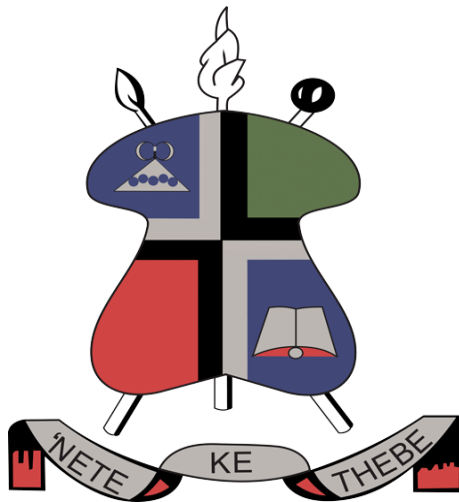


**Impacts of Large-Scale Extractive Industries On Rights
of Women in Polihali and Liqhobong Communities: A
Critical Human Rights Crisis in Lesotho**

By

Adv. Motlatsi J Mofolo

**A Dissertation Submitted in Partial Fulfilment of the
Requirements for the Degree of
MASTER OF LAWS IN HUMAN RIGHTS LAW**



NATIONAL UNIVERSITY OF LESOTHO

FACULTY OF LAW

Supervised by:

Dr. Seth Pusetso Macheli

June 2022

Title:

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Women in Polihali and Liqhobong: A Critical Human
Rights Crisis in Lesotho**

June 2022

DECLARATION

I, Adv. Motlatsi Jonas Mofolo, do hereby declare that this mini dissertation is a presentation of my original research work and has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. Wherever contributions of others are involved, every effort is made to indicate and acknowledge such unambiguously, with due reference to the literature, and acknowledgement of collaborative research and discussions. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of Master of Laws Degree at National University of Lesotho.

The work was done under the guidance and supervision of Doctor Seth Pusetso Macheli, at the Faculty of Law, National University of Lesotho.

Signature:  _____

Supervisor

In my capacity as supervisor of the candidate's thesis, I certify that the above statements are true to the best of my knowledge.

Name: Dr. Seth Pusetso Macheli

Signature: *SpMacheli*

Date: 7th September 2022

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List of Acronyms

ASM	Artisanal and Small-scale Mining
CEDAW	Convention on the Elimination of Discrimination Against Women
CSOs	Civil Society Organisations
CSR	Corporate Social Responsibility
FDI	Foreign Direct Investment
HIV/AIDS	Human immunodeficiency virus infection and acquired immunodeficiency syndrome
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LHDA	Lesotho Highlands Development Authority
LHWP	Lesotho Highlands Water Project
MCDF	Maluti Community Development Forum
NGOs	Non-Governmental Organisations
OECD	Organisation of Economic Co-operation and Development
SDG	Sustainable Development Goals
SRHR	Sexual Reproductive Health Rights
TIP	Trafficking in Persons
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
US	United States
USAID	United States Agency for International Development

Abstract

The research seeks to explore the impacts of foreign direct investments (FDIs) in the form of large-scale extractive industries on the protection of basic human rights in the affected communities of Polihali and Lihobong. Specifically, the research focuses on women as the most vulnerable group affected. It also aims to examine the subtle practices of foreign investments and their modern trends in violation of human rights in Lesotho. It further discusses how Basotho nationals, particularly women, can be safeguarded through the local implementation of human rights.

The advent of the commercial mining and construction of hydro-power dams in Lesotho's highlands brought about large amounts of land in the affected communities being expropriated along with all its life supporting amenities that rural communities relied on for sustainability of life. And because of strong patriarchal systems dictated by customary and traditional norms, dominating all spheres of life against women in the indigenous communities, community consultations preceding such developments excluded the voices and interests of women. As the daily beneficiaries of the land amenities affected and everyday bearers of the responsibilities of family support, women were left with no alternative means of livelihood, thereby increasing their socio-economic pressures as well as subjecting them to other vulnerabilities and exploitations as a result. The situations were further worsened by legislative government interventions that excluded women from economic participation in artisanal mining; the main source of a cash economy mostly explored by women in rural communities of Lesotho, and criminalising such activities.

Chapter One: Introduction and Research Methods

1.1. Research question

What are the human rights violations and legal issues perpetrated and exacerbated by large-scale land extractive industries in Lesotho?

1.2. Introduction and background

The African continent has been endowed with a vast supply of lands with rich natural resources such as gold, diamonds and water amongst the many others. However, most of these countries are often those that suffer from extreme poverty levels. In the same vein, more than 70% of Southern African poorest people live in countries with valuable and abundant natural resources.¹ Unfortunately, studies have revealed that these people do not share in the wealth accrued from extractive industries.² In some instances, their lives are worse-off because the extractive industries in the region are non-inclusive and of an enclave nature.

UN Women³ has noted in a recent policy brief that the on-going discoveries of valuable natural resources have the potential to reduce poverty levels and foster shared economic growth in Southern and Eastern African countries.⁴ However, it cautioned that unless the extractive industry sector is managed in a transparent and equitable manner, there are several risks of severe negative consequences. Such include environmental degradation; economic disturbance; population displacement and accelerated levels of inequality and poverty;⁵ all of which consequently impact on basic human rights of the affected. The situation is worsened by gender-blind laws, policies and practices by governments and companies that continue to give rise to systematic exclusion of women and

¹ UN Women Policy Brief “Gender Equality in Extractive Industries” Available at [UN-Women-Policy-Brief Gender-Equality-in-Extractive-Industries 14-July-2014.pdf](https://www.internationalwim.org/wp-content/uploads/2014/07/UN-Women-Policy-Brief-Gender-Equality-in-Extractive-Industries-14-July-2014.pdf) (internationalwim.org) Accessed 5th December 2021.

² Ibid.

³ The United Nations Entity for Gender Equality and the Empowerment of Women, also known as UN Women, is a United Nations entity working for gender equality and the empowerment of women.

⁴ UN Women Policy Brief “Gender Equality in Extractive Industries” Available at [UN-Women-Policy-Brief Gender-Equality-in-Extractive-Industries 14-July-2014.pdf](https://www.internationalwim.org/wp-content/uploads/2014/07/UN-Women-Policy-Brief-Gender-Equality-in-Extractive-Industries-14-July-2014.pdf) (internationalwim.org) Accessed 5th December 2021.

⁵ Ibid.

silencing of women's experiences, perspectives and interests in relation to extractive industries projects. This has resulted in increased gender inequality and further disempowerment of women, and women are forced to face disproportionate social and environmental impacts. These include, amongst others, loss of livelihoods through land-grabbing. Therefore, as more and more corporate and private entities seek to extract in the region, it is important that the negative gender-based implications of extractive industries are curtailed, while possibilities for poor women's access and socio-economic rights are explored.⁶

The Kingdom of Lesotho has not been an exception to the allegation in the background above. With the insurgence of large-scale commercial diamond mining and hydro-power water projects in the highlands of the districts of Butha-Buthe and Mokhotlong, communities have been subjected to various forms of human rights violations, the consequences of which mostly reflected on women. The rural communities of Lesotho mostly survive on traditional modes of livelihood such as small-scale horticulture direct production, livestock, artisanal mining and other primary sources such as use of forests and shrubs for daily house hold fuel and natural streams for water supply. When large-scale extractive industries expropriated lands, all these resources were eradicated and women as the direct group and primary bearers of daily family responsibilities were further imposed with more stressful burdens of seeking alternative means of family support in the place of the lost resource-supply.

The overarching problem perpetually relies on the fact that third generation rights⁷ or collective rights of people have been excluded from the fabric of protectable human rights in the context of Lesotho besides international obligations and commitments. Third generation rights are sometimes called Solidarity Rights. These are rights that go beyond the framework of mere social and civil spectrum of individual rights, but are focussed on collective concepts such as community and

⁶ (n 4).

⁷ Nega Ewunetie and Admasu Alemayehu "The Distinctive Feature of the African Charter", Abyssinia Law, 22 February 2012, Available at <https://www.abysiniaw.com/about-us/item/361-the-distinctive-feature-of-the-african-charter> Accessed on the 8th December 2021.

the people.⁸ These rights are classified as: the Right to Development;⁹ the Rights to Peace and Security;¹⁰ and the Right to General Satisfactory Environment.¹¹ As a results, it is difficult to enforce these people's rights against the government as part of its responsibilities it should protect.

