challenged family decision before local court.

²⁸⁵ Braun & Dreilling, "From Developmentalism to HIV/AIDS Crisis: The amplification of Women's Rights in Lesotho" (2010) *International Feminist Journal of Politics* 477.

²⁸⁶ W. C. M. Maqutu, and A. J. G. M. Sanders, "The Internal Conflict of Laws in Lesotho" (1987) 3 *The Comparative and International Law Journal of Southern Africa* 20, 377–404. <<http://www.jstor.org/stable/23247688>> accessed 9 January 202.

²⁸⁷ Ibid.

²⁸⁸ *Laws of Lerotholi* 1946, Part 1, Section 12 (4) and 13 (1).

²⁸⁹ K. Matashane-Marite, "Women's Rights and Participation- Including Women's Access to Land And Inheritance, and the Role of Lobbying and Grassroots Organizations In Lesotho" (2005) <<https://www.un.org/womenwatch/daw/egm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf>> accessed 2 April 2024.

²⁹⁰ *Senate Masupha v Senior Resident Magistrate for Subordinate Court of Berea* (n 35); *Bhe and Others v Khanyelitsha Magistrate and Others* 2005 (1) SA 580 (CC) para 89.

²⁹¹ *Laws of Lerotholi* (n 49), Section 11 (1).

²⁹² *Laws of Lerotholi* (n49), Section 11 (2).

²⁹³ Duncan (Supra) (n 71), pg 12.

²⁹⁴ *Lethaha v Lethaha* H.C.C 14/10/1943.

The Local court decided in favor of the daughter but High Court reversed local court decision and held in favor of the father's sibling (brother) as the rightful heir to the deceased property. The court indicated that even if family concurred to appoint a daughter, the appointment was not in harmony with provisions of Section VI Part 1 of the *Laws of Lerotholi* which states as follows;

“The succession to the chieftainship shall be by right of birth: that is the first born male child of the first wife married: if the first wife has no male issue then the first born male child of the next wife married in succession shall be heir to the chieftainship... if a chief dies leaving no male issue the chieftainship shall revolve upon the male following according to the succession of houses”.²⁹⁵

On the strength of the quoted legislation, it is ineluctable that the appointment was illegal. For this reason, customary law is annihilation to women development and contribution to economy as tools of trade are only possessed by males.

3.5.3 Land ownership

Customary law similarly marginalized women in land ownership. In the past, the power to appropriate land was vested in the chief's authority.²⁹⁶ They were guided by the *Laws of Lerotholi* in the alienation process. Customary law did not have provision that allowed women to own land, whether through purchase, as a free gift or inheritance.²⁹⁷ It is indicative that customary law vehemently refutes women's land acquisition. This is in principle a hindrance to the overall women development and pinning them to subordinate status to men. The developments from the Constitution and other Parliament laws have mitigated the barbaric oppressions against women development in the above stated three (3) categories.

There is no Constitutional provision demonstrating the age of majority in Lesotho. However, the *Age of Majority Ordinance*²⁹⁸ (Age of Majority) addresses age of majority in civil law as 21

²⁹⁵ *Laws of Lerotholi* (N 57) Version of 1922. The Laws of Lerotholi were modified in various versions. The first version was in 1903, the second in 1907, third in 1922, the fourth in 1922, the fifth in 1946 and the sixth in 1959. Lethala case was decided in 1943, the latest version by then was version of 1922.

²⁹⁶ C. Fogelman, “Measuring Gender, Development and Land: Data driven analysis and Land reform in Lesotho. World Development Perspectives” (2016) *Political Science, Geography, Sociology*, pg 36 <[10.1016/J.WDP.2016.06.001](https://doi.org/10.1016/J.WDP.2016.06.001)> accessed 24 March 2024; *Laws of Lerotholi* (n 57), Section 7 (1) and (2) which authorize chiefs to apportion land and take it back from the subjects.

²⁹⁷ *Lethaha v Lethaha* (supra); *Thatho v Ntsane and Others* (CIV/T/357/1997) [200] LSCA 111 para 6-7.

²⁹⁸ No. 62 of 1829.

years old in Lesotho. *The Children's and Welfare Act*²⁹⁹ indicates a child as one below 18 years. The *Labor Code*³⁰⁰ on the other hand defines a child as human being below the apparent age of 18 years. The *Sexual Offences Act*³⁰¹ articulates a child as someone less than 16 years. There is no definite age of majority, minority is determined according to the specific piece of legislation. On the contrary, under customary law, there is no apparent age of majority. The woman is from birth to death. The *Legal Capacity of Married Persons Act*³⁰² repealed the marital power. Women can now perform any act which was previously restricted by marital power. Women can now inherit land³⁰³ or acquire property and register land in their own names.

The Constitution contradicts some of customary law perception on the rights of women. The Constitution entails a supremacy clause indicating that any law inconsistent with its provisions shall be void to the extent of the inconsistency. As previously stated, the Constitution prohibits discriminatory laws either in themselves or in effect.³⁰⁴ The Constitution defines discrimination as "...affording different treatment to different persons attributable to wholly or mainly to their respective descriptions by race, color, sex, language, religion, political or other opinion, national or social origin..."³⁰⁵

As set out above, the Constitution prohibits promulgation of laws which are discriminatory, including discrimination on account of gender or sex. This is the pivotal aspect where the Constitution differs from customary law. It has already been reiterated above that customary law expressly discriminates against women when it comes to chieftainship succession. The intent and purpose of freedom from discrimination is to abolish any form of discrimination for every citizen to enjoy fundamental human rights without constraints. The Constitution advocates for equality before the law, though it maintains that discrimination on account of gender is admissible if it is meant for preservation of customary law.

²⁹⁹ No. 7 of 2011, Section 3.

³⁰⁰ 1992, Section 148 (1) which prescribe employment recruitment age to be 18 years and Section 156 provides 18 years as a minimum age for foreign service.

³⁰¹ *Sexual Offences Act* No. 29 of 2003, Section 3.

³⁰² *Legal Capacity of Married Persons Act* (n 64).

³⁰³ *Land Act* (n 63).

³⁰⁴ Constitution of Lesotho (n 1), Section 18 (1).

³⁰⁵ Constitution of Lesotho (n1) Section 18 (3).

The exquisiteness of freedom from discrimination is muddled by section 18 (4) (c) claw-back clause which in principle retrieve the beauty of the entire section. This sub-section appears to be in conflict with the general rule against discrimination as it permits customary-based discrimination. This was affirmed in the famous case of *Senate Gabasheane Masupha v Senior Resident Magistrate for Subordinate Court of Berea and 10 others*,³⁰⁶ the Applicant insisted that Lesotho is obliged to honor international obligation on alleviating all forms of discriminations against women by allowing her to succeed her father in the office of a Principal Chief. Her plea appeared to be inconsistent with the exception of the general rule against discrimination under section 18 (4) (c) of the Constitution which permits customary-based discrimination. The Court of Appeal pronounced that international instruments are not sources of enforceable rights in Lesotho but mere aids to interpretation. Also, that section 18 (4) (c) is a constitutionally sanctioned discrimination.

The judgment attracted massive academic criticisms. Bamisaya Olawaye Oyetole is of the view that Lesotho courts should be proactive and progressive in protecting and safeguarding the rights of women across the globe.³⁰⁷ Also that, the courts should not be a clog in the wheel of progress in the fight against discrimination on women and inequality that prevail in most African states.³⁰⁸ Ochumba Adamma Lindy commented on the assertion of Bamisaya above as follows:

The court of Lesotho has allowed a high degree of injustice to trail down the garment of Judiciary, tarnishing the image and sanity of the court of law, where solace and succor is expected to be dished out in all sense of equality... ratification of CEDAW in Lesotho killed aims and objectives of the Charter, Lesotho's Constitutional Court has mocked articles contained therein. The world is the global village and whatsoever women of Lesotho suffer, all other women in the globe suffer...to be just is being pure and fair without preferences.³⁰⁹

None of the above academics have endeavored to cite section 18 (4) (c). Again, they failed to pinpoint the pieces of legislations either domestic or international which would have guided the Court to have arrived at anticipated legal conclusion. Similarly, they also skirted to address

³⁰⁶*Senate Gabasheane Masupha v Senior Resident Magistrate for Subordinate Court of Berea and 10 others* (n 35).

³⁰⁷O. A. Bamisaya, "Deadly Blow for Women's Rights in Lesotho" (19 June 2014) African Law. Bamisaya's commentary after Court of Appeal decision where Senate Masupha was denied opportunity to hold Chieftainship office on the basis of her or gender. <<https://africlaw.com/2014/06/19/a-deadly-blow-for-womens-rights-in-lesotho/>> accessed 20 February 2024.

³⁰⁸ O. A. Bamisaya (n 307).

³⁰⁹ Ochumba Adamma Lindy's comment on Bamisaya's post (n 307).

reservation on Article 2 of CEDAW by government of Lesotho. The Article obliges state parties to condemn discrimination against women in any forms. It also mandates states parties to embody the principle of equality between men and women in national constitutions and abolish customs which constitute discrimination against women. However, if section 18 (4) was interpreted in line with constitutional morality, the ruling in the above case would have been otherwise. Constitutional morality will be discussed in depth below under analysis of constitutional frame-work. It could therefore, be concluded that the intent and purpose of the Constitution is to diminish discrimination and promote equality before law.

3.6 Regency

Oxford English dictionary defines regent as ‘a person appointed to administer the estate because the monarch is a minor or is absent or incapacitated’.³¹⁰ The history of regency in Lesotho was first observed in 1926.³¹¹ It was after the demise of Paramount Chief Nathaniel Griffith Lerotholi who came into power by succeeding his brother Letsie II until his death in 1939.³¹² During his life time, he married three (3) wives. There was no male issue in the first house. Seeiso born from the second house while Bereng born from the third house. Interestingly, Bereng although born from the most junior house was older than Seeiso. According to the laws of Lerotholi,³¹³ it was inevitable that Seeiso was the rightful successor to his father. However, that was interfered with by Chief Griffith during his life time. He did not hide his desire to be succeeded by Bereng not anyone else.³¹⁴

Chief Griffith had earlier stationed Chief Bereng at Mohales’hoek Phamong ward, which is the ward that he occupied before acceding to Paramountcy. In 1926, he publicly announced Bereng as his senior son and his successor to the throne.³¹⁵ He mobilized Moshoeshoe’s sons to vote for that unusual practice in defiance of the *Laws of Lerotholi*. He also presented Bereng to the British authorities who had recognition powers to acknowledge Bereng as his heir. Seeiso

³¹⁰*Concise Oxford English dictionary*, (Oxford University Press 11th edn 2006).

³¹¹*Bereng Griffith v Prince ‘Mants’ebo Seeiso* 1926-53 HCTLR 50.

³¹²*United Kingdom and British Empire*, No. ‘34365’ the London Gazette (Supplement) 29 January 1937, pg 698. He lived between 1870-23 June 1939.

³¹³*Laws of Lerotholi* (n 49).

³¹⁴Hoolo ’Nyane (n 195).

³¹⁵Resenberg Scott, *Historical Dictionary of Lesotho* 1967 (Lanham, Md.: Scarecrow Press 2004).

challenged his father's decision before family Council at Matsieng. A *Pitso* was convened and the decision favored Bereng because *Pitso* was just a rubber stamp to the Chief's decision whether correct or wrong.³¹⁶ There were other chiefs supporting Seeiso in attendance but did not to vote against Griffith.³¹⁷

Subsequent to the death of Griffith, Moshoeshoe's sons convened a family meeting which resultantly aborted Griffith's plan and appointed Seeiso to succeed to the throne. Seeiso became successor to his father Griffith until his death in 1940. His brother Bereng was still alive at that time. Griffith left his wife 'Mants'ebo Seeiso (widow) without a male issue from his first house. The heir apparent was Bereng Seeiso from the second house who was by then a minor. Following the death of Seeiso, family council elected 'Mants'ebo as regent to her late husband because Bereng Seeiso was still a minor.

Bereng Griffith was not pleased with family decision. He challenged the decision in the High Court, basing his contention on the provisions section 2 of the *Laws of Lerotholi*, which reads as follows:

The succession to the chieftainship shall be by right of birth: that is the first-born male child of the first wife married: if the first wife has no male issue then the first born male child of the next married in succession shall be the chief: provided that if a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses.³¹⁸

The express exclusion of women from holding chieftainship office by the *Laws of Lerotholi* presented the Applicant (Bereng Griffith) with an opportunity to challenge the family decision. He observed a second chance to snatch Paramount Chief's office.³¹⁹ In his mind, he could still remember that his father Griffith succeeded his brother Letsie II on similar fashion. Letsie II did not have a male issue therefore his brother Griffith acceded to Paramountcy; his hopes were legitimate under the *Laws of Lerotholi*.³²⁰ However, Lansdown J asserted that Lerotholi Code was not expressive as whom, between the brother and the widow should stand as regent. He

³¹⁶ Laurence Juma (n 19), pg 108.

³¹⁷ Gordon Mackay Halliburton, *Historical Dictionary of Lesotho*, (Scarecrow Press, 1977), pg 56.

³¹⁸ *The Laws of Lerotholi* (n 57); Patrick Duncan, *Sotho Laws and Customs*, (Morija Museum and Archives 2006), pg 43 to 44.

³¹⁹ Laydevent Morena N. Griffith 1874-1939, (Mazenod Maseru 1953), pg 55.

³²⁰ Gordon Mackay Halliburton (n 290), pg 90.

further indicated that the *Laws of Lerotholi* lacked legal recognition because they were drafted by a commission that had no legislative authority.³²¹ The court vehemently dismissed primogeniture rule as envisaged by the *Laws of Lerotholi*.

Through the judicial activism, the court deviated from the normal practice of primogeniture and promoted women's inheritance rights to succeed to the chieftainship. The judge did not demand either amendment to *Laws of Lerotholi* or intervention of an act of parliament to deviate from unreasonable status quo and introduced Liberal Constitutional Democracy.³²² The Court boldly set new precedence which was not the normal practice. It has been acceptable practice since the regency case.