Women in the rural communities relied on local supply of natural resources for support of life for themselves and their dependants. These resources were, amongst others, local tree plantations which supplied communities with wood for heating and cooking fuel, pastures and grazing lands where these communities found supply of grasses for cattle and livestock, local water streams, ponds and rivers that support the entire ecosystems of rural life with water for all species, both flora and fauna, wild vegetation supporting communities with food and traditional medicines, fertile lands upon which these communities conducted their agricultural activities for food production, and diamond rich lands upon which communities conducted small-scale artisanal mining in diamonds and other minerals as a source for obtaining cash for most families.

These resources are historically the only known means of life support for these communities. When they were arbitrarily destroyed for establishment of commercial extractive industries, affected communities were involuntarily forced to shift from these natural ecosystems and left absent alternative means to replace those that were disturbed. In sound human rights practice landscapes, a destruction of a person's means of livelihood is tantamount to a violation of his right to life¹² and economic participation.¹³ For women, this meant a dawn of a series of life

⁸ Hannan, Mohammad Abdul, "Third Generation Human Rights and the Good Governance" (November 29, 2010). OIDA International Journal of Sustainable Development, Vol. 2, No. 5, , 2010, pp. 41-50, Available at SSRN: <https://ssrn.com/abstract=1717075> Accessed on the 8th December 2021.

⁹ Banjul Charter Article 22.

¹⁰ Banjul Charter Article 23.

¹¹ Banjul Charter Article 24.

¹² Classified as Fundamental Human Right in terms of Charter II of the Constitution of Lesotho 1993 Section 4.

¹³ The Banjul Charter to which Lesotho is party in the Preamble recognizes that "... it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights ia a guarantee for the enjoyment of civil and political rights;" in definition of human rights.

destructions and introduction of several vulnerabilities. As much as community consultations were conducted, albeit tainted with deceit and political corruption meant to trick unsuspecting members of the communities into giving up their rights,¹⁴ women were never sufficiently consulted as gatherings were dominated by opinions and interests of male villagers and women were not guided into fully understanding the implications of the projects upon their daily lives. Consequently, they lost part of their rights to livelihood and economic participation absent informed consent.

Currently, these communities continue to suffer extreme forms of poverty as agricultural fields have been destroyed and those remaining rendered barren by extractive industries' operations causing extreme environmental impacts and rendering food production almost impossible. The little remaining resources are not sufficient to sustainably support all communities and this has resulted in tribal wars between communities, gender inequalities and gender-based violence especially against women. These conditions have been further worsened by the fact that women are now forced to rely on men for economic support amongst other necessities. Furthermore, incidences of girl child marriages have increased as families relinquish girl children to marry early in order to gain economic benefit in the form of dowries in return. Therefore, absent sufficient people-protective institutional and legal frameworks, resort to application of international human rights standards is necessary.

1.3. Statement of the research problem

Foreign direct investments (FDIs) have demonstrated an ideal potential breakthrough for African economies. However, even with its vast virgin natural resources, some African countries have been experiencing severe anti-surges in economic growth regardless of investment opportunities the country presents and to this, Lesotho has not been immune. The ignorance of human rights protection

¹⁴ Billy Ntaote and Lerato Matheka, "Polihali Communities In Tussle For Lifetime Compensation" *The MNN Centre for Investigative Journalism* (Maseru Lesotho 29 October 2018), Available at [Polihali Communities in tussle for lifetime compensation – MNNCIJ \(lescij.org\)](https://www.mnnccij.org/) Accessed 8th December 2021.

factor as a barrier was never taken into consideration. As a result, opportunities grew but the economy remained stagnant. This is because local communities in which areas commercial mining companies have been established, were excluded from the shared economic participation in the mined resources; a violation of their human rights to livelihood. Consequently, when national legal infrastructures failed to protect the people's human rights to livelihood amongst others, societies economic conditions deteriorated.

Under normal circumstances, FDI's that impact on the normal order of life of people that are affected by their operations should be seen to restore such disturbed status and or even improving upon it.¹⁵ Basic amenities of daily life support such as natural resources that will be affected by the FDI's should be alternatively restored to the communities that depended on them for sustainability of life itself. Failure to realise restoration and alternative replacement of such necessities, forces affected group out of the normal order of life that was established and supported by such.¹⁶ Disturbing the normal order of life of a person results in violation of a series of such person's basic human rights such as right to life which should, from the human rights perspective, be legally recognised to include its inalienable right to livelihood.¹⁷

In Lesotho the contrary has been a reality. With the insurgence of large-scale extractive industries in the water and diamond mining sectors, human rights violation in the affected communities have escalated. Majority of rural communities mostly affected by large-scale land extractive industries primarily depend on land produce for social, economic, political and cultural support of life. These include, amongst others, forests for fuel supply, herbs for food and medicinal supply, land for agricultural production, pastures for grazing of livestock, streams, wells and

¹⁵ Isabella Mannucci, 'The Impact of FDI In Developing Countries' Newsletter published on LinkedIn. Available at <https://www.linkedin.com/pulse/potential-impact-foreign-direct-investment-developing-mannucci/> accessed 16th May 2022.

¹⁶ Bjorvatn, Kjetil & Kind, Hans & Nordås, Hildegunn. (2002). The Role of FDI in Economic Development. *Nordic Journal of Political Economy*. 28. 109-126. Available at https://www.researchgate.net/publication/23978505_The_Role_of_FDI_in_Economic_Development.

¹⁷ *Bangladesh: Ain o Salish Kendra (ASK) v Government of Bangladesh & Ors* 19 BLD (1999) 488.

rivers for water supply and for those residing in diamond-rich areas, minerals for economic support. These amenities have established a certain order of life for such communities that has allowed them, amongst others, social, economic and political independence that is not supported by a cash economy. However, large-scale extractive industries established in these communities have severely disturbed this natural order of life thereby forcing the affected into exploring non-compatible means of survival.

The consequences of these have been most severe on the women group in the affected communities. Women in the rural communities of Lesotho are subjected to extreme burdens of daily family sustenance when men mostly explore migrating into the Republic of South Africa in search for jobs.¹⁸ Women remain behind bearing and raising children and this burdens them with the daily responsibilities of securing means of life support for survival of themselves and their families in terms of fuel for heating and cooking, sources of water, and searching for crops for food and medicine amongst others.¹⁹ This also increases gender inequalities and the further disempowerment of women and human rights infringements. For example, as land is expropriated for extractive industries, women's livelihoods and food security are put in jeopardy. Risks of HIV and AIDS and violence against women and girls can escalate with the influx of transient workers, the transition to a cash economy, and the emergence of new socio-economic stresses. Furthermore, as vital resources like water and wood become scarcer, and water becomes more polluted, women's care work dramatically increases.²⁰

The situation is worsened by various factors. On the one hand, government has been passing laws for protection of the interests of investors without intentionally being considerate of the rights of citizens. Rural communities also depended on artisanal mining of diamonds and medicinal herbs for support of economic life. However, with the insurgence of commercial mining companies, artisanal mining was

¹⁸ 2021 Lesotho Net Migration rate suggests -4.59 migrant(s)/1,000 population. [Lesotho - The World Factbook \(cia.gov\)](#) Accessed 5th January 2022.

¹⁹ Community consultations undertaken with women from affected communities. Full details narrated in Chapter 5.

²⁰ (n 1) 6-8.

criminalised through an Act of parliament which consequently trampled on the affected communities' rights to economic participation.²¹ On the other hand, entrenched gender bias and inequalities between men and women and patriarchal systems dominating rural life resulted in gender-blind practices in community consultations and decision-making processes which gave rise to the systematic exclusion of women and a silencing of women's perspectives, agendas, and interests in the decisions that directly affected them. Also, gender biased customary practices to land rights that exclude women further resulted in more widowed and divorced women losing land being barred from claiming their rights.

Consequently, the vulnerability of women is exacerbated as their dependence on male counterparts for survival increases. Women continue to be rendered unable to negotiate safe sex and family planning against men who assume economic power over them. This results in compromising of their health rights, child marriages against girl children escalate as families seek to lessen family support burdens, incidences of gender-based violence and new HIV infections against women increase.