As set out above, it is illustrative that the regency case instilled new development in Lesotho customary law. Women are presently equally capable to occupy office of Paramount Chief as men. There is no reason why women could still not succeed to chieftainship in their own right. There is also no need for consideration of parliament to change unreasonableness in the *Laws of Lerotholi* but the courts could change to pragmatic episteme of the time. Lesotho High Court's inconsistency was indicative in the case of *Lethaha*³²³ which was decided within similar period, the only daughter was denied the right to inherit her father's property instead the court favored male relatives.

It would seem that the same principle enunciated in 'Mants'ebo regency case should have been equally applied in the *Senate Masupha's case*.³²⁴ The applicant was similarly faced with reliance on the agony of the applicability of customary law in her case, for argument sake, the applicant challenged provisions of Section 10 of *Chieftainship Act*³²⁵ which is mirror face of Section 2 Part I of the *Laws of Lerotholi*. The observation is that the purpose of *Chieftainship Act* was just to bring the *Laws of Lerotholi* to statute. The spirit of the *Laws of Lerotholi* is still harboring in the

³²¹ Sebastian Poulter (n 72), pg 155.

³²² Sons of Letsie I and Moshoeshoe were in attendance of family council who recommended 'Mants'ebo as Regent as opposed to Bereng. The result reflected democratic appointment of the widow.

³²³ The case was decided in 1943, which is the date not very far from 'Mants'ebo regency case.

³²⁴ *Senate Gabasheane Masupha v Senior Resident Magistrate for Subordinate Court of Berea and 10 others* (n 35).

³²⁵ *Chieftainship Act* (n 25), Section 10 (1).

Chieftainship Act. Therefore, decision in the regency case is mostly appropriate in the *Senate* case.

Precedence in the Regency case influenced additions in the *Chieftainship Act* to formally introduce Regency in the statute. The current position post 1968, widows are now recognized under the statute to hold position of regency and that if the incumbent Chief dies without leaving the male issue, the widow is legalized to succeed him in terms of the Act.³²⁶ The aftermath of *Senate Masupha 's case* calls for enactment of similar statute which empowers women to chieftainship inheritance though the main argument is for the courts to play a leading role for the protection of fundamental human rights through judicial activism.

The court deviated again from the normal practice in the case of *Ramootsi*.³²⁷ The applicant pleaded that there was no marriage as Section 34 (1) (c) of the *Laws of Lerotholi* was not complied with. There was no payment of *bohali* or part thereof. The court divagated from axiomatic *Laws of Lerotholi* and asserted that due to the present economic slackening, most males do not have cattle or equivalent money. It will therefore be against their right to marry if the court holds on payment of *bohali* or part thereof. The section was interpreted by the court to mean agreement to *bohali*, that means agreement to either pay or not to pay *bohali*. The essence of this case is to affirm that courts could deviate from strict customary practices and liberalize it by introducing new interpretation that encompass the current state of legal affairs and ways of life.

3.7 Analysis of the Constitutional and Theoretical Framework

Section 1 (1) of the Constitution declares Lesotho as a democratic state. Democracy is defined as a government in which the supreme power is vested in the people and exercised by them directly and indirectly through a system of representation.³²⁸ On the strength of this section, the impression is that Lesotho practices democracy, and includes the citizens in the decision-making processes. As such, Lesotho would qualify as a constitutionally democratic state. However, it has

³²⁶ *Chieftainship Act* (n25), Section 10 (3).

³²⁷ *Ramootsi and Others v Ramootsi* (CIV NO. 14/08) [2009] LSCA 30 (23 October 2009).

³²⁸ Merriam-Webster Dictionary <<https://www.meriam-webster.com>> accessed 12 February 2024.

already been canvassed above that women were not represented in the *Laws of Lerotholi* Codification process. The Lerotholi Code is a substratum of customary law which is protected by the Constitution in Lesotho.³²⁹ On that basis, the extent in which Lesotho conform to democratic principles is doubtful.

Supremacy of the Lesotho Constitution is articulated under section 2.³³⁰ The content of the section insinuates that the Constitution is supreme law of the land and that any other law which conflicts with its provisions is void to the extent of that inconsistency. The question as to whether both *Chieftainship Act* and *the Laws of Lerotholi* conflict with the Constitution, by denying women the right to chieftainship succession is a strenuous topic. One would have a thought that since both laws derive their validity and protection from the Constitution, they could not be perceived as inconsistent with the supreme law. In whatever way, exclusion of women from enjoying certain classified rights like inheritance right to chieftainship is against Constitutional Morality principle. The law defies Constitutional Morality if it undermines the values it upholds inclusive of democracy, socialism, equality and integrity.³³¹

The principle requires that the law should conform to the core values and norms of the Constitution and avoid activities that violate the rule of law or act in an arbitrary manner.³³² In India, Constitutional Morality principle has been included in the Constitution. It forms part of fundamental human rights (article 12 to 35),³³³ directive principles of state policy (Article 36 to 51),³³⁴ the preamble and fundamental duties. Indian fundamental human rights and directive principles of state policy are similar to Lesotho sections 4 to 24³³⁵ (fundamental human rights and freedoms) and 25 to 36³³⁶ (directive principles of state policy) respectively.

³²⁹*Constitution of Lesotho* (n 1), section 18(4) (c) which provides that constitutionally sanctioned discrimination due to adherence to custom is legitimate.

³³⁰*Constitution of Lesotho* (n1).

³³¹NEXTIAS Content Team, "Fundamental Human Rights in the Constitution of India: Meaning, Features, Significance and Criticism" (13 February 2024) <<https://www.nextias.com/blog/fundamental-rights/>> accessed 30 February 2024.

³³² *Ibid.*

³³³*The Constitution of India*, Sections 12 to 35 [As on 26th November 2021].

³³⁴ *The Constitution of India*, Sections 36 to 51.

³³⁵*The Constitution of Lesotho* (n 1), Sections 4 to 24.

³³⁶ *The Constitution of Lesotho* (n1), Sections 25 to 36.

Constitutional Morality is adherence to the core principles of Constitution. The principle was illuminated by the Supreme Court of India in the case of *Indian Young Lawyers Association and others v The State of Kerala and others*.³³⁷ The case is commonly known as Sabarimala case. The Supreme Court held that exclusion of women between the ages of 10 to 50 years from attending church in Sabarimala due to their natural course of menstruation violated the core principles of the Constitutional Morality which are equality, justice, liberty and fraternity. The court clarified that the term morality in sections 25 and 26 of Indian Constitutions refers to Constitutional Morality. The court further highlighted that Constitutional Morality is not limited to following certain provision of the Constitution literally but it is based on protecting individual values like liberty, equality, justice, non-discrimination, identity with dignity and right to privacy.

On account of the above case, the court defenestrated discrimination against women on the basis of their biological reasons. Had the principle of Constitutional Morality applied in Lesotho's Constitutional case of Senate Masupha, the court would have arrived to the conclusion that *Chieftainship Act* and the *Laws of Lerotholi* violated the core values of the Constitution of equality and freedom from non-discrimination on the basis of sex. The Supreme Court of India also professed that Constitutional Morality prevails over public morality.³³⁸ This means even if Basotho believe that discrimination against women when it comes to chieftainship inheritance is correct, Constitutional Morality must show its course by throwing away perceptions that lead to inequalities and discrimination on the basis of sex or gender.

In *Naz Foundation v Government NCT of Delhi*,³³⁹ the court extinguished 158 years British era law which prohibited same sex relations between consenting adults in their private lives which was enshrined under *Indian Penal Code*.³⁴⁰ The court opined that the law was irrational, indefensibly and manifestly arbitrary. The interest in this case is its similarities with the *Laws of Lerotholi* which was codified during British era. They were predicated upon patriarchal domination principles but Lesotho courts still abide by their sourness even after many years after

³³⁷ (2017) INSC 1040.

³³⁸ *Naz Foundation v Government NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

³³⁹ 160 Delhi Law Times 277 (Delhi High Court 2009).

³⁴⁰ *Indian Penal Code No. 45 of 1860*, Section 377.

independence. The judge in the above case emphasized on Transformative Constitutionalism, which is treating the Constitution as a dynamic document that progressively realizes various rights. Therefore, it goes without saying that supremacy of the Constitution should prevail over the *Chieftainship Act* because the Act undermines the core values of the Constitution on freedom from non-discrimination and equality before law.

What is more, sections 18 and 19 of the Lesotho Constitution uphold the Constitutional provisions of non-discrimination and equality before law. These sections stem from the Bill of rights. The essence of the two sections is to abolish inequalities and discrimination on the basis of sex and gender amongst others. It is significant to highlight that human rights are rights that people have simply because they exist.³⁴¹ They are not granted by state, they are inherent in human beings.³⁴² However, Lesotho Constitutional Court was confronted with predicament to bestow equality and non-discrimination rights to *Senate Masupha* but she was denied fundamental rights because what she claimed was in conflict with the customary law of Lesotho.³⁴³ Tellingly, the primogeniture rule derive authority from section 18 (4) (c) of the Constitution but there is no single provision which amplifies feminism or feminist movement in the Constitution. Despite the sanction, women's rights organizations like FIDA, WILSA and Southern African Litigation Centre engaged in to feminist movement to support and assist their fellow to claim her rights to chieftainship succession. Their endeavor was in vain.

The repeal of section 18 (4) (c) is imminent because it is inconsistent with principles of Constitutional Morality and Transformative Constitutionalism. The section is misplaced because it is anchored under the section which prohibits discrimination but on the other hand perpetuates discrimination on account of customary law. Even though, protection and preservation of customary law is commendable, its protection should not be consolidated in the civil law creature (Constitution). There must be a body which specifically deals with customary law so that the compilation of customs law will be tested against the Constitution. The point will be discussed in depth under chapter 6 on recommendations.

³⁴¹ United Nations Human Rights, "What is Right" <<https://ohchr.org/en/whatisrights>> accessed 24 February 2024.

³⁴² *United Nations Universal Declaration of Human Rights* was the first legal document to set out fundamental human rights. Article 1 provides for equality before law, article 2, for freedom from non-discrimination.

³⁴³ *Constitution of Lesotho*'s Section 18 (4) (c) is an exception to the general provision of freedom from non-discrimination.

Interpretation of the Constitution along the principles of Constitutional Morality and Transformative Constitutionalism would have yielded different conclusion had the court paid attention to the principles as discussed in depth above. It was illustrated in Botswana courts that unequal treatment by law is species of discrimination. This was asserted in the case of *Muzila v The Attorney General*,³⁴⁴ Justice Marumo expressed:

In my view therefore, the principle of non-discrimination by the law, which can also be expressed as the principle of equality before the law, or, regard being had to the *ipissima verba* of s 3 of the Constitution, as 'the protection of the law', requires inter alia that all persons, regardless of their social and economic rankings, or personal antecedents, or their prominence or obscurity in society are entitled to be treated no better nor worse than any other, unless there be an ascertainable valid and legitimate reason for differential treatment.³⁴⁵

The valid and legitimate reason depends on the purpose of government when introducing the Bill of rights. In Lesotho, the British crafted Constitution of 1965 right before the elections which did not comprise the Bill of rights. It could be assumed that introducing fundamental human rights in the Constitution was to counter oppression of customary law because there is no mention of rights in Leretholi Code.

Section 22 of the *Constitution of Lesotho* gives the High Court original jurisdiction to protect rights that appear in the Bill of rights. The section goes on to state that the Court may decline to intervene if it is satisfied that there are other adequate means of redress available under any other law. It is doubtful if there are other means of redress in protecting women's rights in the *Senate* saga other than approaching the courts, the case is mostly cited because of its relevance in this investigation.³⁴⁶

As stated above (under section 22), the High Court must exercise its powers to protect fundamental human rights of the citizens. It also has powers to interpret or set new precedence where there is a need. The other sections which are pertinent and qualify under Constitutional frame-work are sections 26 and 28 appearing under Directive Principles of State Policy. The

³⁴⁴ 2003 (1) BLR 471 at 478.

³⁴⁵ *Ibid*, pg 479.

³⁴⁶ *Masupha Sole v Cullinan* No and others LCA (2000-2004) 572, when faced with similar dilemma Gauntlett JA declared that there were no other means of redress available. So is in the Senate case.

general rule is that directive principles are non-justiciable.³⁴⁷ They are rights in waiting as they basically depend upon the economic muscle of a state.³⁴⁸ Despite that, where the rights under Chapter III, directive principles, are inconsonance with the rights under Chapter II, fundamental human rights and freedoms, they become justiciable.³⁴⁹

The principle was elucidated in the case of *Khathang Tema Baits'okui and Another v Maseru City Council and Others*.³⁵⁰ The issue was whether the provision of alternative spot for trading by Maseru City Council constituted the violation of applicants' right to livelihood and whether the right to life under section 5 of the Constitution can be interpreted to include socio-economic right to livelihood. The court adopted restrictive interpretation as opposed to Indian liberal interpretation and dismissed the case on the ground that right to life does not include right to livelihood. Doctor Mosito, for the applicants, was put to task of proving that his clients would die if they are relocated. It was virtually a difficult assignment.

The relationship between Chapter II and Chapter III was approved in the case of *Lesotho Medical Association v Minister of Health*³⁵¹ where the court interpreted right to health to include right to life. In *S v Makwanyane*,³⁵² the South African Constitutional Court asserted that right to life is antecedent to all other rights in the Constitution. Without life, it will be impossible to exercise other rights.

As illustrated above, the right to equality and justice³⁵³ is intertwined with right to equality before law.³⁵⁴ The opportunity to work³⁵⁵ is in harmony with right to participate in government.³⁵⁶ Non-Justiciable rights if paired and matched with justiciable rights become justiciable. Inheritance to Chieftainship is perceived as right to work; it goes with remuneration with the amount depending on the category of the chief. That is the main reason behind men

³⁴⁷*The Constitution of Lesotho* (n1), Section 25.

³⁴⁸ *The Constitution of Lesotho* (n 1) Section 25..