Therefore, this research seeks to establish that, under a large family of human rights law and international standards that the Kingdom of Lesotho has pledged to uphold, these incidences constitute reprehensible acts of human rights violations. Also, it will establish as matter of fact that government has intentionally overlooked these community grievances and worsened them in a way, as an incentive to attract and retain foreign direct investors. Ultimately, the end goal will be to demonstrate that absent strong systems for protection of human rights, local implementation and or community empowerment on recognition of these rights will go a long way in guaranteeing that vulnerable communities hold capacity to stand as the first line of self-defence against violation of their inherent rights and freedoms. This will also empower their political participation to endeavour to take active participation

²¹ *Mines and Minerals Act* No. 4 of 2005 Section 46(1). See also Precious Stones Order of 1970 (Amended in 2004 through Legal Notice No.160 of Precious Stones Regulations) Section 6(1)(a) and the Land Act of 2010 which also repealed the Land Act of 1979. See Chapter 4 for a full discussion.

against government interventions that threaten to jeopardise their basic human rights, and consequently encourage public effort in holding political institutions accountable.

Comprehensively, the research will discuss the sole problem that these incidences identified amount to human rights violations that Lesotho has pledged to eradicate in its local, regional and international commitments yet they remain uncurbed. Also that these incidences were not in existence during periods prior to establishment of commercial land extractive industries to support an allegation that they were indeed a result of insufficiently regulated FDIs.

1.4. Summary of Research Questions

Under the main research question “What are the human rights violations and legal issues perpetrated and exacerbated by large-scale land extractive industries in Lesotho?”, the research shall also utilise guidance of the following sub-questions per chapter to aid in answering the main research question.

- Chapter 2: What is the actual nature of the corpus of human rights as established by international standards and has Lesotho been able to reflect this in its laws?
- Chapter 3: What are the global rules and regulations governing extractive industries in order to ensure protection of human rights in their operations?
- Chapter 4: What has been the relationship between extractive industries and women’s human rights in Lesotho?
- Chapter 5: What are the case studies of women’s human rights violations by extractive industries in the affected communities of Polihali and Liqhobong?
- Chapter 6: Based on the findings, how can these challenges be addressed in order to stop women’s human rights violations?

1.5. Significance of the Study

The study shall serve as a research-country’s (Lesotho) introspection document on the milestones achieved in protection of fundamental human rights under a large

family of international human rights standards, laws and policies, as well as Sustainable Development Goals.²² It will also contribute as a baseline study for the direct nexus between human rights and foreign direct investments. Lastly, the study will contribute to the development of the Bill of Rights in the current National Reforms to include economic participation and collective rights of people as fundamental human rights in the context of Lesotho.

1.6. Scope and purpose of the study

The study shall look into the relationship between FDI and Human Rights in order to establish the nexus that forms the basis of this research. Furthermore, the study shall explore the legal and institutional framework governing large-scale extractive industries to demonstrate how the Government of Lesotho has relaxed protection of human rights as an incentive for attraction of FDI. This shall also include a discussion on real time data of case studies analysing the human rights situation of women in the sampled communities of Liphobong and Polihali, carried out and exacerbated by large-scale extractive industries.

The selection of the two sampled communities of Liphobong and Polihali is actuated by the recent extractive development undertakings happening in these communities and the larger population of affected women as compared to other locations. Since the research is targeting women as the specific beneficiaries of this research, it was important to identify communities with the largest population of women in order to adequately premise the quantification of the impacts. Also, the Polihali communities are targeted in order to adequately cover the spectrum of impacts from both diamond extractives (Liphobong) and water extractives (Polihali).

The purpose of the study is to bring solutions to the human rights gaps identified in the impacts of FDI on the basic human rights of the unsuspecting members of the affected communities. This is because, the relationship between FDI and Human

²² The Sustainable Development Goals (SDGs) are a collection of 17 interlinked global goals set up in 2015 by the United Nations General Assembly in a UN-GA Resolution called the 2030 Agenda, designed to end poverty, hunger, HIV/AIDS, and discrimination against women and girls.

Rights seems to be downplayed by national legislative, policy and institutional frameworks, thereby impeding on the progress Lesotho has pledged under its international obligations towards upholding and protection of fundamental human rights.

1.7. Review of literature

Several human rights studies have been conducted in the country by different researchers analysing the general situation of human rights in the context of the Kingdom of Lesotho. Such studies include those conducted annually by the United States Department of State Bureau of Democracy, Human Rights and Labour.²³ Most of these studies focussed on the legislative, policy and institutional framework preparedness of the Kingdom towards protection of human rights without necessarily digging into the depths of grass-roots human rights situations within societies, especially indigenous and rural communities. However, the 2020 report revealed that there were legal limitations on the employment of women in industries such as mining.²⁴

On the other hand, there is also a series of other unpublished works on the human rights situations of indigenous and rural communities in Lesotho, undertaken by individual consultants and local NGOs supported by international donors. Reports on these studies have only been compiled and shared with the donors who had supported them. Examples are a Ford Foundation supported project awarded to Women and Law in Southern Africa Research and Education Trust-Lesotho, titled *“Rural Women Artisanal Miners and Women in Mining Areas in Selected SADC Countries Increasingly Mobilised, Organised to advocate for Improved Land and Mining Rights to Increase their livelihoods by 2022.”* The project supported a baseline study that rural women and women artisanal miners in Zimbabwe, Zambia, Lesotho, Mozambique, should have strengthened voices to meaningfully participate, defend their rights and benefit from a mutually violence free, gender

²³ These annual studies are available at <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-democracy-human-rights-and-labor/> Accessed 15th January 2022.

²⁴ US Department of State Lesotho 2020 Human Rights Report. Available at [*LESOTHO 2020 HUMAN RIGHTS REPORT \(state.gov\)](https://www.state.gov/lesotho-2020-human-rights-report/) Accessed 16th January 2022.

responsive, accountable and inclusive natural resources governance sector. The other one was a project implemented by the Transformation Resource Centre supported by the European Union titled “*Promoting Good Governance and Human Rights.*” The project also studied the culture of human rights in rural communities and assessed communities’ strengths toward holding government accountable.

In 2021, the European Union further supported a study titled “Large-Scale Diamond Mining in Lesotho: Unpacking its Impact on Adjacent Communities”,²⁵ undertaken by the Kimberly Process Civil Society Coalition through the Maluti Community Development Forum. The study was aimed at unpacking both negative and positive impacts on selected villages affected by diamond mining, particularly those living in the rural areas of Lesotho where large-scale commercial mining takes place. The initiative was to address the long-standing outcry of Lesotho’s vulnerable mining-affected communities by holding those responsible for misdeeds accountable and inviting the Government of Lesotho and diamond industry actors to be more responsible and responsive when conducting mineral sourcing.

In relation to human rights issues in the affected communities, the study revealed that many actions undertaken by the government have been to the detriment of the affected communities. The study narrates that several events in the past years have demonstrated that the Government of Lesotho and Lesotho’s police forces seem prone to applying excessive force, either directly or indirectly, in their interaction with members of the affected communities trying to fight for their rights and demanding fair services and justice from the mining companies.²⁶ The report also mentions the doctrine of Corporate Social Responsibility in ensuring protection of human rights in the mining-affected communities. The doctrine is defined as a term

²⁵ A report compiled by Maluti Community Development Forum (MCDF) Thabo Lerotholi. Available at <https://www.kpcivilsociety.org/publications/publications-from-the-coalition/grassroots-research-on-local-diamond-mining-impact/> Accessed 6th February 2022. See also Claude Kabemba, Edward Lange and Masutane Modjadji, ‘Women's Land Rights and Extractive Industries in Southern Africa’ pg 129.; Moses M. M. Daemane ‘Perceptions of Lesotho’s Rural Communities on their Contribution Towards Sustainable Rural Water Supply Systems’ Global Journal of HUMAN-SOCIAL SCIENCE: H Interdisciplinary. Volume 15 Issue 6 Version 1.0 Year 2015.

²⁶ Ibid Maluti Community Development Forum (MCDF) pg.19.

to cover companies' strategies to make a positive contribution to the needs of communities in the location of their business operations.

Holistically, the study's approach was of a general nature focussing on scientific and statistical situational analysis. Although an insight into human rights formed critical part of its concerns, it did not disaggregate the impacts by a target population of women group as shall be the approach of this dissertation.

Be that as it may, a report published by other international organisations in the business of protection of women's rights such as the Association for Women's Rights in Development and the Women Human Rights Defenders International Coalition,²⁷ argue that women's right to participate in decision-making processes, including decisions related to development projects, is made explicit in several international human rights instruments yet the extractive industries however tend to exclude local communities from decision making processes. The report narrates that when there are attempts at community consultations, it is common for companies to primarily consult with traditional leadership about proposed plans, which often excludes women.

There are also other academic researches conducted in the purview of livelihood impacts by the commercial mining industries in Lesotho. One is a PhD Humanities research thesis conducted by Esther L Makhetha in 2016 titled "*Small-scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho*"²⁸ undertaken at the University of Pretoria. The thesis examined how individuals and households of Kao and Liqhobong responded to economic challenges resulting from implementation of structural adjustment policies in the mining sector in Lesotho, and how local artisanal miners with their own moral economies negotiated

²⁷ Barcia, I., 2017. *Women Human Rights Defenders Confronting Extractive Industries an Overview of Critical Risks and Human Rights Obligations*. [online] Awid.org. Available at: https://www.awid.org/sites/default/files/atoms/files/whrds-confronting_extractive_industries_report-eng.pdf Accessed 18th February 2022.

²⁸ Available at https://repository.up.ac.za/bitstream/handle/2263/62649/Makhetha_Small_2017.pdf?sequence=1 Accessed 18th February 2022.

the contestation over natural resources with Government of Lesotho and international commercial mining companies.

Beyond the Kingdom of Lesotho, other scholars such as Uwafiokun Idemudia, in his article “*The Extractive Industry and Human Rights in Africa: Lessons from the past and future directions*”,²⁹ have discovered that there are traceable similar patterns at least across the continent of Africa on the issue of human rights and extractive industries. He found that all extractive industries human rights abuses tend to be associated with the violation of economic, social, and cultural rights, tensions over land ownership, the loss of livelihood, and community marginalization.³⁰ And while the article notes that there are a number of ways in which resource extraction enables human rights violations, it identifies the dominant three as: conflict or competition over land ownership; loss of traditional sources of livelihood; and lack of community participation in decision-making.³¹

While these researches discuss the impacts of extractive industries on human rights of affected communities from different perspectives, they share a common denominator proving that there is indeed a commission of human rights violations by extractive industries on the rights of the people. This assertion is validated by Idemudia’s findings that these violations appear to be of a similar nature in most countries experiencing commercial land extraction in natural resources such as diamonds and gold. Also, they establish a sound premise for this dissertation’s contention of a violation of human rights by extractive industries, although with a demarcation with a specific focus of women’s human rights.

Contrary to the scope and proposed content of this dissertation, the above researches do not unravel the human rights situations in the selected communities from the perspective of legality and enforceability of rights on behalf of the affected group of women. The point of demarcation lies in the fact that this dissertation focusses

²⁹ Resources Policy, Volume 78, 2022, available at <https://doi.org/10.1016/j.resourpol.2022.102838>. Accessed 7th September 2022. See also Marcellinus Essah, ‘Gold Mining in Ghana and the UN Sustainable Development Goals: Exploring community perspectives on social and environmental injustices’ *Sustainable Development*, 30(1), 127– 138. Available at <https://doi.org/10.1002/sd.2233>.

³⁰ Ibid 1.

³¹ Ibid 4-6.

on enforceability of compromised human rights rather than merely arguing human rights from the anthropological and archeological focal points.

Specifically, unlike the studies herein discussed, this dissertation's approach is to identify and address the human rights gaps in relation to women as a specifically underserved population of the Basotho rural communities; a factor that is not a subject of the research works herein discussed. This is because women in Basotho societies are already subjected to perpetual human rights violations (a result of customary and traditional practices) that are excluding them from equal participation in society. Therefore, contrary to the researches here above discussed, this dissertation argues that extractive industries have worsened the human rights situation of women in the affected communities.

1.8. Hypothesis

The Kingdom of Lesotho's fabric of Human Rights is enshrined and limited to the provisions of the Bill of Rights in Chapter II of the Constitution.³² The Bill of rights in sections 4 to 24 defines rights and freedoms that the State will recognise as protectable and enforceable fundamental human rights of its nationals regardless of status. According to this background, the constitution recognises no other rights and freedoms as definitive human rights of the people in Lesotho beyond the fabric of the Bill of rights.

However, Lesotho is party to a list of international legal rights instruments which recognise the definitions and scope of human rights and freedoms of people beyond the limitation of the Bill of rights per the Constitution. One example of such rights is the right to development;³³ the right to peace and security³⁴ and the right to general satisfactory environment;³⁵ all identified as part and parcel of the fabric of

³² The Constitution of Lesotho 1993.

³³ Article 22 of the Banjul Charter.

³⁴ Article 23 of the Banjul Charter.

³⁵ Article 24 of the Banjul Charter.

fundamental human rights to which people are entitled to by virtue of being humans, as provided for by the Banjul Charter³⁶ to which Lesotho is party.

Also, the Universal Declaration of Human Rights,³⁷ read with the International Covenant for Civil and Political Rights,³⁸ and the International Covenant for Economic, Social and Cultural Rights,³⁹ the instruments which collectively make up the international bill of rights, define human rights as rights we have simply because we exist as human beings and uphold that they are not granted by any state. These instruments guarantee that human rights are universal rights and are inherent to all people, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status. They range from, inter alia, the most fundamental - the right to life - to those that make life worth living, such as the rights to food, education, work, health, and liberty.

In this regard, it is therefore improper for the Kingdom of Lesotho to limit the protection of the fundamental human rights to the rights and freedoms defined in the Constitution. Lesotho should take recognition of protection of human rights according to their true nature and interdependence. The assertion also goes further to challenge the decision of the courts of Lesotho in taking the position that the right to life as enshrined in section 5 of the Constitution cannot be interpreted to include the socio-economic right to livelihood.⁴⁰

The Lesotho's approach cannot be the proper approach to the definition of human rights. As a result, the consequential impacts of extractive industries on the livelihoods of the rural communities in Lesotho is undoubtedly a violation of the

³⁶ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> Accessed 19th February 2022.

³⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> Accessed 19 December 2021.

³⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> Accessed 19th February 2021.

³⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> Accessed 19th February 2022.

⁴⁰ *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* CA (Civ) 4/05 CONST/C/1/2004.

group' fundamental human rights. Expropriation of land that the communities utilised for economic activities that supported their daily lives, destruction of the water sources, air and water pollution, displacements that do not restore group status quo ante and imposition of laws that criminalises communities economic participation, are not only a violation of the people's basic human rights in themselves but they also give rise to a series of further human rights situations such as worsened gender biases against women especially in respect of social, economic and political participation, increased poverty levels which increases the vulnerability of subjects to exploitations such as human trafficking, gender-based violence, forced evictions and unsettled stay of local communities as a result of land-extractive operations causing amongst others noise and other environmental pollutions.

Summarily, the hypothesis alleged that the Constitution of Lesotho does not reflect and protect the true nature of the fabric of human rights; and that this has been a provision of a lee-way to the uncurbed violations of human rights by extractive industries. Lastly, the hypothesis alleges that these gap has been utilised by the Government of Lesotho as an incentive to attract FDIs, and the consequences of this approach has been more hazardous to human rights of already underserved populations such as women from affected communities.

1.9. Methodology

The research is going to adopt use of more than one methodology in order to effectively collect enough data to address the research questions. On the one hand, the research requires an assessment of the human rights violations perpetrated and exacerbated by impacts of extractive industries on the rights of women in the identified communities of Liqhobong and Polihali. The assertion is double ended. First it alleges proof of human rights violations in the target communities, and secondly it alleges that these human rights violations are caused by extractive industries operating in the target communities. This requires a mode of field-based data collection for gathering of information necessary to prove these assertions. On the other hand, the research alleges that domestic provisions of human rights definitions are insufficient and do not reflect the true picture of the status of

peoples' inherent human rights. Also, the proof of these assertions requires a whole different approach of data collection altogether. As a result, the research methodologies proposed for this study are as follows:

- a) Field visits for distribution of survey questions to collect primary data in the target communities: a two-dimensional questionnaire toolkit will be developed and distributed in the target communities for collection of primary data. The first dimension of the questionnaire will collect data on the social, economic and political status of women in the target communities prior to the establishment of the extractive industry. The second dimension of the questionnaire will collect data on the social, economic and political status of women post the establishment of the extractive industry in the community. The data will then be compared and analysed for qualitative assessment of the human rights situations caused and worsened by establishment of the extractive industry within the target community on the lives of women in order to come up with a comprehensive case study. The research toolkit will ask group specially designed questions intended to separately collect data in respect each of the two dimensions.
- b) Desktop and Literature Review: the research will also investigate the literature governing the legal obligations of investment companies or extractive industries in respect of protection of human rights of potential victims of their operations. This will also be a platform to assess the relationship between human rights and investment laws.