³⁴⁹*Khathang Tema Baits'okui and Another v Maseru City Council and others* LCA (2005-2006) 85.

³⁵⁰ *Khathang Tema Baits'okoli* case (n 349) pg 90.

³⁵¹ CC 19/2019.

³⁵² 1995 (3) SA 391 (CC).

³⁵³*The Constitution of Lesotho* (n1), Section 26 (Principles of state Policy).

³⁵⁴ *The Constitution of Lesotho* (n1), Section 19.

³⁵⁵ *The Constitution of Lesotho* (n1), Section 29.

³⁵⁶ *The Constitution of Lesotho* (n1), Section 20.

monopolizing the position upon them. In the similar vein, equality and justice is inseparable from equality before law and therefore similarly justiciable.

Under section 154 (1), the Constitution asserts that customary law means customary law of Lesotho for the time being in force subject to modification by Act of Parliament. The wording of the section ‘for the time being’ opines that customary law was intended to operate as and when people practice it. However, even after 57 years of independence, where the country and the world is geared towards gender equality, women are still marginalized in matters of chieftainship succession underpinned under custom.

Justice Huguwe in the *Senate Masupha case*³⁵⁷ was confronted with dilemma of indulging in to audacious decision of scrapping off customary law and upholds a Constitutional right of the unmarried girl to chieftainship inheritance. He instead restrained himself and ruled that it was a matter of parliament to consider. It could be argued that the judge misdirected himself on the ground that redress to court was the only remedy before the appellant at the time. There was an option for the court to create new precedent.³⁵⁸ The South African Courts are not reluctant to create new precedence when there is a need to develop customary law. In *MM vMN*,³⁵⁹ the Constitutional Court of South Africa developed customary law of Tsonga to make it compulsory for husband to consult with his wife before entering in to subsequent marriage. Therefore, it was possible for the Constitutional Court in the Senate case to adopt new precedent.

Lastly, section 154 (1) of the *Constitution of Lesotho* avers that law include customary law of Lesotho and ‘any other unwritten rule of law.’ The illustration in the quotes could refer to unwritten Constitutional principles like Constitutional Morality and transformative constitutionalism which will definitely mitigate effects of women oppressions. International human rights law could also be inferred from the quote above. The protection of women’s rights should therefore not be understood in the context of literal wording of the Constitution or

³⁵⁷*Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (n 35).

³⁵⁸ H.L Hahlo, and E. Kahn, “The South African Legal System and its Background” (2008) 18 (3) *International & Comparative Law Quarterly*. Authors define precedent as new legal rules that are developed by the courts. Constitution confirms the developmental function of the courts with regard to the common and customary law.

³⁵⁹*MM v MN* 2013 4 SA 415 (CC); S. M. Weeks, Customary Succession and the Development of Customary Law: The Bhe Legacy: Part III: ‘Reflections on Themes in Justice Langa’s Judgments’ (2015) 1 *Juta’s Law Journals*; 215.

restrictive interpretation, rather in a liberal constitutionalism comprehension. International human rights as revelation for oppressed women would be discussed in details in the next chapter.

3.8 Conclusion

In Lesotho, Women's inheritance rights to chieftainship are regulated by the Constitution and the *Chieftainship Act* that carries the spirit of customary law. The two pieces of legislation are in unison in some areas and divergent in other areas. The Constitution's ideology is primarily on promotion of rights by uplifting equality and freedom from discriminations rights in favor of women. Customary law on the contrary, expressly discriminates against women when it comes to the right to chieftainship succession. The complexity of this dilemma is from the fact that customary law provision that denies women the right to succeed to the throne is an exception to freedom from non-discrimination. In principle, section 18 consists of two contradicting sub-sections.

The intricacy is occasioned by the fact that the bill of rights, emanating from civil law and customary law are both in one document (Constitution) let alone being accommodated under one section. In a normal setting, customary law should be regulated under a special body designed to regulate customary law.

The Courts of Lesotho are also reluctant to develop customary law through judicial precedent yet there is a catalogue of authorities demonstrating that they can. The initiative demonstrated by women rights organizations in the Senate case is indicative that feminism strongly refutes discrimination of the basis of sex and gender. Recently, society has traversed from the primitive perception of believing chieftaincy is male privilege. The women's expectation was the introduction of the new precedence by upper courts but they abided by the book (section 18 (4) (c) of the Constitution. On the contrary, in South Africa, their Constitution empowers courts to interpret common law and customary law within the spirit of bill of rights under section 39 (2).

Chapter Four

Principles of International Human Rights Law Pertinent to Alleviation of Discrimination Regarding Women's Right to Chieftainship Succession in Lesotho.

4.1 Introduction

The Kingdom of Lesotho has acceded to a plethora of international, continental, regional and sub-regional treaties and enacted domestic laws aimed at the promotion and protection of international human rights favorable to minority or vulnerable groups like women. In the context of this chapter, international human rights are examined in line with Lesotho women's right to succession to chieftainship. The research question that is addressed is: - to what extent is Lesotho's reservation on *Convention on Elimination of All Forms of Discrimination against Women* (CEDAW)³⁶⁰ and other International instruments aimed at promoting and protecting women's rights justified?

The presence of the sovereignty principle in the *Constitution of Lesotho*³⁶¹ is vital to determine the extent to which the aggrieved party could rely on international law to claim rights in the domestic legal system.³⁶² In a dualist state, like Lesotho, the position of law is that domestic law commands primacy status over international law. It is only through ratification and adoption of international human rights instruments that accord recognition and justifiability in the municipal court.³⁶³ The magnificence in most international agreements is blurred by non-adoption of dualist states into domestic legislations. Apparently, the beauty in CEDAW has been faded by Lesotho's reservation on Article 2 of the Convention. The reservation attracted attention of the author to investigate the legality on the reservation. Apart from CEDAW, there are also other International Human Rights Agreements that are not enforceable in Lesotho courts because of their inconsistency with the customary law of Lesotho. The discussion commences with CEDAW and

³⁶⁰ CEDAW (n 2), Article 2 of CEDAW; The Article condemns discrimination on women in all forms, also mandates state parties to amend national laws which discriminates against women. It further provides that states parties should abolish customs that discriminates against women.

³⁶¹ Constitution of Lesotho (n 1), section 1 (1); The section stipulates that Lesotho shall be a sovereign democratic state.

³⁶² R. F. Oppong, "Re-Imagining International Law: An Examination of the Recent Trends in the Reception of International Law in to National Legal System in Africa" (2006) *Fordham International law Journal* 3, pg 30.

³⁶³ F Viljoen (n 37), pg 10.

extends to other international human rights law instruments. The monist theory of international human rights law is discussed in contrast with dualist theory as aids to interpret international human rights law instruments.

4.2 Convention on the Elimination of All Forms of Discrimination against Women

As previously indicated, the Kingdom of Lesotho is categorized as dualist state. This means that Lesotho's obligation on international instruments is limited to domestication of international human rights laws through enactment by the legislative body.³⁶⁴ This asserts that Lesotho courts are not expected to apply international instruments as readily binding if they are short of parliament's adoption. Amongst international treaties which Lesotho has ratified is the *Convention on Elimination of All Discrimination against Women (CEDAW)*. Lesotho had expressly placed reservation of the Article 2 of the convention. The article pronounces that the state parties must embody the principle of equality between men and women in their domestic constitutions and other corresponding legislations.³⁶⁵ It also mandates governments to modify or abolish existing laws, regulations, customs and practices that discriminate against women.³⁶⁶

According to Viljoen, the government of Lesotho explicitly indicated its reservation on Article 2 of CEDAW articulating that it is inconsistent with the Constitution where it protects the customary law. It is indicative that women's inheritance to chieftainship is intentionally sanctioned by the Constitution. The Constitution and the courts of Lesotho elbow any legislation, either domestic or international, which seeks to advance women rights to equality when it comes to chieftainship succession. This is instructive that Lesotho still does not consider women as human beings who deserve rights that are equivalent to their male counterparts.

International human rights activist, Akstiniene opines that CEDAW addresses issues of equality and discrimination against women emanating from culture, economic and social

³⁶⁴ Sothern African Litigating Centre for Human Rights, "Utilising International, Regional and Comparative Law" <<https://southerafricanlitigationcentre>> accessed 10 March 2024.

³⁶⁵ CEDAW (n 2), Article 2 (a).

³⁶⁶ CEDAW (n 2), Article 2 (f).

conditions.³⁶⁷ Lesotho is not the only state that expressed unwillingness to domesticate Article 2 of the CEDAW. There are also Islamic countries that embrace patriarchy for religious purposes and some African states that subscribe to chieftaincy.³⁶⁸ In most instances, states with these common legal systems are in oftentimes dualist.³⁶⁹

The *Vienna Convention on the Law of Treaties* defines reservation as;

‘...a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. A reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. Reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made’.³⁷⁰

The above article of the *Vienna Convention* article is conspicuously asserting that the law regulating reservations prohibits reservation that is inconsistent with the object and purpose of the treaty. Therefore, the reservation on CEDAW that conflicts with the object and purpose of the treaty which is to eliminate all forms of discrimination, including cultural, is regarded unlawful. From the above quote, the object of the Convention is to eradicate all forms of discrimination and inequalities perpetuated against women. According to the *Vienna Convention*, states parties are obliged to respect their commitment enshrined in the treaty. The reservation by any state party is challengeable by any member state (s) that opines that the reservation is inconsistent with the object and purpose of the treaty. Article 20 to 23 of *Vienna Convention on the Law of Treaties* empowers state parties to object the reservations that are in conflict with the purpose of the treaty. Freeman attests that history of the reservation on the law relating to international human rights is complex.³⁷¹ He further articulates that Finland, Netherlands and

³⁶⁷ A. Akstiniene, “Reservations to Human Rights Treatise: Problematic Aspect Related to Gender Issues” (2013) 20(2) *Jurisprudence* 451 <[10.13165/JUR-13-20-2-05](https://doi.org/10.13165/JUR-13-20-2-05)> accessed 21 March 2024.

³⁶⁸ African States like Botswana and South Africa accede to chieftaincy.

³⁶⁹ Southern African Litigation Centre (n 344).

³⁷⁰ *Vienna Convention on the Law of Treaties* 1969, Article 2 (1) (d).

³⁷¹ M. A. Freeman, “Reservation to CEDAW: An Analysis for UNICEF” (2009) <<https://projects.iq.harvard.edu/violenceagainstwomen/publications/reservations-cedaw-analysis-unicef>> accessed 28 March 2024.

Norway objected to Lesotho's reservation on Article 2 pursuant to article 23³⁷² of the convention. The problem with international law is that there are no effective methods of compliance that enforce member states conform to their international obligations, such as standard policing and simple prosecution as in the fashion of a State governance.

The Committee on CEDAW obliged all member states to implement the provisions of CEDAW in their entirety.³⁷³ This was the resolution of its 50th session on the 3rd to 21st October 2021 held at Geneva. In that meeting, Lesotho was duly represented by the then Honorable Mpeo Mahase; Minister of Justice, Human Rights and Honorable Mathabiso Lepono; Correctional Services and Minister of Gender, Sports , Youth and recreation.³⁷⁴ The team of experts asked Lesotho delegates as to which are other positions that women are were excluded from other than succeeding to the throne. Their response was that women are not barred from any other positions other than Chieftaincy.³⁷⁵ They went further to submit that the reason for exclusion is on the hypothesis that girls would be married to other families, whereas remunerations from chieftainship office was poised to take care of the family after the loss of the incumbent.³⁷⁶

The committee obliged state parties to systematically and continuously implement all provisions of the Convention. Under, Recommendation 12 and 13, the committee noted prohibition of discrimination in any forms against women.³⁷⁷ However, section 18 (4) (c) of the *Constitution of Lesotho* is an exception to general rule of non-discrimination in respect of the application of customary law. There is no specific section in the Constitution which points at the discrimination against women. The Constitutional section only refers to preservation of customary law, though its effect is discriminatory against women and therefore in conflict with CEDAW

³⁷²CEDAW (n 2), Article 23(1) provides, "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty."

³⁷³Antonio Guterres, "Concept Note on the Future General Recommendation on Equality and Inclusive Representation of Woman in Decision-making Systems" (2023) <<https://www.un.org.sg/en/nede/2260228>> accessed 5 June 2024.

³⁷⁴ Committee on CEDAW held at Geneva on 11 October 2011 < <https://ungeneva.org> accessed on 30 December 2023.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

provisions.³⁷⁸The committee insisted its concern on exception of section 18 (4) (c) which permits customary law-based discrimination against women, with the result that contradicts with article 2 and 16³⁷⁹ of CEDAW. CEDAW committee recommended repeal of Constitutional provisions that permit gender-based discrimination.

Further, the committee on CEDAW also urged Lesotho to withdraw its reservation on CEDAW on recommendation 14, because of its inconsistency with the object of the Convention.³⁸⁰ This indicates that Lesotho's reservation on CEDAW is in conflict with the *Vienna Convention on the Law of Treaties*, which prohibits reservations that contradict the object and purpose of the treaty.³⁸¹ The CEDAW's recommendation to Lesotho on withdrawal of the reservation was communicated as far as 2011 but there are no salient initiatives for compliance. This invites a question which international law students are often asked as to whether international law is law. The concern is on the basis of its non-justiciability in the domestic courts. There is thinking that states invariably neglect their international obligations because of absence of sanctions. It could be argued that chieftainship is foundation of Lesotho custom. It is common knowledge as Lesotho's 200 years of foundation of the Basotho Nation is widely spoken in a country in various public spaces. It marks the journey that the King Moshoeshoe I took from Menkhoaneng to Thaba-Bosiu to form the Basotho Nation from 1824 to 2024.³⁸²

The Nation's commemoration of the formation of the Basotho Nation by King Moshoeshoe I and the galvanization to celebrate 2024 indicates acceptance of King Moshoeshoe as Founder of Basotho Nation. It is assumed that it could be one the reasons why Lesotho is reluctant to alter customary law when it comes to chieftainship succession. There is evidence that Moshoeshoe I wanted Senate to succeed his Father, Letsie I. Therefore, the assumption that women in Lesotho

³⁷⁸“Discrimination against women: - means 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.”