Another literature review will be conducted on the international human rights corpus in order to justify the human right violations identified in the case study/ field-based data collection, as qualifying under the legal definition of human rights.

1.10. Summary of chapters

The dissertation comprises of 6 Chapters to provide an effective and well-founded response to the research question. Chapter 1 outlines the founding theoretical background that led to the research ideas. The chapter also unpacks the statement of the research problem which clearly narrates the trajectory of human rights events that informed the basis of the research. It also most importantly tabulates research methodologies to be explored in collecting various forms of data critical to the information necessary for undertaking this research.

Chapter 2- Concept and Theories on Human Rights: On the basis of the argument that the bill of rights in the Constitution of Lesotho does not reflect an authentic depiction of the actual fabric of human rights as defined in the corpus of international human rights standards, customary international law, treaty agreements and common law, the chapter shall discuss and unpack the true nature of human rights with specific focus on the rights potentially violated by commercial mining practices in the context of Lesotho. The chapter will also demonstrate how the bill of rights in Lesotho has been insufficiently drafted to leave out such critical human rights entitlements.

Chapter 3- Concept and Theories on Extractive Investments: The chapter will explore national and international rules and obligations that investors are obliged to observe in respect of human rights to protect communities from potential negative impacts of their operations. This will also be a platform to assess and analyse how much the Kingdom of Lesotho has taken recognition of these rules and to evaluate the extent to which they have been ensured to be implemented in respect of human rights protection in the extractive-industries affected communities.

Chapter 4- Extractive Industries and Women's Human Rights in Lesotho: The chapter will demonstrate how extractive industries have perpetrated human rights in Lesotho. A visit will be taken into the legal framework to clearly paint a picture that government had intentionally relaxed protection of human rights as an incentive for attraction of FDIs. The chapter will also demonstrate the importance of establishing human rights protection as a necessary screening measure in

attraction of foreign investments in the extractive industries in Lesotho. In this line, an argument will be raised that failure to align investment regulations with human rights principles is a critical political misdirection that results in worsening economic conditions in the Kingdom despite vast investment opportunities.

Chapter 5- Case Study on Women's Human Rights Violation by Extractive Industries: The chapter narrates real-time data of 'I stories' of women from the affected communities to demonstrate how human rights violations of women have been perpetuated and exacerbated in the aftermath of establishment of extractive industries. The data will be analysed from a questionnaire that will be distributed to women asking questions in respect of social and economic landscape prior to establishment of extractive industries within their communities and the post-experiences lived that this research argues are human rights situations created and worsened by establishment of this land extractive industries.

Chapter 6- Conclusions and Recommendations: The chapter will provide a comprehensive analysis to respond to the research question "What are the human rights situations perpetrated and exacerbated by large-scale land extractive industries in Lesotho?". This will be achieved by advancing and demonstrating that indeed there are dire human rights violations mostly suffered by women in the extractive industries affected communities and that these industries played a large role in these cases. Following this line of thinking, recommendations will be provided that are aimed at ascertaining socio-political empowerment of women in rural communities as a strategy to enforce implementation of human rights and accelerate communities' response to potential human rights violations by land-extractive industries.

Chapter Two: Concept and Theories on Human Rights

2.1. Introduction

The introduction of codified Constitutions in various countries has had an adverse impact of limiting recognition of basic and fundamental rights that people should naturally be entitled to just by virtue of being humans. In other instances, domestic legal systems have constitutionally dodged the responsibility of taking necessary recognition and enforceability of some fundamental rights by tabulating them under what are generally termed Directive Principles of State Policies; constitutional provisions that create rights that are non-justiciable against the state and or on behalf of people purported to be protected under the same Constitutions. This is despite international efforts to ensure equal recognition, respect and protection of human rights in all countries of the world.⁴¹

On the basis of the argument that the bill of rights in the Constitution of Lesotho⁴² does not reflect an authentic depiction of the actual fabric of human rights as defined in the corpus of international human rights standards, customary international law, treaty agreements and common law, the chapter shall discuss and unpack the true nature of human rights with specific focus on the rights potentially violated by commercial mining practices in the context of Lesotho. The chapter will also demonstrate how the bill of rights in Lesotho has been insufficiently drafted to leave out such critical human rights entitlements as a legally recognised in human rights international instruments to which Lesotho is party.

2.2.The nature and scope of human rights

2.2.1. Definitions

Over the time, there have been abstract definitions of human rights, intended to effectively encompass their natural status, indivisibility and universality in a text

⁴¹ Tamás Lattmann and Balázs Vizi (eds), *International Protection of Human Rights*. (National University of Public Service Institute of International Studies Budapest, 2014). Page 12. The authors argue that positioning protection of human rights on the level of international law provides for a possibility of a better and stronger control over actions of states. Unfortunately, sometimes states' domestic provisions prove to be ineffective or insufficient in this matter. In some occasions, mankind has also experienced that states use their legal system to violate human rights systematically and on a large scale.

⁴² Constitution of Lesotho 1993.

form. Simply put, human rights are standards that recognize and protect the dignity of all human beings. Human rights govern how individual human beings live in society and with each other, as well as their relationship with the State and the obligations that the State have towards them.⁴³ They are those conditions of social life without which no man can live a fulfilling life as a human being. International human rights instruments have coined the definition for global adoption as, rights we have simply because we exist as human beings - they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status. They range from the most fundamental - the right to life - to those that make life worth living, such as the rights to food, education, work, health, and liberty.⁴⁴

These definitions can therefore be summed up to hold that human rights are not an award of political or human authority unto individuals. States, through codification of these rights into national legal instruments, merely undertake formal recognition of rights that were existent and naturally attached to the bodily and spiritual being of humans before they were transcribed in a text form. This assertion was long confirmed by the Inter-American Court of Human Rights in its *Advisory Opinion on Habeas Corpus in Emergency Situations*.⁴⁵ In this case, these rights cannot be partially recognized while others of the same nature are not recognized.

Constitutional codification of human rights in domestic legal systems cannot take away individuals' human rights by merely failing to recognize the full extent of their magnitude and incorporating some while totally disregarding the others. By so doing, States would be assuming the divine authority of granting human rights while in actual fact human rights cannot be granted by human authority. Equally, States' failure to codify a true fabric of all due human rights in domestic legal

⁴³ Anton Hausen and Annika Launiala "Introduction to The Human Rights Based Approach- A Guide for Finnish NGOs and their Partners" UNICEF Finland [2015]. Available at <[HRBA_manuaali_FINAL_pdf_small2.pdf \(crasman.fi\)](#)> Accessed 27th February 2022.

⁴⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <<https://www.refworld.org/docid/3ae6b3712c.html>> Accessed 27th February 2022.

⁴⁵ 27 I.L.M. 512 (1988). The court ruled that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human personality and cannot, per se, be suspended even in emergency situations, because they are inherent to man.

instruments should not be equated to non-justiciability of such non-codified human rights and therefore denying their enforceability on behalf of human beings. For instance, the Constitution of Lesotho recognises human right to life as merely biological existence of a person as a homo-sapien⁴⁶ but excludes from it such rights that ensure the right to life is fully enjoyed at maximum quality. E.g.:

Table 1. Codified v Excluded Human Rights

Codified Human Rights	Excluded Human Rights (Recognised in International Human Rights Instruments)
Right to life (Section 5)	Right to livelihood/Work
	Right to Food
	Right to health
	Right to water
	Right to Land
Freedom of movement and residence (Section 7)	Right to Generally Satisfactory Environment and Housing
Right to equality before the law and equal protection of the law (Section 19)	Right to Social Security including Peace and Security

2.3.Principles governing the nature of human rights

Since human rights are a number of interrelated human entitlements, they have been implemented on a number of principles that demonstrate and monitor their inseparable co-existence and interrelatedness.⁴⁷ This approach to recognition of human rights has guaranteed that implementation and protection of human rights is standardized and protected in such a way that protection of one right does not put in jeopardy protection of the others or their implementation. The approach has been commended by scholars⁴⁸ on the notion that this approach safeguards implementation of human rights by making sure that such small entitlements as may be deemed incidental to satisfaction and implementation of human rights, are

⁴⁶ *Khathang Tema Baitšokoli and Another v Maseru City Council and Another* CIV/APN/04/2005.

⁴⁷ UN General Assembly, *Vienna Declaration and Programme of Action* (1993), Article 5.

⁴⁸ Yash Tripathi 'Jurisprudential Analysis of *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors*' [2015] Available at <[Jurisprudential Analysis of Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors. - Academike \(lawctopus.com\)](https://www.academike.com/lawctopus.com)> Accessed 28th February 2022.

equally recognized in the protection of such rights as may be deemed primary on behalf of humans.⁴⁹ The principles have been largely expressed as follows:

- i. **Universality and inalienability:** the principle provides that human rights are universal since they are said to belong to all humans equally in every society. Human rights are also supposed to be inalienable; because they flow from and protect human existence, they also cannot be taken away without endangering the value of that existence. The principle continues that all people everywhere in the world are entitled to them and no person can voluntarily give them up nor can others take them away from him or her.⁵⁰
- ii. **Indivisibility:** Human rights are indivisible. Whether civil, political, economic, social or cultural in nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights. There is no such thing as a 'small' right. There is no hierarchy of human rights. All human rights are indivisible and interdependent. This means that one set of rights cannot be enjoyed fully without the other. For example, making progress in civil and political rights makes it easier to exercise economic, social and cultural rights. Similarly, violating economic, social and cultural rights can negatively affect many other rights.
- iii. **Inter-dependence and inter-relatedness:** The principle dictates that the realization of one right often depends, wholly or in part, upon the realization of

⁴⁹ The court in *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180. was commended for holding that "...the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean, merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life an equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood." This approach was however rejected in Lesotho in the case of *Khathang Tema Baitšokoli and Another v Maseru City Council and Another* CIV/APN/04/2005.

⁵⁰ Andrew Heard, "Human Rights: Chimeras in Sheep's Clothing?" [1997] Available at <[Introduction to Human Rights Theories \(sfu.ca\)](#)> Accessed 29th February 2022.

others. Porter⁵¹ writes that interdependence was understood as a dependence of civil and political rights on a commitment by States to social and economic development. He argues that since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

Arguably, human rights implementers should take full recognition of these principles so as to escape the possibility of partial realization of basic human rights. Furthermore, based on these principles, constitutional description of human rights as realized in domestic legal systems should be implemented in a manner that acknowledges the existence of other human rights as are recognized in international instruments on the Bill of Rights.⁵² Failure to adopt this approach results in violation of these principles and places in the way of harm such other equally fundamental human rights that a State may not have recognized in its bill of rights.

2.4. Philosophical approaches and classification of human rights

Human Rights can be broadly looked into from different perspectives: on the one hand, they can be viewed from various aspects of human life whether civil, social, economic, cultural, political and or moral. On the other hand, human rights can be looked at further from the point of the methods of securing them. On the latter basis, they are either constitutional or legal. These viewpoints are backed by philosophical approaches to human rights. These philosophies pose an impact of turning human rights from purely legal instruments into effective policies, practices, and practical realities. Consequently, they articulate a practical dimension to the recognition of human rights before they were subjects of a legal definitions. They are:

⁵¹ Bruce Porter, "Interdependence of Human Rights" *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, [2020] Page 305.

⁵² The UDHR, together with the 2 covenants - the International Covenant for Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights - make up the International Bill of Rights.

- a) **Natural rights:** Natural rights are those rights which are considered to be inherent and integral to human nature. In fact, every individual by nature is given an individual property of his own which cannot be taken away by any authority. Such rights include intellectual rights, rights of the mind and also rights of acting as an individual for his own comfort and happiness, provided they are not injurious to natural rights of others.⁵³
- b) **Moral rights:** These rights are based on the general principle of fairness and justice. These are simply aspirations and ideals of the people who endeavour to claim for them. Sometimes, people justify these rights on the ground of the role they perform or the position they occupy in society. Their grounds are primarily the harms that the individual right-holder normally suffers when they are violated. Thus, they presuppose basic human needs.⁵⁴
- c) **Fundamental rights:** There are certain rights which are more important and basic than the others. For example, the right to life is the most basic of all rights upon which the enjoyment of other rights depends. These rights can never be restricted or taken away by any authority. That is why, every society has a fundamental duty to protect it all the times. Among other basic rights are the rights to be recognized as a person before the law, the right to equal protection under law and freedom from illegal arrest or detention.⁵⁵
- d) **Legal rights:** Legal rights are otherwise known as positive rights. These rights are laid down in law. They are also guaranteed and protected by the law of the state. Thus legal rights are uniform and open to all irrespective of the caste, colour, race or culture.⁵⁶

⁵³ Rajeev Kumar, "Classification of Human Rights" [2015] 5, International Journal of Engineering and Management Research 756.

⁵⁴ Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford Scholarship Online 2011) 96.

⁵⁵ Rajeev Kumar Ibid. (n 50).

⁵⁶ Ibid.

- e) **Civil and Political Rights:** Rights that are granted by government or civil society are called Civil and Political Rights. These rights provide the bases for the fulfilment of elementary conditions of the social life. Without them, civilized life is not possible and they are, therefore, considered very essential for the progressive life of man.⁵⁷ Civil and political rights, however, include the right to freedom of speech, of assembly, the right to move freely, to hold property and practice trade or profession and the right to take part in the government of one's country.
- f) **Economic, Social and Cultural Rights:** These are entitlements of the individual vis-a-vis the state, in order to eradicate social inequalities, economic imbalances and to limit disadvantages caused by nature. Most of the Socialist States recognize these rights as fundamental rights of the people.⁵⁸ Right to equality, right to work, right to have family, right to privacy, right to information, right to public assistance during old age and sickness, right to health care, right to special care during childhood and during motherhood are some of the examples of these rights.

It is imperative to realise from logic of the above philosophical approaches that the implementation and protection of human rights in silos is an impractical undertaking that cannot guarantee comprehensive recognition of all inherent rights of each person. Unfortunately, this is arguably the detrimental approach that the Constitution of Lesotho and its jurisprudence⁵⁹ has adopted in the implementation and recognition of human rights in the Kingdom. Based on the fact that they are in their nature interdependent, indivisible and interrelated, domestic recognition of human rights should be seen to realise this relationship in the constitutional codification of the bill of rights. However, many constitutions around the world have alienated these human rights principles into justiciable rights partly under the

⁵⁷ (n 53).

⁵⁸ (n 53).

⁵⁹ See the case of *Khatang Tema Baitshokoli v Maseru Citi Council*, footnote 6. *In casu*, the court recognised the right to life in silos from the right to (livelihood) protection of the means of livelihood of street-vendors, which should necessarily be an extension of the constitutionally protectable right to life.

chapter on the bill of rights, and non-justiciable rights partly under the chapter on the directive principles of state policy.⁶⁰ In the circumstance of the latter division, these human rights cease to exist as such and rights bearers cannot claim them against those who tend to violate them. Nevertheless, faced with a similar issue, courts in countries like India held that the destruction of the guarantees given by fundamental human rights in order purportedly to achieve the goals of directive principles of state policy is plainly to subvert the Constitution by destroying its basic structure.⁶¹

2.5. Generational development of human rights

While it is in their nature the interdependence, indivisibility and interrelatedness, human rights are also inseparable from the major aspirations of time. The theory of generations of human rights was coined by a Czech Jurist Karel Vasak⁶² in 1979. The theory divides human rights into three separate generations based on (a) civil and political rights, (b) economic, social and cultural rights, and (c) collective or solidarity rights. Vasak argues that the approach is meant to capture new emphasis on the rights to development, peace or a healthy environment. The three generations are categorized as follows:

- a) **First Generation Human Rights:** This category deals essentially with liberty and participation in political life. They are fundamentally civil and political in nature: They were aimed at securing the citizen's liberty from arbitrary action by the state. These rights correspond by and large to the civil and political rights in the International Bill of Rights⁶³ such as the right to individual freedom, freedom of speech, thought and faith, the right to own property and so on. They

⁶⁰ The court in *Minerva Mills Ltd. & Ors. V Union of India & Ors.* 1981 SCR (1) 206, held that the Directive Principles of State Policy of India are the guidelines or principles given to the institutes for governing the State. These are not enforceable by any court, but the principles laid down therein are considered 'Fundamental' in the governance of the country, making it the duty of the State to apply these principles in making laws to establish a just society in the country.

⁶¹ *Minerva Mills* case. See (n 60).