³⁷⁹ State parties undertook obligation to eliminate discrimination on women and undertook to ensure equality.

³⁸⁰ Recommendation 14 of the CEDAW Committee; ‘[t]he committee is concerned at the State party’s reservation to article 2 of the Convention with respect to succession to the throne and chieftainship, and in this respect, takes note of the information provided in the State party’s reply to the list of issues and during the dialogue with the Committee that the Government is considering reviewing its position with regard to its reservation to the Convention’.

³⁸¹*Vienna Convention* (n 350), Article 18; Mandates state parties to refrain from acts that defeat purpose and object of the treaty.

³⁸²Kabelo Mollo, “200 Years On” (13 March 2024) <<https://thereporter.co.ls>> accessed 5 June 2024.

are discriminated when it comes to chieftainship succession because of the customs and traditions that originated from Moshoeshoe I's era, is baseless.

Lesotho's rationale for non-compliance to CEDAW provisions is predicated on the understanding that Lesotho is a dualist state. International human rights do not automatically apply in a dualist state as it is the case under monist states. In a dualist States, there is a pre-condition for a law to be applicable. The theories are discussed below.

4.3 International Law Harmonization Theories: Monist theory and Dualist Theory

There are two contrasting theories in international law which are monist and dualist theories. This dichotomy distinctively prescribes the manner in which international instruments are enacted into domestic legislation. The state can therefore accept and integrate international law into domestic legislation with these theories. The tension between these divergent views of international law reached its peak in Europe between World War I and World War II. This impulse was when legal scholars began to seriously question how and to what extent could the binding international legal obligations and formal international institutions, minimize the threat of war.³⁸³ Some scholars were exponents of monist theories, whereas others preferred dualist approach. The discussion of these theories kick-starts with the monist theory;

4.3.1 Monist

A genesis of this school of thought is traceable from the endeavor to reconcile the entrenched positions maintained by Monism against the ones belligerently held by Dualism. The monist theory is conceptualized to indicate that municipal law and international law as a single unit because they serve the same purpose.³⁸⁴ According to Clapham, international law is concluded between the states but the subjects or beneficiaries of the international instruments are individual human beings, and states are obliged to protect people's rights.³⁸⁵ The monist theory directs

³⁸³Carolyn A. Dubay, "General Principles of International Law: Monist and Dualist" (2014) *International Judicial Academy: Washington DC* <<https://judicialmonitor.org>> accessed 30 September 2023.

³⁸⁴J. G. Starke "Monist and Dualist In the theory of International Law" (1999) in S. L. Paulson (ed) *Normatively and Norms: Critical Perspective on Kelsenian Themes*. Page 66.

³⁸⁵A. Clapham, "The Role of Individual in the International Law" (2010) 21 *European Journal of International Law* 25.

application of international law in domestic courts, in the event that domestic law is inconsistent with international law, international law prevails.³⁸⁶

The supremacy of international law underpinned by monist theory is superior even on the Constitution of municipal state. The situation remains even if a state ratified the international instrument after promulgation of municipal law.³⁸⁷ That municipal law will automatically be void if it contradicts subsequent ratified international law. In any event, states are also advised not to use their municipal laws to contravene international obligations. Hans Kelsen is a proponent of monist theory; he postulates that this monist theory occupies superior hierarchy over dualism.³⁸⁸ If Lesotho subscribed to monist theory, the provisions of CEDAW would have applied in the case of *Senate Masupha*.³⁸⁹ The Constitutional Court would have applied international human rights law which abolishes all discrimination against women and sanctioned the provisions of section 18 (4) (c) of the Lesotho Constitution.

4.3.2 Dualist

Dualism perceives national law as a distinctly separate phenomenon from international law.³⁹⁰ It is fundamentally premised upon the notion that each State is sovereign, therefore application of international is limited to international decision and does not prevail over domestic decisions.³⁹¹ This theory implies that international law can be applied in domestic disputes if transformed and adopted into national legislations.³⁹² In principle, it maintains the idea of supremacy of municipal law over international law and prescribes the methodology through

³⁸⁶ J. F. Coyle, "Incorporative Statutes and the Borrowed Treaty Rule" (2010) 50 *Virginia Journal of International Law* 656.

³⁸⁷ M. Killander & H. Adjohoun "International Law and Domestic Human Rights Litigation in Africa: An Introduction" (2010) 5 in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa*.

³⁸⁸ J. G. Starke (n 362), pg 50.

³⁸⁹ *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (n 35).

³⁹⁰ D. P. O'Connell, 'The relationship between international law and municipal law' (1960) 4 *Georgetown Law Journal* 432.

³⁹¹ *France v Turkey* 1927 CIJ Reports, Series A, No. 10; 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own freewill as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'

³⁹² J. Dugard *International law: A South African perspective*, (Kenwyn: Juta & CO 2011) 46.

which international instrument could be transformed into municipal law. The Act of parliament is the only way to incorporate international law to domestic arena.

A rationale behind that prescribed procedure for international law to be adopted by Parliament is chiefly to confirm that treaty or convention will be in consonance with municipal law and be consistent with the Constitution. The understanding is that in the process, parliamentarians would have the opportunity to solicit the views of the electorate, make the necessary research and consultations for the purposes of ascertaining views of voters if the adoption would be in the best interest of the country.³⁹³ To put it differently, dualist theory subscribe to representative democracy principle and constitutional supremacy which requires every law to be consistent with the constitution.

It has already been reiterated that Lesotho is a dualist state. It would seem that Article 2 of CEDAW would remain unenforceable unless they are adopted through an Act of parliament. In summation, the *Constitution of Lesotho* provides under section 2 that the Constitution is supreme law of the land and that any other law which is inconsistent with it, is void to the extent of inconsistency. It goes without saying that article 2 of CEDAW is in conflict with the Constitution, therefore, its application is impossible and can only be felicitously applied if section 18 (4) (c) of the *Constitution of Lesotho* is repealed to the extent of its permission of customary discrimination.

The dualist theory was not applied in Zimbabwe although it is characterized as a dualist country. SADC Tribunal decided to intervene in the domestic affairs of Zimbabwe despite its reliance on municipal law in the case of *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*.³⁹⁴ In that case, the government of Zimbabwe launched a land reform program that stimulated illegal land occupations in the year 2000. The program entailed expropriation without compensation in the event that the land was illegally acquired. White farmers were mostly affected by the program. The Zimbabwean Parliament amended the Constitution and included expropriation agrarian land without compensation except on improvements made prior to expropriation. The

³⁹³G. Burdeau, *Droit Constitutionnel*, (25 edn, L.G. D. J 1997) 180; Marc Van der Hulst, *Parliamentary Mandate*, (Inter-Parliamentary Union Geneva 2000) 13.

³⁹⁴(2/2007) [2008] SADCT 2.

Amendment also ousted jurisdiction of domestic courts over land expropriation disputes. Mike Campbell and other white farmers challenged the land expropriation law³⁹⁵ before SADC Tribunal on the basis that it was racially discriminatory as it only targeted white farmers. The state breached its obligation under the *SADC Treaty*.³⁹⁶ Article 4 (c) alludes that SADC member states are required to act in accordance with human rights, democracy and the rule of law.

The government of Zimbabwe argued that expropriation was not attributable to racism but to remedy the colonial exploitation. The government also argued that SADC Tribunal did not have Jurisdiction over the expropriation program. However, the Tribunal decided the matter notwithstanding, it held in favor of the whites. The Tribunal pronounced that it was impossible for the Applicants to seek remedy from municipal law because Amendment expressly ousted jurisdiction of domestic courts.³⁹⁷ Zimbabwe refused to recognize decision of the Tribunal and maintained its reliance on municipal law. Subsequent to the tribunal's decision, Zimbabwe's government refused to accept decision of the tribunal. The government contended that *SADC Treaty* has no specific article which prescribes appropriation of agricultural land. Therefore, the Tribunal could not borrow articles from other jurisdictions. The argument was that Tribunal's interpretation of Human Rights should only be limited to what is set out by member states.

The Tribunal announced that Article 21 (b) empowers SADC Tribunal to develop its jurisprudence. Further that, the Tribunal has jurisdiction because Amendment ousted domestic remedies. There was a complexity as to whether domestic legislation prevailed over international law. In that particular case, dualist theory was compromised by SADC tribunal. Zimbabwean Parliament Amended Constitution to mitigate effects of colonial expropriation of land from Zimbabwean black farmers to white Zimbabwean farmers. In a dualist state, the Tribunal applied International law.

The lessons learned from this case are, first, that the Tribunal reviewed domestic law to be in compliance with International Human Rights imperatives. Second, where national law does not offer remedy, or remedy offered is ineffective, the individual is not required to exhaust local

³⁹⁵ Section 16B (2) (b) of the Constitution of Zimbabwe (Amendment No. 17 of 2005) provides or expropriation without compensation.

³⁹⁶ 1992.

³⁹⁷ *The Constitution of Zimbabwe*, Section 16B (3) (a).

remedies before approaching the tribunal.³⁹⁸ Third, that access to justice is fundamental right, deprivation of which constitutes serious violation of the rule of law.

Had the same approach being applied in the case of Senate Masupha, it is inevitable that Lesotho's Section 18 (4) (c) of Constitution is inconsistent with International Human Rights instruments. Therefore, it would have been significant to have approached SADC Tribunal for intervention. Article 15 (1) of SADC Treaty establishes jurisdiction to entertain disputes between legal persons and the state. This makes it possible for Human Rights organizations to institute a case of human rights violation on behalf of Senate Masupha. Be that as it may, the SADC Tribunal's vindication of white farmers was short-lived. After it ruled in favor of the farmers, Zimbabwe commenced a lobbying campaign to convince Southern African leaders to disband the Tribunal.³⁹⁹ On August 17, 2010, SADC leadership capitulated ordering a review of the role and function of the Tribunal.⁴⁰⁰ During the review process, the Tribunal was provisionally suspended. It was stripped of its jurisdiction to hear individual human rights claims, relegating it to only disputes between nation-states.⁴⁰¹

CEDAW is not the only an international instrument in which women's rights to chieftainship inheritance could be realized. There is plethora of other corresponding international instruments. To name but a few, *International Covenant on Civil and Political rights*, *African Charter on Human and People's Rights*, *Southern African Development Community (SADC) Protocol on Gender Equality and Development*, *Maputo Convention* and *Beijing Declaration*. These instruments are discussed below.

³⁹⁸SADC Treaty, Article 15 (2).

³⁹⁹30th Jubilee Summit of Southern African Development Community Heads of State, Aug. 16–17, 2010 <<https://scholarlycommonslaw.com>> accessed on 01 June 2024.

⁴⁰⁰Drew F. Cohen, "A President, an International Tribunal and a Band of Farmers Walk into a Constitutional Court-The Last Laugh: Mike Campbell v. The Government of the Republic of Zimbabwe" (2014) 28 Emory International Law Review 29, Pg 39 <<https://api.semanticscholar.org/CorpusID:155564362>> accessed 16 July 2024.

⁴⁰¹Mike Campbell case pg 50.

4.4 International Covenant on Civil and Political Rights

The *United Nations International Covenant on Civil and Political Rights* ⁴⁰²(ICCPR) came into force on the 23rd of March 1976. According to ICCPR, everyone has a right to be recognized as a human being before the law.⁴⁰³ In the same spirit, Lesotho's Constitution provides for equality before the law.⁴⁰⁴ ICCPR similarly stipulates equality under article 2. The article mandates states parties to guarantee all individuals within their territorial boundaries the rights therein without any distinction on the basis of sex or gender. It is evocative that ICCPR strongly refutes inequalities leveled against women within its member states. The Covenant mandates state parties to ensure the enjoyment of civil and political rights equally between men and women.⁴⁰⁵

Additionally, even though the *Convention on the Rights of Children (CRC)*⁴⁰⁶ is the specific legislation that envisages the rights of children, ICCPR similarly refutes discrimination against children on the basis of sex.⁴⁰⁷ The other indispensable article within the convention is article 26, the article impedes discrimination on the basis of sexual orientation and subscribes to equality before law. This article encompasses the contents in sections 18 and 19 of the *Constitution of Lesotho*.

The ICCPR is a cardinal covenant for promotion and protection of women's rights in Lesotho. The covenant subscribes to equality before the law and non-discrimination. It has the potential to transform women's rights to chieftainship succession in Lesotho. The only impediment is unwillingness of the government to domesticate the Covenant into the municipal law of Lesotho. Lesotho is a party to ICCPR, it has the obligation to ensure conformity to articles 2 and 26 of ICCPR on equality and non-discrimination provided they are consistent with the Constitution.

The misfortune of women in Lesotho is that the relevance of international law is measured against its consistency with the municipal law. The covenant will still be ineffective like CEDAW due to the constraints circumscribed under section 18 (4) (c) of the *Constitution of*

⁴⁰² 1966.

⁴⁰³ ICCPR (n 373), Article 16.

⁴⁰⁴ *Constitution of Lesotho* (n 1), Section 19.

⁴⁰⁵ ICCPR (n 373), Article 3.

⁴⁰⁶ 1989, Article 2.

⁴⁰⁷ ICCPR (n 373), Article 24.

Lesotho. However, in the case of *AZAPO and Others v President of The Republic of South Africa*,⁴⁰⁸ the court pronounced that domestic law should be interpreted in a manner that would avoid conflict with international law. Perplexingly, Lesotho Courts interpret section 18 (4) (c) repugnance in defiance with interpretative proficiency of international law.

The ICCPR was cited in the Constitutional Court of Lesotho in the case of *Thabo Fuma v Commander, Lesotho Defense Force*.⁴⁰⁹ In that case, the Court emphasized that the international principle of equality and non-discrimination envisaged in the ICCPR is aid to interpretation of domestic laws. Lesotho is a member state to ICCPR, but the applicability of the Covenant entirely depends on its conformity with the Constitution and other domestic laws.