⁶² Vašák, Karel. 'A 30-year struggle; The sustained efforts to give force of law to the Universal Declaration of Human Rights'. *UNESDOC*. Available at <<https://unesdoc.unesco.org/ark:/48223/pf0000048063>> accessed 28th February 2022.

⁶³ See (n 9). They were enshrined at the global level and given status in international law first by Articles 3 to 21 of the 1948 Universal Declaration of Human Rights and later in the 1966 International Covenant on Civil and Political Rights.

were also meant to impose negative obligation on governments to desist from interfering with the exercise of individual liberties.⁶⁴

- b) **Second Generation Human Rights:** Second-generation human rights are related to equality. They are fundamentally economic, social, and cultural in nature. They guarantee different members of the citizenry equal conditions and treatment. These rights are usually ‘positive’ in nature and states have an obligation to fulfil these rights. Amongst other things, they include the right to work, the right to education, the right to health, right to an adequate standard of living (which includes the right to food, right to water, right to housing and right to clothing), and right to participate in cultural activities.⁶⁵ Like first-generation rights, they were also covered by the Universal Declaration of Human Rights, and further embodied in Articles 22 to 28 of the Universal Declaration, and the International Covenant on Economic, Social, and Cultural Rights. Second generation rights can also be divided into two sub-categories.⁶⁶ The first sub-category relates to norms of the fulfilment of basic needs, such as nutrition and healthcare. The second sub-category relates to norms of the fulfilment of “economic needs.” These rights are also said to be "security-oriented" as it provides for social, economic and cultural security.
- c) **Third Generation Human Rights:** Also known as solidarity human rights, these are rights that try to go beyond the framework of individual rights to focus on collective concepts, such as community or people. They go beyond the mere civil and social rights, as expressed in many progressive documents of international law.⁶⁷ They include group and collective rights, such as Right to self-determination, Right to economic and social development, Right to a healthy environment, Right to natural resources, Right to participation in cultural heritage, and Right to intergenerational equity and sustainability.⁶⁸ The

⁶⁴ Rajeev Kumar Supra. See (n 53).

⁶⁵ Ibid.

⁶⁶ Lindsey Reid, ‘The Generations of Human Rights’ (UAB Institute for Human Rights Blog, 14 January 2019) <[The Generations of Human Rights – UAB Institute for Human Rights Blog](#)> accessed 2nd March 2022.

⁶⁷ *The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development.*

⁶⁸ Jack Donnelly, ‘Satisfying Basic Needs in Africa: Human Rights, Markets and State’ [1985], *Africa Today* 32, pg 2.

Banjul Charter⁶⁹ also ensures many of these rights: the right to self-determination, right to development,⁷⁰ right to natural resources and right to satisfactory environment.⁷¹

Classification of human rights into generations is advantageous in recognizing the constantly evolving social, economic and political nature of human life to accommodate developments that may positively aid enjoyment of life. The second and third generations rights are of utmost importance to this research. Recognition of economic participation as a fundamental category of human rights implementation is imperative to realization of people's basic needs for the enjoyment of life. If states were to grant the right to life as a basic human right but fail to equally recognize tools that will support full enjoyment of that right, then that right will not have been fully granted and or protected. Also, a paradigm-shift from individualism in realization of human rights where rights were only realized on the basis of an individual person to solidarity rights where rights are also realized on the basis of a community, has expanded protection of human rights not as a notion of divided entitlement anymore, but as an ecosystem of shared interests that form a unit of society. As a result, human rights are no longer only rights when held individually in respect of each person, but are also rights at the intersection of shared human interests. Has Lesotho been able to realise these critically important values into its domestic human rights frameworks?

Although not particularly important to this paper, there is also a new generation of human rights in the wake of the 21st century which advances recognition of protection of human life in the presence of new kinds of artificial intelligence.⁷² This is because traditional human rights concepts have been deemed under pressure as technology is creating new capabilities for human rights violations. Albeit not fully coined yet, proponents of the theory argue that human rights are not going to

⁶⁹ *Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter")*, (1981), Articles 20, 21, 22 and 24.

⁷⁰ Article 22.

⁷¹ Article 24.

⁷² Changrok Soh, and Others, 'Time for a Fourth Generation of Human Rights?' [2018] UNRISD.

be immune from the impacts of the 4th industrial revolution through technological advancements that are going to trample on the 2nd and 3rd generations of rights.⁷³

2.6. Incorporation of core human rights values in Lesotho

Human rights in Lesotho are a product of the Constitution.⁷⁴ The bill of rights is embodied in Chapter II, which is made up of twenty sections 4 to 24, dealing with the protection, derogation from and interpretation of fundamental rights and freedoms. According to section 2, the Constitution is the supreme law of Lesotho and if any other law is inconsistent with its provisions, such other law shall to the extent of the inconsistency be void. Therefore, Lesotho has constitutional supremacy.⁷⁵ Section 4 of the Constitution provides that every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to the fundamental rights and freedoms as enlisted in its Chapter II. Does this Constitution embody principles of human rights as discussed in the chapter above?

The Constitution provides further that the provisions of Chapter II shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions. It goes further to clarify that those limitations shall be designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest. The bill of rights shall by virtue of section 4(2) be enforceable by all structures of government, natural or artificial persons as well as private citizens. Thus, the bill of rights is both vertically and horizontally enforceable. Section 22(1) grants the High Court jurisdiction to hear matters turning on a violation of any of the rights enumerated in sections 4 to 21.⁷⁶

⁷³ (n 68).

⁷⁴ Constitution of Lesotho 1993.

⁷⁵ Itumeleng Shale, 'The Law and Legal Research in Lesotho' [2019] Housar Global Law School Program. Available at <[UPDATE: The Law and Legal Research in Lesotho - GlobalLex \(nyulawglobal.org\)](https://nyulawglobal.org)>. accessed 1st March 2022. The article iterates that constitutional supremacy means the Constitution is the supreme law and any other law, conduct by humans and other agencies, must be consistent with the provisions of the Constitution. See also Section 2 of the Constitution of Lesotho which provides that the Constitution shall be the supreme law of Lesotho.

⁷⁶ Itumeleng Shale (n 75).

2.6.1. Second and Third Generation Rights in the Constitution of Lesotho

The Constitution of Lesotho embodies the second and third generation human rights in Chapter III. Under this chapter, these rights are titled ‘Principles of State Policy’. Provisions in this chapter contain socio-economic⁷⁷ and solidarity rights⁷⁸, of which as indicated earlier in this research, are second and third generation of human rights. In terms of section 25 of the Constitution, Principles of State Policy are not enforceable in the courts of law. This provision provides that principles contained in Chapter III shall form part of the public policy of Lesotho and shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.

The approach of the Constitution that socio-economic and solidarity rights are not enforceable is an indication that the supreme law of Lesotho does not recognize these rights as human rights on behalf of its subject. Furthermore, this is an affront to the principles founding the nature of human rights which holds that it is impossible to recognize human rights without full realisation of such other amenities that make those rights enjoyable and effectively implementable on the part of rights holders. Based on the argument that the bill of rights in terms of the Constitution of Lesotho does not embody an honest depiction of the true corpus of human rights, as it should be, inclusion of second and third generation rights under non-enforceable directive principles of state policy leaves a void in the recognition and protection of human rights in the Kingdom.

2.6.2. Redemption of constitutional lacunae in recognition and protection of human rights

Courts of law in the Kingdom, as the apex interpreters and rights protectors on behalf of the people, had an opportunity to remedy the problem through invocation of international law which Lesotho has adopted, inter alia, through treaty ratifications. However, the courts somewhat missed this opportunity in the case

⁷⁷ Section 29 Opportunity to work, Section 34 Economic opportunities.

⁷⁸ Section 35 Participation in cultural activities, 36 Protection of the environment.

of *Khathang Tema Baitsooli & Another V Maseru City Council & Other*.⁷⁹ In *casu*, street vendors challenged their eviction from the Maseru city's main streets. They argued that the Constitutional Court must declare the eviction as a violation of their right to life which is guaranteed under section 5 of the Constitution. The Constitutional Court held that the right to life guaranteed under section 5 does not include socio-economic rights such as the right to livelihood and further that such socio-economic rights are, under section 25, unenforceable in the courts of law. This holding was further upheld by the Court of Appeal.⁸⁰

Cognisant of the courts' mandate to follow the letter of the Constitution in its implementation, the argument is that courts should refrain from upholding constitutional provisions which have an impact of violating human rights that the same Constitution pledges to protect. To allow such an approach into the supreme law of the land has an impact of subjecting the bill of rights to the mercy and discretion of the directive principles of state policy. Simply put, the practice would subject one chapter of the Constitution to the discretionary consideration of another chapter of the same Constitution as though there is a hierarchy⁸¹ of importance amongst constitutional provisions where some of the rights enshrined therein will be weighed against the others to gauge which one is worth protecting at the compromise of the other.