4.5 African Charter on Human and People's Rights and Optional Protocol on African Charter on Human and People's Rights

The *African Charter on Human and People's Rights* (ACHPR) and *Optional Protocol on African Charter on Human and People's Rights* (Maputo Convention) are African Continental international human rights instruments. ACHPR was adopted in June, 27, 1981 and entered in to force in October, 21, 1986.⁴¹⁰ The Kingdom of Lesotho ratified the Convention in April, 9, 1991. In 2004, Lesotho ratified the Optional Protocol.

Article 3 of ACHPR provides for equality and equal protection of the law. Article 2 prohibits discrimination on the basis of sex or gender. Article 1 mandates state parties to recognize rights, duties and freedoms enshrined in the ACHPR and undertake to adopt legislative and other measures to give effect to rights contained therein. The ACHPR, (like ICCPR and CEDAW) provisions of rights incorporates equality and non-discrimination. The two sets of rights are of primary importance for human beings, they are fashioned in a way that they complement one another. According to De Waal, equality is basic; people who are similar should be treated similarly without distinction. The author went on with hypothetical example that women cannot

⁴⁰⁸ SA 1996 (4) 672 (CC) at 6888-6889 A.

⁴⁰⁹(CONST 8 of 2011) [2013] LSHC 68 (10 October 2013).

⁴¹⁰The preamble indicates that the Charter draws its inspiration from the Charter of the OAU which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.

be denied their right to stand for elections because as on that aspect, men and women similarly have the right to vote. Therefore, men and women are alike and should be treated as such.⁴¹¹ In the similar vein, the Charter accords same the treatment between men and women when it comes to equality and freedom from discrimination. In this aspect, they are alike.

The ACHPR has Optional Protocol which was adopted in Maputo hence the name Maputo Protocol. It was specifically adopted to promote and protect women's rights in Africa. The Convention still delved into equality and none discrimination.⁴¹² For the purposes of this chapter it also has the provision on the right to inheritance.⁴¹³ Article 21 (2) provides that women and men shall have equitable shares to inherit their fathers' properties. The convention as well obliges state parties to take legislative measures to abolish discrimination and inequalities perpetuated against women in African continent.

The ACHPR and its Optional Protocol are continental international instruments accessible to Africans including Basotho. Both instruments strongly refute discrimination and inequalities within the member states. ACHPR mandates state parties to undertake to adopt legislative measures to repeal discriminatory laws within member states. In compliance with the above international instruments, there has been the establishment of the African Commission on Human and Peoples' Rights⁴¹⁴ which ensures protection of human rights through its communication procedure. The Commission peacefully settles disputes and entertains appeals from member states. Any African or International non-governmental organization can bring communication before the Commission.⁴¹⁵ The overall function is to make recommendation to the Assembly of Head of states and Government of African Union.⁴¹⁶

⁴¹¹ De Waal J and Other, *The Bill of Rights Handbook*, (2nd edition, Kenwyn Juta & Co, Ltd 1999) 188; The definition of equality originates from the writings of Aristotle (384-322BC): 'Equality in mortals means this: those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.'

⁴¹² *African Charter on Human and People's Rights* 1981, Articles 2 and 8.

⁴¹³ ACHPR, Article 21.

⁴¹⁴ ACHPR, Article 45.

⁴¹⁵ Sabelo Gumedza, "Bringing Communications Before the African Commission on Human and Peoples' Rights" (2003) 3 *African Human Rights Law Journal* 118 <<https://AHRLJ/2003/part1>> accessed 5 June 2024.

⁴¹⁶ *African Charter on Human and People's Rights* (n 383), Article 55.

The beauty in the ACHPR is that it allows individuals and international organizations to bring communications before the Commission. Senate Masupha took this opportunity to bring communication before the Commission.⁴¹⁷ She is joined by women civil organizations, Federation of Women lawyers Lesotho (FIDA) and Southern African Litigation Centre (SALC) as *amicus curia*.⁴¹⁸ She challenges the Constitutionality of Section 10 of Lesotho *Chieftainship Act* on the ground that the section favors males to succeed to the chieftainship. The ACHPR obliges member states, including Lesotho, to adopt legislative measures to repeal discriminatory laws. It is on this basis that Senate brought communication before African Commission and seeks substantive enforcement of equality as opposed to one merely formal.

4.6 Southern African Development Community Protocol on Gender Equality and Development

On the sub-regional level, Lesotho has ratified the *Southern African Development Community (SADC) Protocol on Gender Equality and Development*. This unputdownable piece of legislation was adopted in August 2008 and came in to force in 2013. Lesotho signed and ratified the protocol in 2008. The overall goal of the gender policy is to promote and provide guidelines for institutionalizing gender equity and equality as an integral component of social, economic and political development of SADC women.⁴¹⁹ Article 2 of the Protocol mandate state parties to harmonize domestic legislation with regional international instruments related to the empowerment of women and girls with the purpose of promoting equality and equity.⁴²⁰ Article 6 obliges state parties to amend and repeal domestic legislation that discriminates on the basis sex and gender by 2015. The content of this protocol is predominately on gender parity.

The *SADC Protocol on Gender and Development* was revised to align with international and continental frameworks such as the *Sustainable Development Goals and Africa's Agenda 2063*. Amongst the goals of Agenda 2063, is to realize full equality in all spheres and empower youth and children by 2063. The goals are also reflected in Agenda 2030, Sustainable Development

⁴¹⁷Kaajal Ramjathan-Keogh, 'Masupha v Senior Resident Magistrate for the Subordinate Court of Berea and Others' (2016) *Southern African Litigation Centre Case Book* 2005-2015.

⁴¹⁸ Southern African Litigation Centre <<https://www.southernafricanlitigationcentre.org>> accessed 5 June 2024.

⁴¹⁹*National Gender and Development Policy* 2018-2030.

⁴²⁰*SADC Protocol on Gender Equality and Development* 2008, Article 4.

Goals (SDGs) of 2015, which likewise seeks to abolish inequalities between men and women by 2030 and promote equity. This is assisting women in various ways to be at the same level with men.

The parity was illustrated in the case of *Molefi Ts'ephe v Independent Electoral Commission and others*.⁴²¹ In 2004, Lesotho introduced an amendment to the *Local Government Elections Act*⁴²² that provides for reservation of one third of all seats in every local council for women. The remainder is open to both men and women alike. The Constitutionality of objective the electoral quota was challenged by a man whose candidacy for local government was rejected on the single ground that the electoral division at issue was reserved for women. The appellant argued that these measures are unconstitutional since women's participation in local governments could have been achieved without debarring men from the same. The Court of Appeal upheld the judgment of the court a quo, dismissed the appeal and held that the Amendment was not unconstitutional, the impugned measures were carefully designed to achieve its of gender parity.

The uniqueness of the Sub-regional human rights instrument is on equality and equity, whereas the above instruments focused only on equality. The importance of delving into achieving equality is primarily to bridge the existing gap between men and women through legislative measures like *Local Government Elections Act*. The Women are favored over men with the purpose of advancing them to the level of men in politics. The action is sometimes referred to as positive discrimination.⁴²³ South Africa also bridged the gap by introducing legislation aimed at assisting women to be at the same level with men. The Legislations include the; *Employment Equity Act*,⁴²⁴ the *Broad-Based Black Economic Empowerment Act*⁴²⁵ and the *Codes of Good Conduct (Black) female*.⁴²⁶ The three pieces of legislations were introduced with the sole purpose

⁴²¹ CIV/APN/135/2005 [2005] LSHC 96 (27 April 2005).

⁴²² No. 5 of 1998.

⁴²³ University of Dundee, "Positive Action or Positive Discrimination" (11 September 2023) <<https://www.dundee.ac.uk/corporate-information.com>> accessed 30 September 2023.

⁴²⁴ No. 55 of 1998.

⁴²⁵ No.53 of 2003.

⁴²⁶ No. 42391 23.

of empowering women by giving them employment in top occupations. There is evidence that black female employment in top positions increased after 2003.⁴²⁷

On the strength of the above international instruments which protect and promote rights of women in Lesotho, it is observed that the common denominator is equality and non-discrimination on the basis of gender or sex. The state of affairs in the Mountain Kingdom is evident that the Protocol is not fully or even close to be implemented. Lesotho is still riddled with inequalities when it comes to women's succession to chieftainship. Women are still discriminated on the basis of sex or gender.

The world is leaning towards abolishing all kinds of discrimination perpetuated against women; however, there is a concern that protection of women is exaggerated. The illustration is the case of *Molefi Ts'ephe* above, women are preferred over men pursuant to the *Local Government Election Act* that apportions one third of seats to women. In principle, the *Local Government Amendment* is not inconsistent with sections 18 and 19 of Constitution on non-discrimination and equality before law. The purpose is to reach gender parity. The move is perceived as affirmative action or positive discrimination.⁴²⁸ On the contrary, in the *Senate Masupha's* case, preferential treatment to men is globally unacceptable on basis of discrimination and inequality before law. Some men argue that equality and discrimination are engaged in favor of women's human rights protection as opposed to men. However, women have been marginalized for long time and are lagging behind men in most spheres of life.⁴²⁹

The two distinct scenarios are the reason for magnificence of the *SADC Protocol*. The protocol brought new development of equity. Since women were left behind, the Protocol endeavors to reduce the gap between men and woman. Secondly, its weakness is on the implementation. The only recognized development is the introduction of *Local Government Elections Act*. Regardless of its enticing contents, the *SADC Protocol's* goals have not been implemented as directed on the time-frames.

⁴²⁷Klasen, Stephen and Manasyan, Anna, 'The Impact of Affirmative Action on the Gendered: Occupational Segregation in South Africa' (March 2018) <<https://econstor.eu.com>>accessed 30 September 2023.

⁴²⁸*Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea Others* (n 35).

⁴²⁹Klasen, Stephen and Manasyan (n 398).

There are other international instruments leaning towards obliteration of inequalities and discrimination perpetuated against women. They include amongst others; *Beijing Declaration for Gender Equality*⁴³⁰ and its plan of action which also refutes inequality on the basis of sex or gender. Furthermore, *SADC Gender policy*,⁴³¹ *Gender Equality and Woman Empowerment*,⁴³² *Vienna Declaration and Program of Action*⁴³³ and other treaties that preach abolition of discrimination and inequality on the basis of gender or sex.

4.7 Conclusion

The similarity with the above discussed international instruments is protection and promotion of women's rights, specifically on discrimination and equality. It is observed that the latter rights are of global concern. They are provided and encouraged from the *Universal Declaration of Human Rights* (UDHR),⁴³⁴ which is the genesis of human rights down to sub-regional international organizations like SADC. In the context of this dissertation, the desire is to apply these international instruments to the domestic courts where the present legislations are not extensively protecting women's rights. The policies that enshrines in all these instruments are profoundly appealing. The difficulty surrounding implementation of most international agreements is absence of political will from the contracting member states.

The ineffectiveness of international human rights application in Lesotho was envisaged in the case of *Senate Masupha*. The *amicus curia* cited CEDAW provisions in an attempt to persuade the court to consider the provisions contained therein. In particular, Article 2 which seeks to abolish discrimination in any form against women. The complexity was attributed to the fact that the Convention is inconsistent with the Constitution and other laws of the Mountain Kingdom. The laws of Lesotho permit discrimination on matters relating to customary law. The above discussed instruments, mandates state parties to undertake legislative measures to abolish all forms of discrimination against women, but the situations remain the same. The committee on

⁴³⁰ 1975- 1995; It advocates for equality between men and women both in law and in practice.

⁴³¹ 2007.

⁴³² 2008.

⁴³³ 1993.

⁴³⁴ *United Nations Universal Declaration of Human Rights* 1948.

CEDAW recommended that Lesotho should withdraw the reservation on Article 2 in 2011, but Lesotho has not complied with the recommendation.

The legal conundrum encircling international law is unwillingness by member states to fulfill their international obligations. International instruments are voluntarily ratified, presumably, with the understanding of being bound by the provisions arising from a specified instrument but states choose otherwise. The women's right to chieftainship succession in Lesotho would be realized only if Lesotho fulfills its international obligation of repealing domestic legislation that discriminates against women.

Chapter Five

5.1 Comparative Analysis on Lesotho's Custom-based Discriminatory Treatment Towards Women as Opposed to its African Counterparts

In this chapter, the focus is on comparing Lesotho with some African countries. The intention is to show the extent of progress in relation to the subject matter of the dissertation, and harness some good values that Lesotho may be persuaded to follow. The first country is South Africa, which has implemented significant anti-discriminatory laws and policies with the aim of empowering women. The next is Botswana, which is followed by Ghana. These countries are a good choice because their jurisprudence is interrelated and similar in one way or another. All these states are adherent to dualism approach with regard to binding nature of international agreements. The international human rights agreements are justiciable only if they are in rhythm with the Constitutions and other laws of the above mentioned states respectively. It is on the basis of this striking similitude that the set out states are akin to Lesotho's international human rights approach.

5.2 Non-discrimination in South Africa

Equality and non-discrimination in South Africa have seen much progress as seen from its Constitution, other Acts of Parliament and courts decisions that have interpreted and enforced equality not only as a formality but as practical approach to their democratic state.

Analogously, the *Constitution of the Republic of South African*⁴³⁵ recognizes customary law as part of the South African law just like the *Constitution of Lesotho*. Section 211(3) provides that courts must apply customary law where it is applicable subject to the Constitution and any other legislation that deals with customary law. Furthermore, section 39(2) provides that, when developing customary law, a court is obliged to promote the spirit, purpose and objects of Bill of Rights. Finally, section 39(3) provides that the Bill of Rights does not deny the existence of other rights or freedoms conferred by customary law as long as they are consistent with the Bill of Rights.

⁴³⁵ No. 108 of 1996.

It is therefore important to critically examine the relationship between Section 9 of the South African Constitution with the customary law principles that regulates the primogeniture rule. Firstly, section 9 of the South African Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. In the subsequent subsections, it adds that, “equality is the full and equal enjoyment of all rights and freedoms” and obliges the State to enact laws to ensure same, and ensure that no one not even the State itself may in itself or effect unfairly discriminate against anyone on one or more grounds, including sex and gender. The connection between this section and the primogeniture rule was discussed in the case of *Bhe v Magistrate, Khayelitsha, and others*.⁴³⁶ The applicant had approached the court on behalf of her two minor daughters for an order declaring the rule of primogeniture unconstitutional. She also pleaded for an order enabling the daughters to inherit.⁴³⁷ The applicant further challenged this rule in the public interest, in the interest of female descendants, descendants other than the eldest descendants and extra-marital children.⁴³⁸

The applicant’s daughters were born of a relationship between herself and their deceased father, who had died intestate.⁴³⁹ The Magistrate of the Khayelitsha Magistrate’s Court had, after the death of the deceased, appointed the father of the deceased as the sole heir of his estate in accordance with section 23 of the *Black Administration Act*.⁴⁴⁰ The deceased’s father indicated that he intended to sell the deceased’s immovable property, on which the applicant and the minor children lived, in order to pay the funeral expenses incurred as a result of the deceased’s death.⁴⁴¹

Under the system of intestate succession flowing from section 23⁴⁴² of *Black Administration Act* and the regulations,⁴⁴³ in particular regulation 2(e), the two minor children did not qualify to be the heirs of the intestate estate of their deceased father.⁴⁴⁴ According to these provisions, the

⁴³⁶ 2005 (1) SA 580 (CC), para 10.

⁴³⁷ *Bhe* (Supra), para 10.

⁴³⁸ *Bhe* (Supra) para 10.

⁴³⁹ *Bhe* (Supra), para 12.

⁴⁴⁰ No. 38 of 1927.

⁴⁴¹ *Bhe v Magistrate, Khayelitsha, and others* (n 417), para 17.

⁴⁴² *Black Administration Act* (n 421), section 23, “The estate of a deceased black person shall devolve upon his surviving spouse, if any, and if not, upon his issue, if any, and if not, upon his parents, if any, and if not, upon his brothers and sisters, if any, and if not, upon his other relatives, if any, in such manner as may be determined by the regulations.”

⁴⁴³ *Regulations for the Administration and Distribution of the Estates of Deceased Blacks* No. 200 of 1987.

⁴⁴⁴ *Bhe* (Supra), para 16.

estate of the deceased fell to be distributed according to black law and custom because the owner of the estate had died intestate. The issue to be determined was whether or not these provisions were consistent with the Constitution. The court stated that to the extent that the primogeniture rule prevents all women, female children and extra-marital children from inheriting, it was discriminatory.⁴⁴⁵ In exact words of Deputy Chief Justice Langa:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.⁴⁴⁶...Customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny.⁴⁴⁷

The Constitutional Court thus found that section 23 of the *Black Administration Act* was unconstitutional and regulation 2(e) had to fall away. The Constitutional Court found further that the application of the rule of primogeniture to intestate succession was not consistent with the equality protection under the Constitution.⁴⁴⁸ The Constitutional Court, as part of its order, declared the applicant's daughters the sole heirs of their deceased father's estate.

In a similar fashion, the South African Courts consistently applied the same principle as they also did in the case of *Shilubana and Others v Nwamitwa*.⁴⁴⁹ In *casu*, the court dealt with customary leadership. The brief facts are that the chief of the Valoyi traditional community, died in 1968. His eldest daughter, (the applicant) was not considered for the position according to the principle of primogeniture that governed succession to chieftainship. Instead, Hosi Fofeza's younger brother, Richard, succeeded him. During Richard's reign, the royal family of the Valoyi opted to confer chieftainship on the applicant (Ms Shilubana), Richard was part of family meeting. The Royal Council accepted and confirmed that *Hosi* Richard would transfer chieftainship powers to Ms Shilubana. Mr. Nwamitwa, the eldest son of Richard, applied for the declaration order to the

⁴⁴⁵ Bhe, para 93.

⁴⁴⁶ Bhe, para 91.

⁴⁴⁷ Bhe, paras 95 and 97.

⁴⁴⁸ Bhe, para 100.

⁴⁴⁹ *Shilubana and Others v Nwamitwa* [2008] ZACC 9, 2008 (9) BCLR 914 (CC), 2009 (2) SA 66.

High Court that he should be the rightful successor of Richard upon his death, and not the applicant. The High Court and the Supreme Court of Appeal held in his favor.

Ms Shilubana argued that the Valoyi had amended customary law to restore the traditional leadership to the house from which it had been removed by gender discrimination, even though the gender discrimination occurred prior to the coming into operation of the 1996 Constitution. Ms Shilubana succeeded in her appeal in the Constitutional Court of South Africa. The Court held that the contemporary practice of the Valoyi reflected a valid legal change that resulted in Ms Shilubana's succession to the chieftainship. Two important passages capture the central principles which the Court established:

Where there is a dispute over the legal position under customary law; a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognize and give effect to that development, to the extent consistent with adequately upholding the protection of rights⁴⁵⁰...Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of customary-law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice.⁴⁵¹

Ms Shilubana's case clarifies how the content of customary law is determined, and how customary law is developed in the Republic of South Africa. According to the two cases above, the South African jurisprudence reflect democratic conception of customary law, rather than an autocratic conception.⁴⁵² The law comes from practice, and practice comes from the people. It is of course an interactive or dialectical process. Practice affects law, and law affects practice.⁴⁵³ Customary law is adaptive to changes by its very nature. Most importantly, South African Constitution has no provision which allows discrimination in the Constitution on account of customary law like Lesotho's section 18(4) (c).

⁴⁵⁰ Shilubana (Supra), para 49.

⁴⁵¹ Shilubana, para 55.

⁴⁵² Aninka Claassen, "Transformative Constitutionalism and Customary Law in South Africa" (2016) 5 *Constitutional Court Review* 75 <<https://www.saflii.org/za/journals/CCR/2016/5.pdf>> accessed 4 April 2024.

⁴⁵³ *Ibid*, pg 80.

The textual difference between Lesotho's Constitution and South African counter-part is that Lesotho Constitution permits discrimination on matters related to customary law. On the contrary, South African Constitution does not contain corresponding section. Thus, in the *Bhe* and *Shilubana's* cases, there was clear violation of women fundamental right against discrimination which lacked justification in terms of the South African Constitution. This is occasioned on the fact that South Africa has no Constitutional provision which permits discrimination in favor of customary law. Section 18 (4) (c) of the Lesotho Constitution is a standout section which differentiates Lesotho's Constitution from South African conception of freedom from discrimination.

Relatively, both the Constitutions of Lesotho and that of South Africa subscribe to equality before the law with exception to the general provision. It is prudent to focus on jurisprudence surrounding the right to equal protection of the law, as opposed to the prohibition of unfair discrimination. The South African Constitution, like Lesotho's Constitution, provides for the right to equal protection of law as independent section from freedom against discrimination.

The other clearly distinguishable feature between Lesotho and South Africa is that Lesotho does not subscribe to Customary International law, whereas International Customary law is part of South African Law. The implication of this assertion is that South Africa prosecutes cases appearing under international law treaties even if such crimes are not sanctioned in the domestic legislation. This was illustrated in the case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another*.⁴⁵⁴ In that case, South Africa relied on Section 232 of its Constitution which stresses that International Customary is part of South Africa law unless it is inconsistent with the Constitution or an Act of Parliament.⁴⁵⁵

The case involved a challenge to the constitutionality of the SA Police Service's failure to investigate allegations of torture committed in Zimbabwe by Zimbabwean officials. In its decision, the Court pronounced that since torture is a crime under customary international law, it was also automatically a crime in South Africa. The other classical case is the case of *The*

⁴⁵⁴ [2014] ZACC 30, 2015 (1) SA 315 (CC) (Torture Docket).

⁴⁵⁵ *Constitution of the Republic of South Africa* (n 406).

Prosecutor v. Omar Hassan Ahmad Al Bashi.⁴⁵⁶In *casu*, the accused was the President of the Republic of Sudan from 1993, until 2009 when warrants of arrest were issued against him by the International Criminal Court (ICC). He was alleged to have committed five (5) of war crimes. South Africa decided not to arrest him despite being within its territorial boundaries. The argument advanced was based on Customary International law, on Article VIII (1) of African Union (AU) which accords immunity on head of state.

One would argue that Lesotho's Constitution should similarly accommodate customary international law like section 232 of the South Africa Constitution with a view of alleviating discrimination and inequality. It will be a cul-de-sac problem because adoption of customary international will not solve the intended problem, as that will be inconsistent with section 10 of *Chieftainship Act* and section 18 (4) (c) of the Constitution.

However, interpretation of the Constitution along Constitutional Morality Principle would mean freedom from discrimination is a core value of the Constitution. The general rule of non-discrimination should not be interpreted as if it is subservient to its exception. If that is the case, it defeats the whole purpose of the right of freedom from discrimination. On the principle of Transformative Constitutionalism, the society is transformed from antiquated beliefs that only men could occupy chieftainship office.⁴⁵⁷ The feminist moves in the case of *Senate Masupha* by FIDA, WILSA and SALC are clear indication that women have transformed from primitive believes.

5.3 Botswana

Both Lesotho and Botswana are dualist states. Their Constitutions are almost similar. There are thin lines of differences in court decisions addressing same set of facts particularly on issues evolving around equality and non-discrimination against women. The demonstrations will

⁴⁵⁶ICC-02/05-01/09.

⁴⁵⁷*Shilubana and Others v Nwamitwa* (n 430); The court elucidated that where there is a dispute over the legal position under customary law; a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognize and give effect to that development and that customary law must be allowed to develop.

comprehensively be reflected below. *Botswana Customary Law Act*⁴⁵⁸ defines customary law as the law “in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.”⁴⁵⁹ It is indicative that the *Customary Law Act* preserves customary law that is not repugnant to the written law, morality, humanity or natural justice. The inquiry from this definition is to ascertain whether the rule of male primogeniture which permits only male off-springs to inherit intestate is in conformity with provisions of the written law. The written law includes the Constitution of Botswana and other Acts of the Parliament.

In its section 3, the Constitution of Botswana guarantees every person fundamental human rights and freedoms irrespective of amongst others sex or gender and the enjoyment of which does not prejudice the rights and freedoms of others or the public interest.⁴⁶⁰ Those rights and freedoms are subject to limitations only on two grounds, firstly, that they do not prejudice the rights and freedoms of others, and secondly on the ground of public interest.⁴⁶¹ These limitations are provided for in chapter II of the Botswana Constitution.⁴⁶² Botswana High Court shared the same sentiments in the case of *Kamanakao I and Others v AG and Another*,⁴⁶³ where the court asserted that rights enshrined under section 3 of the Constitution apply to every person in Botswana without exception or discrimination on the basis of sex or gender.

It would seem that discrimination and inequality underpin the Botswana customary law despite unequivocal provisions of section 3 of the Constitution. The inequality favoring men over women under the customary law of Botswana still reins, whereby the customary law provides that the estate of the deceased parents devolves onto the first male issue. The authority that is explicit in addressing preferential treatment accorded to men is the case of *Tidimalo Jokase v Gaelebale Mpho Seakgosing*,⁴⁶⁴ where Lesetedi J ridiculed patriarchic based discrimination. He articulated that customary law rule that completely disregards this right of equality and equal

⁴⁵⁸ *Customary Law Act* (n 47).

⁴⁵⁹ *Customary Law Act CAP* (n 47) 16:01.

⁴⁶⁰ *Constitution of the Republic of Botswana* 1966, Section 3.

⁴⁶¹ *Customary Law Act*, Section 3; *Attorney-General v Dow* 1992 BLR 119, at 133.

⁴⁶² *Customary Law Act*, Section 3.

⁴⁶³ 2002 (1) BLR 110 (HC).

⁴⁶⁴ MAHLB 000661-10.

protection of the law is inconsistent with Section 3 (a) on the basis that it prefers a male child on issues related inheritance by virtue of his sex.⁴⁶⁵

Section 15 (1) of the Botswana Constitution is mirrored by Section 18 (1) of the Lesotho Constitution. The Constitutions both stipulate that no law shall make provisions which are discriminatory on itself or its effect. Section 15(4) (c) is still analogous to section 18(4) (c) of the Constitution of Lesotho. The section is expressive that discrimination is permissible if it is on account of community interest or customary tribe.⁴⁶⁶ In this aspect Lesotho and Botswana Constitutions are in agreement in retrieving a basic human right by application of claw back clause from the fundamental human right to freedom from discrimination. The sections exempted customary law-based discrimination from the general rule of non-discrimination.

Despite the provision of section 15(4)(c) of the Constitution of Botswana, the women's rights to inheritance were subsequently addressed in the land mark case of *Mmusi and Other v Ramantele and Others*.⁴⁶⁷ In that case, the first applicant approached the Lower Customary Court in the Ngwaketse area seeking an order declaring her to inherit a dwelling house of her deceased father, who died intestate. The application was dismissed on the basis that a woman cannot inherit her father's dwelling house according to Ngwaketse⁴⁶⁸ customary law. Consequently, applicant appealed to Higher Customary Court, which ordered that family meeting be convened to determine the occupant of the house.

The decision of Higher Customary Court was overturned by Customary Court of Appeal. It pronounced that it has been a long-standing practice of Bangwaketse to designate a house to last born son.⁴⁶⁹ The ruling was in favor of the first respondent (Ramantele) and ordered the applicant to vacate the house. The applicant was not pleased with the decision, she appealed to Botswana High Court and joined her other two sisters and challenged Ngwaketse customary law which

⁴⁶⁵ Tidimalo Jokase v *Gaelebale Mpho Seakgosing* para 10.

⁴⁶⁶ *Constitution of the Republic of Botswana* (n 430), Section 15 (4) (d).

⁴⁶⁷ *Tidimalo Jokase v Gaelebale Mpho Seakgosing* (Supra) (n 434).

⁴⁶⁸ Ngwaketse is one of the largest ethnic group situated the southern part of Botswana. Customary law of one ethnic group could differ from customary law of another ethnic group.

⁴⁶⁹ *Mmusi and Other v Ramantele and Others* (n 437), para 10.

deprives women of the right to inherit their father's house solely on the basis of sex. The crux of their argument was that the rule violated their right to equality enshrined under section 3(a) of the Constitution.⁴⁷⁰ The presiding judge relied solely on section 3 (a) in his final judgment and avoided discussion encompassing section 15.

The applicants' application was opposed by their nephew and the Attorney-General. They argued that, although the *Constitution of Botswana* contained provisions on non-discrimination and equality, in terms of its section 15(4) (c) and 3 (a), discrimination is permitted when it comes to devolution of property upon death or other matters of personal law. In this legal conundrum, the presiding judge was embedded with judicial responsibility of interpretative techniques that will enable section 3(a) which guarantee applicants' rights to equality and protection of the law to co-exist within a single unitary Constitutional scheme being section 15(4)(c). He avoided engaging section 15(4) (c) in his discussion. His argument was that section 3 (a) is a separate section from section 15 and a party who seek redress from section 3(a) is entitled to remedial entitlement without the contamination from other sections.

The resemblance between the Lesotho and the Botswana Constitutions is that they provide for equality and freedom from non-discrimination. The other likeness is that they both entrench discrimination on the other sub-section. The conflict between the sub-sections is tipped to be curtailed by invoking the doctrine of harmonization. The doctrine asserts that the provisions within one Constitution should be interpreted in the manner that one recognizes the existence of the other.⁴⁷¹

The Presiding Judge, Dr. Linake J was pressed to give reasons as to why did he not engage the provisions of section 15 (4) (c) in his discussion but only relied on section 3(a) and Section 15(1) which provides for the general rule against discrimination. He refused to acknowledge the conflict between the Constitutional provisions and cited the case of *Stratosphere Investments*

⁴⁷⁰*Constitution of the Republic of Botswana* (n 430), Section 3(a); "Whereas *every person* in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever *his place of origin*, political opinion ... but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely (a) life, liberty, security of the person and the protection of the law ... "

⁴⁷¹*Mmusi and Other v Ramantele and Others* (n 437), pg 211.

*(Pty) Ltd t/a Club Havanna and Others v Attorney-General*⁴⁷² where applicant had met all the requirements of section 3(a). He alluded that section 3(a) provides for rights which are not dependent on section 15. Section 3 (a) alone is enough to spell out justiciable rights of the applicant in the absence of section 15.

He expressed that if a litigant opts to proceed to claim rights under section 3 (a) only, he or she is entitled to succeed. There is no hierarchical ranking in the Constitutional provisions; no provision is superior to the other.⁴⁷³ It was elucidated in the previous court decisions that in circumstances like this, harmonization doctrine was imperative. The purpose of harmonization is to interpretively harmonize the conflicting sections within a Constitution. The Constitution must be read and interpreted as a single, integrated compact and not in a manner which implies one provision and sustain the other.⁴⁷⁴

In his conclusion, Dr. Linake J enthralled on International Human Rights Law. The court concluded that having scrutinized pertinent decisions of foreign municipal and international tribunals and provisions of relevant international human rights instruments, his insistence was that the rule of *Ngwaketse* customary law violated the applicants' rights to equality and dignity guaranteed under section 3(a) of the Constitution. He further alluded that the differential treatment embodied in the rule of *Ngwaketse* customary law was inconsistent with contemporary thinking and therefore unjustifiable. He critiqued the rule as perpetuating an unacceptable culture of male dominance that relegates women in to subordinate positions and subservience. He also stressed that the courts of law, as the conscience and voice of contemporary society, must do their part to ensure that the ideal of gender parity is achieved. However, the Judge did not address concept of harmonization between the two conflicting sections. Despite the coaxing reasoning in his judgment, it seems the judge wanted to change archaic discriminative customary law precedence. There is no logical connection on harmonizing the two conflicting sections. He decided to ingrain his reasoning around equality.

⁴⁷²MAHLB-000576-08 (HC).

⁴⁷³*Kamanakao I v Attorney-General* [2001] (2) BLR 54.

⁴⁷⁴*Christopher Mtikila v Attorney-General* Civil Case 5 of 1993 (High Court of Tanzania) pg 8.

In South Africa, the harmonization principle was enlightened by Nugent J in *Midi Television (Pty) Ltd v Director of Public Prosecutions*⁴⁷⁵ (Western Cape). The learned judge observed that, where Constitutional provisions are mutually discordant, a court must adopt an interpretation that is aimed at harmonizing them. The judge stated that they could not be weighed against one another but should be interpreted in a manner that enables their peaceful coexistence within the Constitutional scheme in line with the principles of justice.⁴⁷⁶

In ESwatini, in a situation where relevant and applicable Constitutional provisions were conflicting was in the case of *Jan Sithole and Others v Government of the Kingdom of Swaziland*.⁴⁷⁷ One of the questions that the Court had to determine was how sections 25 and 79⁴⁷⁸ of the *Constitution of Swaziland*⁴⁷⁹ may be accommodated within a unitary Constitutional scheme. The Court settled it by applying the harmonization principle by reading each of them such that they do not clash. The above decisions are suggestive that if Senate Masupha was augmented solely around section 19 of the Constitution of Lesotho, she would have been entitled to succeed. Section 19 is substantively distinct from section 18 as it was emphasized by Dr. Linake J in the case of *Mmusi*. However, the decisions on harmonization seem to be the relevant authorities to have been applied in Lesotho courts to harmonize sections 18 and 19 of the Constitution.

One would have a thought that Justice Linake erred in his decision by relying solely on section 3 (a) in total neglect of section 15 (4) (c) in his judgment. The rights under sections 3 and 15 are inter-connected just like Lesotho sections 18 and 19. The absence of discrimination, is *conditio sine qua non* of equality, likewise, equality complements freedom from discrimination.⁴⁸⁰ Harmonization theory is imperative to settle the tension or conflict between section 3 (a) and 15 (4) (c) of the Constitution of Botswana and sections 18 and 19 of the Constitution of Lesotho.

⁴⁷⁵[2007] SCA 56 (RSA).

⁴⁷⁶*Midi Television (Pty) Ltd v Director of Public Prosecutions* paras 8 and 9.

⁴⁷⁷2792 of 2006) [2007] SZHC 123 (6 November 2007).

⁴⁷⁸*The Constitution of the Kingdom of Swaziland Act* of 2005, Section 25; It guarantees the right to freedom of association. However, sec 79 prohibits individuals from using political parties to be elected to public office. It prescribes that every individual will be elected to public office on merit.

⁴⁷⁹Act 001 of 2005

⁴⁸⁰*Thabo Fuma v The Commander, Lesotho Defense Force and Two Others* (n 380); Justice Makara indicated that freedom from discrimination enshrined under section 18 of the Constitution and Right to equality provided under section 19, complement one another. And that they should be interpreted harmoniously.

The conflicting sections should be interpreted in with the intent to harmoniously promote the spirit and values of the Constitution.

5.4 Ghana

The *Constitution of the Republic of Ghana*⁴⁸¹ recognizes customary law as source of law in Republic of Ghana. The Constitution articulates that the laws of Ghana shall comprise of, *inter alia*, the Common Law, the rules commonly known as the Doctrines of Equity and the Rules of customary law as well as Precedence of Superior Court of Judicature.⁴⁸² Customary law is applicable only to members of a particular community.⁴⁸³ Thus, the Constitution defines customary law to mean ‘the rules of law which by custom are applicable to particular communities in Ghana.’⁴⁸⁴

5.4.1 Equality and freedom from discrimination

Article 17 of the *Constitution of Ghana* prohibits discrimination and provides for equal protection to all persons regardless of their sex or gender.⁴⁸⁵ The Constitution also gives Parliament the power to enact laws that are reasonably necessary to provide for, *inter alia*, matters relating to devolution of property on death or other matters of personal law.⁴⁸⁶ The power of parliament does not extend to validation of the customary law rule of male primogeniture in Ghana. In the event that parliament enacts laws favorable to male primogeniture, the Supreme Court of Ghana has the power to strike down that law as being unconstitutional.⁴⁸⁷ The freedom from discrimination was hailed by the Supreme Court of Ghana in the case of *Fianko v Aggrey*.⁴⁸⁸ In that case, the Court enunciated that the children of the deceased mother, both male

⁴⁸¹ 1992.

⁴⁸² *The Constitution of the Republic of Ghana* (n 475), Article 11(2).

⁴⁸³ *Courts Act* No. 459 Of 1993, Section 54.

⁴⁸⁴ *Constitution of the Republic of Ghana* (n 475), Article 11(3).

⁴⁸⁵ *The Constitution of Ghana*, Article 17(2).

⁴⁸⁶ *The Constitution of Ghana*, Article 17(4)(b).

⁴⁸⁷ *The Constitution of Ghana*, Articles 2 and 130 (1) (b).

⁴⁸⁸ (2007-2008) SC. GLR 1135.

and female have a right to inherit their deceased mother's property. This is regardless of whether the woman came from a matrilineal or patrilineal family.⁴⁸⁹

5.4.2 The Ghanaian courts' express rejection of male primogeniture

It has been the position in Ghana to sanction primogeniture rule even before coming into operation of the 1992 Constitution. This was pronounced by Justice Ollennu in the famous case of *Nartey v Nartey and Another*.⁴⁹⁰ The plaintiff instituted a case in the local court for the recovery of real and personal properties alleged to be the self-acquired property of his deceased father. His claim was based on the customary rule that only children of the deceased were entitled to inherit property of their father not their father's sister and mother because of the latter's feminine gender. It appeared that children of the deceased were still minors at the time of the death of their father. Their aunt was appointed as trustee duly assisted by deceased mother. The local court ordered that since Prampram (a community in Ghana) was a patrilineal society, the defendant alone could not administer the estate 'because her sons must inherit their father' and appointed a brother of the deceased jointly with the defendant as administrators of the estate, real and personal, and directed them to distribute the properties in a certain manner. The plaintiff appealed to the High Court. In the High Court, Ollennu J held as follows:

Succession is a matter of election or appointment by the family and there is no rule of customary law that a male must be appointed to succeed to a male. Although the deceased was survived by his brother, the family was therefore within its rights in appointing the defendant; whom it considered the most suitable person; the only course open to the local court therefore was to dismiss the plaintiff's claim and enter judgment for the defendant and co-defendant. Having failed to do this, the orders and directions made were *ultra vires* and should be declared null and void and judgment entered for the defendant and co-defendant.⁴⁹¹

Ollennu J thus dismissed the local magistrate misgivings about the appointment of a woman to inherit from a male when there were men available according to custom. He reiterated that both

⁴⁸⁹*Fianko v Aggrey*, at pg 1145.

⁴⁹⁰ [1962] 1 GLR 184.

⁴⁹¹*Nartey v Nartey and Another* pg 189.

male and female are equally capable to administer deceased's estate. The judge took cognizant of the fact that the defendant (woman) took care of the plaintiff and other siblings in the same sense of humanity and moral obligation as she will look after her own children.

The similar decision was arrived at in the case of *Akrofi v Akrofi*.⁴⁹² The plaintiff, a female native of Buem state and the only child, brought an action against the defendant, her paternal uncle, for a declaration that she was entitled to succeed to her late father's properties. The defendant argued that succession in Buem was patrilineal and he, not the plaintiff was entitled to succeed. His Lordship Sowah J discovered through evidence presented before his court that succession to property in Buem state is patrilineal. His findings were that only male children are considered to succeed their fathers not the female. His Lordship asserted that the plaintiff was equally qualified to be appointed a successor to inherit her father's property.

The court dispelled the customary law rule of primogeniture which the Paramount Chief of the Buem people relied upon as the applicable customary rule. In verbatim, he professed that "a custom which discriminates against a person solely on the basis of sex has outlived its usefulness and is not in conformity with public policy; if customs are to survive, they must change with the times."⁴⁹³

As set out in the cases above, Ghanaian law does not subscribe to the customary rule of male primogeniture. In few cases that were brought to courts, the Ghanaian courts have been consistent in dismissing discriminatory customary law rule practice which favored males over females. Inequality perception was perceived to be antiquated. The position under Ghanaian law on issues related to inheritance, the successor to the deceased property who died intestate is appointed by members of the family at a meeting convened for that purpose.⁴⁹⁴ The appointment is made irrespective of gender or sex.⁴⁹⁵

⁴⁹² [1965] GLR 13.

⁴⁹³ *Akrofi v Akrofi* (n 458), pg 18

⁴⁹⁴ *Akrofi v Akrofi* (n 458) pg 18.

⁴⁹⁵ *Fianko v Aggrey* (n 458).

5.5 Conclusion

On the basis of the above comparative analysis, South African Constitution has no section similar to Lesotho section 18 (4) (c) nor Botswana's section 15 (4) (c) which primarily permit discrimination on account of customary law. South Africa's perception is slightly similar to Ghana as both states subscribe to family decisions when addressing issues of inheritance. The exemplary case in South Africa is *Shilubana* and the Ghanaian cases of *Akrofi* and *Fianko*. The comparative lessons learned from all three countries are that the states have traversed from oppressing women under the guise of preserving customary law. With the renowned Constitutional interpretation principles including amongst others, Liberal Constitutionalism, Constitutional Democracy, Transformative Constitutionalism and Constitutional Morality, the shift is favorable to women.

It seems there is no place for discrimination and inequalities perpetuated against women. There is a plethora of international instruments that specifically aid of the interpretation of women's rights which most African states have ratified. It defies common sense and logic to understand as to why Lesotho is the only state lagging behind. It would be extensively discussed in the last chapter (6), how both Parliament and Judiciary of Lesotho could conspire with the intent to advance women's rights to succeed to chieftainship in Lesotho.

The Constitution of Botswana is contextually similar to the Constitution of Lesotho. Botswana traversed from inequalities perpetuated against women through judicial precedence in the case of *Ngwaketse*. Virtually, with the same principles involved, Lesotho courts failed to deviate from the past practice in the case of *Senate Masupha*. The other interesting part with Botswana is its reliance on international human rights instruments, though it is a dualist state like Lesotho. After the comparative analysis between the chosen above states, it is well founded that Lesotho is way behind on advancing women's rights compared to its counterparts.

Chapter Six

Conclusion and Recommendations

6.1 Introduction

Chapter six is primarily focused on the conclusions drawn on the findings set out in the previous chapters, particularly on discrimination and inequalities perpetuated against women in Lesotho when it comes to chieftainship inheritance. The main research question is: to what extent is the legal frame work on inheritance to the chieftainship succession discriminatory against women in Lesotho, and weather that discrimination is justifiable. The connivance between the Constitution and customary law on the same subject was scrutinized. The analysis was also drawn on the impact of section 18 (4) (c) of the Constitution of Lesotho and customary law on the women's right to the chieftainship succession.

The research was based on the hypothesis that women are marginalized because of adherence to concepts such as primogeniture, patriarchy, sex and gender. They are reasons behind subordinate status of women in Lesotho when it comes to the inheritance right to the chieftainship succession.

6.2 Key Findings of Chapters

6.2.1Chapter Two

In this chapter, the significant overarching findings of the study are that inequality and discrimination against women in Lesotho are eternalized by adherence to Patriarchal credence. The principle of male primogeniture derives from the ideological believe of male superintendence over women on the vital leadership positions, including the women inheritance right to chieftainship succession. This Decalogue ingrained in women's submissive temperament. It remains a laborious task to depart from this anguish psychological male despotism state. However, this agony is progressively attenuated by combatants' feminists who believe in equality between men and women. The feminist movements emphatically struggled for the repeal and amendments of laws which oppressed women and influenced the introduction

of alleviating laws like *Inheritance Act Amendment* of 1992 and *Legal Capacity of Married Persons Act* 2006 with the assistance of civil society organizations.

To a certain extent, the Constitution of Lesotho permits discrimination against women under section 18 (4) (c). It is approximated that interpretation of the Constitution in line with Constitutional Morality and Transformative Constitutionalism could propel the repeal of discriminating sections within the Constitution.

6.2.2 Chapter Three

The exploration of this chapter unearths the Constitution as a *grund norm* from which other subservient legislations derives authority. Their validity is void to the extent of inconsistency with the Constitution. The Constitution consists of the *Bill of Rights under Chapter II*. The intent and purpose of the Bill of Rights is to promote and protect fundamental human rights and freedoms of the subjects of the state. Sections 18 and 19 succinctly provides for rights to freedom from non-discrimination and equality before law respectively.

In contradistinction with the Constitution, Customary law does not subscribe to equality between men and women when it comes to chieftainship inheritance. It comprehensibly discriminates against women. Interestingly, chieftainship succession is not administered by the Constitution like Kingship, it is regulated by Customary Law legislations name checked as *the laws of Lerotholi* and *Chieftainship Act*. Clearly, customary law is opposed to the values of equality and freedom from non discrimination rights. Intriguingly, the Constitution permits discrimination imposed by Customary Law.

The inheritance right of women to chieftainship succession is constitutionally sanctioned on account of customary law. It would seem the Constitution and Customary law are paradoxical on the perception of rights, they are incongruent when it comes to deprivation of women inheritance rights to the chieftainship succession.

6.2.3 Chapter Four

The chapter delves on International Human Rights perception of women inheritance rights to chieftainship succession. The magnificence of International Human Rights instruments catalogue which have been comprehensively discussed in chapter four, are luminous on women succession rights to chieftainship. The revelation is that international Human Rights Instruments subscribe to Equality between men and women. They are contrived towards alleviation of all forms of discrimination against women, including women inheritance rights. They also oblige state parties to repeal existing laws which are discriminatory on the basis of sex or gender.

The intricacy of International Human Rights application lies on the dualistic nature of adopting international instruments in to the domestic arena. In Lesotho, international instruments are construed to be binding only if they are adapted in to the municipal law. All international instruments are espoused with a condition of being consonance the Constitution and other laws of the land. It seems ratification is an otiose exercise, in as far as section 18 (4) (c) of the Constitution of Lesotho remains operative. The divulgence is that International Human Rights agreements are only aids to interpretations, they are not justiciable.

6.2.4 Chapter Five

The chapter compares Lesotho's perception on Equality and freedom from discrimination with analogous jurisdictions. The lessons are learned from South Africa, Botswana and Ghana. The similarity between Lesotho and South Africa is that customary law is part of their laws. They both subscribe to the supremacy of Constitution. The difference between the two states is on the relationship between customary law and the Constitution. South Africa's customary law is entailed under different customary law legislations inclusive of *Intestate Succession Act*,⁴⁹⁶ *Black*

⁴⁹⁶ No. 81 of 1987.

*Administration Act*⁴⁹⁷ and *The Regulations for the Administration and Distribution of the Estate of Deceased Blacks*.⁴⁹⁸ Unlike in Lesotho, in South Africa, customary law gender-based discrimination is tested against the Constitutional provisions of equality and freedom from discrimination. The cases of Bhe and Shilubana are illustrative. The Constitution authorizes the courts to develop customary law. In Lesotho, discriminatory customary law provisions are permitted by the Constitution. The courts are reluctant interpretatively to depart from the current practice.

Lesotho and Botswana perception of International Human Rights law is homogeneous. They have incorporated the discriminatory sub-section which permits customary law-based discrimination within their Constitutions. However, Botswana departed from that past discriminating practice through the jurisprudence in the Mmusi's case. The Judge dispensed off the inequalities directed against women. The judge had also cited the relevant International Human Rights law and foreign appropriate judgments despite dualist nature of Botswana. Besides Mmusi's legal philosophy, Lesotho Customary law is almost identical to Botswana.

The similitude between Lesotho, Ghana, Botswana and South Africa is that customary law is part of their law. However, the Constitution of Ghana prohibits discrimination and provides equal treatment to everyone regardless of sex or gender. The Ghanaian legislative authority is incapacitated to authenticate primogeniture rule, if that happens, the Supreme Court can set it aside as unconstitutional. In Lesotho all courts, in their hierarchical structures subscribes to primogeniture rule simply because it is preserved in the Constitution.

6.3 Conclusion

As set out above, the legal investigation was conducted to answer the question that reads as: to extent is the legal frame work on women's rights to chieftainship succession discriminatory against them? And whether that discrimination, if any, is justifiable?

The treatise ferret out that discrimination and inequality against women seems to be a prevalent Gordian knot in most African communities. The history of women domination is traced as far as

⁴⁹⁷*Black Administration Act* (n 428).

⁴⁹⁸*Regulations for the Administration and Distribution of the Estate of Deceased Blacks* (n 431).

from the Paramount Chief Lerotholi's era, during the colonial administration. Women were barred from taking active in national decision making process. The national issues were discussed at *khotla* and *pitsos*, which were platforms where attendance of women was expressly sanctioned. This means women did not have direct participation in the decisions which directly affected them. That tradition or practice was traversed in to law through the codification of the Laws of Lerotholi. Chieftaincy was the first section in the Lerotholi Code version of 1903.

The section 1 of the Code was later reduced in to the statute under *Chieftainship Act*. The contents of Lerotholi Code on succession to the chieftainship are reflected in the Act with few additions. The Act and the Code elbow women rights to chieftainship succession. Both pieces of legislations are discriminative against women. Within the content of the two statutes, there is no mention of the words 'equality' and 'non-discrimination' in addressing issues relating to the rights of women. However, the Constitution enshrined Right to Equality and Freedom from non-discrimination under the heading of Fundamental Human Rights. The impression is that it deviates from the Laws of Lerotholi Code and Chieftainship Act comprehension on women rights.

Chapter II of The Constitution of Lesotho outlines Fundamental Human Rights and Freedoms, although it explicitly stipulates that the rights are not absolute. They are subject to limitations designed to ensure that enjoyment of those rights and freedoms does not prejudice the rights and freedoms of others or the public interest. Freedom from discrimination, as revered under section 18 of the Constitution, is momentarily vital right in the context of this dissertation. The superintendence of section 18 is attenuated by claw-back clause circumscribed under subsection 4 (c) which permits discrimination against women on account of customary law. The effect of the claw-back clause renders the general section as subservient to the subsection. In that fashion, it defeats the whole purpose of freedom from non-discrimination because it gives right with one hand and retrieves it with another. The sub section ergo is providential to antiquated practices of male primogeniture, patriarchy, sex and gender as the major forces behind women subordination.

The Customary law and the Constitution legal conundrum discussed above could be mitigated by reliance on the Constitutional interpretative theories. Constitutional Morality theory seeks to interpret the Constitution in line with the core values, spirit and purport of the Constitution. The theory of Transformative Constitutionalism is very elucidative on societal transformation aspect.

The society is transformed so much that they no longer acknowledge unequal treatment of state subjects before law. The feminist theory on the other hand advocates for equality and parity between men and women.

The preeminent finding is that the connivance between the Constitution and Customary law to perpetuation of discrimination and inequalities against women is attributable to the fact that section 18 (4) (c) in the Constitution is misplaced. It is placed as a subsection under the general section that extends fundamental human rights. The effectiveness of the rights turns in to fecklessness futile exercise. International human rights instruments are the only aspiration to abrogate scrofulous desuetude customary law practices which are no longer popular in some African States like Ghana and South Africa. In Lesotho, the legal quagmire would still be that they should first be adapted in to the domestic legislation, to avoid inconsistency with the Constitution and other laws of Lesotho. There is no synergy between the customary law, Constitution and the implementation of international human rights instruments.

Despite the increased women's participation in decision making in various national platforms, the right to chieftainship succession is still a barrier to overcome. Part of society is deeply rooted in custom, culture, religion and tradition. It would seem the legislature is not ready to accept recognition of women in the chieftainship leadership roles, even though they have shown in recent times that are prepared for leadership roles including succession to chieftainship in the Senate case. Such development can only realized through concerted effort commencing with enthusiastic political will, traditional leadership categories and societal deliberate strategies to totally surcease discriminatory laws against women. The comparable states have legislatively and jurisprudentially achieved equality; ergo it is possible for Lesotho to accomplish the same.

6.5 Recommendations

It is recommended that section 18 (4) (c) of the Constitution of Lesotho be repealed. The proposition is that there be a standalone chapter in the Constitution that establishes a body which will assist with development of customary law. The process is proposed to be through an *ad hoc* committee appointed for that specific purpose. The similar process has already been visualized when the *Laws of Lerotholi* were crafted. However, it is commendable that women and other stakeholders be participants in that process to ensure adequate representation to all interested parties.

Once the body that regulates and develop customary law is established, customary law will be tested against the Bill of Rights in the Constitution. Therefore, the practice of culture will not undermine any provision of the Bill of rights. In that way, the conflict between the Constitution and Customary law will be settled. The women's rights to chieftainship will receive proper recognition because customary law Code will be confronted with section (s) 18 and 19 of the Constitution; the inconsistency will render the discriminatory customary law *null and void* to the extent of their inconsistency with the Constitution.

Section 154 of the Lesotho Constitution asserts that customary law is developed by an Act of Parliament. It is also of paramount importance to take cognizant of the fact that Section 70 empowers the Parliament to make laws. Parliament is a civil law creature. It is not advisable to task it with the responsibility to develop customary law in the traditional style. The simultaneous recognition of customary law and civil law in the Constitution is recommended. In that fashion, the Constitution would be preserving the traditions and customary laws of Lesotho through retaining the dual legal system as introduced in section 2B of the *General Law Proclamation* of 1884 during colonial era.

It is commendable that Human Rights Commission be resuscitated. The operationalization of Human Rights Commission Act of 2016 is expeditiously recommended. The conscientious effort to implement the Act was riddled with objections from Transformation Resource Centre (TRC) in 2017 on the ground that it lacked proper appointment processes. The Act is now in the General Assembly for discussion.

It is also recommended that germane International Human Rights Instruments that exponent alleviation of discrimination against women be adopted into the national Constitution. The limitations or reservations in the application of international human rights instruments like in CEDAW and ICCPR ought to be repealed. In that way, women's rights to chieftainship succession will be fully accomplished.

The other recommendation is that the courts of law should play the active role in interpreting customary law in line with the core values, spirit, purport and morality of the Constitution. The interpretation should also assist with the consistent and constant development of the customary law. The recommendations suggested, though not exhaustive, provide the glimpse into

approaches that may be opted for the continuation of the study and analysis of inheritance rights of women to the chieftainship succession in Lesotho.

It is further suggested that the Constitutional Court be given a Constitutional mandate to interpret and develop customary law. Republic of South Africa has merited this process. It empowers the courts through section 39(2)⁴⁹⁹ of their Constitution to develop customary law to promote the spirit, purport and the objects of the Bill of Rights. Customary law in the cases of *Bhe* and *Shilubana* was developed on the strength of the above section. It is highly commendable that courts of Lesotho be legislatively given this mandate as the Parliament sometimes takes a long time to promulgate laws.

It is also proposed that appointment of Judges of the High Court and the Court of Appeal be on academic merits. It is observed that the current requirement for their appointment is Bachelors of Laws (LLB) and at least five years of experience in the legal practice. Pursuant to the requirements set under Section 6 (1) (C) (iii) of the *Legal Practitioners Act*,⁵⁰⁰ it is stated that a person who applies to be admitted as an advocate has to satisfy the requirement of LLB. The same requirement applies for appointment of Judges and Magistrates. It is proposed that the requirement for appointment of Judges be advanced to Masters Degree.

There are theories of law or Constitutional law in particular, which are not in the curriculum of LLB but are of paramount significance in the High Court and the Court of Appeal application decisions. For instance, Constitutional Morality, Transformative Constitutionalism, Political question, Constitutional Democracy, Constitutional Liberalism and others, are not dealt in depth in the first degree, as it is the case in post graduate studies. The inconsistency of decisions in the upper courts could be amplified by academic defects. A vast experience unchaperoned with academic qualification is insufficient to transform judicial institution. Gender parity is also encouraged in appointment of the Judges of the High Court and the Court of Appeal.

⁴⁹⁹ 1996

⁵⁰⁰ Act No. 11 of 1983

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