This approach against the constitution is further endorsed on the reasoning that if courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as 'writ in water'. The reasoning is adopted from the words of Justice V. Y. Chandrachud⁸² of India who succinctly opined that to allow such an approach would have an effect

⁷⁹ CIV/APN/04/2005 [25 April 2005]. See also the UN Environment Program on the discussion of *Khathang Tema Baitsooli and Another v Maseru City Council and Others*, available at [Khathang Tema Baitsooli and Another v Maseru City Council and Others. | Judicial Portal \(informea.org\)](#); Bonolo Ramadi Dinokopila, 'The Justiciability of Socio-Economic Rights in Botswana' Cambridge University Press: 27 February 2013.

⁸⁰ C. of A. (CIV) NO. 4/05.

⁸¹ The paper also argues review and repeal of Section 25 of the Constitution which has made important human rights in Chapter III not rights in the human rights sense and non-justiciable against the state.

⁸² *Minerva Mills v Union of India*. See (n 60).

of destructing the identity and the basic structure of the constitution which is premised upon equal importance of both the bill of rights and the directive principles of state policy. His Lordship continued that if constitutional provisions cannot be pronounced to be invalid even if they destroy the basic structure of the Constitution, then any law passed in pursuance of such a constitution will be beyond the pale of courts' intervention because it will receive the protection of the constitution which the courts will be powerless to strike down. Justice V. Y. Chandrachud concluded that:

(Indeed), the rights conferred by (the bill of rights) are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by (the bill of rights) would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in (directive principles of state policy) would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means. The goals set out in Part IV (directive principles of state policy) have, therefore, to be achieved without the abrogation of the means provided for by Part III (the bill of rights). It is in this sense that Parts III and IV together constitute the core of the Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of the Constitution.⁸³

The Kingdom of Lesotho can borrow from the persuasive wisdom of other jurisdictions that have successfully overcome the challenge of balancing interests between the bill of rights and the directive principles of state policy per the Constitution. In Nigeria, Justice Pats-Acholonu,⁸⁴ observed that even if the powers of the courts are handicapped by the provisions of the same Constitution, courts should not close eyes to the serious injustices relating to the manner in which the Constitution purports to be implemented. He argued that '...it is within the province of the court to ensure strict adherence to the spirit of the Constitution for the endurance of a democratic regime.'⁸⁵ In Uganda, Justice Kanyehamba⁸⁶ also ruled that judicial powers should be extended to vary constitutional political authority where clear cases of a violation or threatened violation of individual liberties are shown.

⁸³ *Minerva Mills v. Union of India*, page 5.

⁸⁴ *Chief Enyi Abaribe v. the Speaker Abia State House of Assembly & Ors* (2003) 14 NWLR 788.

⁸⁵ *Ibid* para 26.

⁸⁶ *Major General David Tinyefuza v Attorney General (Constitutional Petition 1 of 1996)* [1997] UGCC 3.

India, Uganda and Nigeria are exemplary successes in the protection of human rights jurisprudence against other constitutional provisions that threaten adequate protection of the bill of rights. Although courts in the Lesotho are incapable of deviating from the Constitution to advance a similar approach to the protection of human rights, the legal fraternity has made a significant impact towards influencing such a direction. Of note is the speech of the President of the Lesotho Law Society at the opening session of the Court of Appeal in 2012.⁸⁷ The then President argued in his speech that apart from evident social challenges, there are legal issues which necessitate one to make a proposition that the Constitution should be amended to cater for socio-economic rights as is the case with our South African counterparts. He continued that this would represent a radical departure from judicial norms prevailing in most of Southern Africa, where it is uncommon for judges to rely on international treaties and norms, and where the enforcement of socio-economic rights is often regarded as a thorny issue best left to the discretion of the Executive.⁸⁸

The other notable advance is the decision of the Court of Appeal in *Bulane Andrew Sechele v. Public Officers Defined Contribution Fund and Others*,⁸⁹ which also stands out as yet another illustration that as members of a society whose description falls within the scope of developing countries, the infusion of socio-economic rights in our Constitution is a necessary avenue. The court ruled that social security in modern times is very essential and is an important pillar for social stability, and one that can be described and recognized today as a socio-economic right.

⁸⁷ Adv. Monaheng Seeiso Rasekoai, 'Speech by the Law Society President at the Opening of Court of Appeal' 10 April 2012 Available at <https://lesotholii.org/ls/speech_for_sourt_of_appeal_opening_april_2012_pdf_18290.pdf> Accessed 5th March 2022; See also H 'Nyane & T Maqakachane 'Standing to litigate in the public interest in Lesotho: The case for a liberal approach ' (2020) 20 African Human Rights Law Journal 799-824 <<http://dx.doi.org/10.17159/1996-2096/2020/v20n2a20>> Accessed 5th March 2022, in which authors argue that doctrine of Locus Standi in Judicio should be extended to include litigation of public interest in Lesotho.

⁸⁸ (n 83).

⁸⁹ (6/2010) (NULL) [2010] LSHC 94 (13 December 2010). These advances can also be noted from other judgments such as *Khasake-Mokhethi v Moloji* (CIV/APN/73/13) [2013] LSHC 86, *Metsing v Director General, Directorate of Corruption and Economic Offences and Others* (Constitutional Case No. 11 of 2014) [2015] LSHC 1.

The High Court of Lesotho also had an occasion to pronounce on the issue of socio-economic rights in the case of *Lesotho Chamber of Commerce and Industry and Others v. Commissioner of Police and Others*.⁹⁰ The court held that in reality, socio-economic issues affect the livelihood of many people directly and sometimes touch on the very survival of these people. It continued that such delicate issues must always be addressed by the stakeholders in a dispassionate manner, realistically and without prejudice or favour. To escape the liability of influencing this shift, the court charged that whereas the socio-economic rights which are provided for under the Constitution of Lesotho are not enforceable in the courts of law, these issues should be addressed out of court through bargaining, agreements, negotiation, mediation, reconciliation or arbitration and other lawful measures. However, it was emphasized that democracy essentially involves exercise of these rights and freedoms within the parameters of the law and all these issues must be addressed in a peaceful manner at all times with full knowledge that many international instruments recognize the universality and indivisibility of political and civil rights and of core socio-economic rights of a people.

Although the courts in the Kingdom of Lesotho have not taken full responsibility of effecting a judicial paradigm shift from non-enforceability of second and third generation human rights, it is significantly apparent that there is a necessary shift of mind-sets on the enforceability of these rights on the part of judicial officers.

2.6.3. Other Sources of Second and Third Generation Human Rights in Lesotho

Local human rights systems in the Kingdom are also influenced by international responsibilities Lesotho has undertaken to realise through ratification of international law and treaties. However, Lesotho belongs to the dualist tradition, thus views international law and domestic law as two separate legal systems. Hence, domestication of international law by an Act of Parliament is necessary before international law can be applied.⁹¹ Be this as it may, there is proof that the courts in

⁹⁰ (CIV/APN/405/2011) [2011] LSHC 127.

⁹¹ *Metsing v The Director of Public Prosecutions* (CC 27&28/2018) [2020] LSHC 46. See also *Joe Molefi v Government of Lesotho* 1967–70 LLR 237.

Lesotho have been overtime struggling with consistent approach to invocation of international law on the basis of the need for legislative domestication.

Examples include the case of *Joe Molefi v Government of Lesotho*.⁹² The court in this case adopted a strict approach towards application of international law where it demanded that ratified international instruments should first be incorporated into the domestic law before courts of law in the Kingdom can regard their provisions enforceable. The same approach was further upheld in *Basotho National Party and Another v Government of Lesotho and Others*.⁹³ In this case, the applicants, *inter alia*, sought an order directing the Government of Lesotho to take the necessary steps, in accordance with its constitutional processes, to adopt such legislative and other measures necessary to give effect to the rights recognised in international conventions such as the African Charter on Human and Peoples' Rights. The Court explicitly stated that the Conventions could not form part of Lesotho's law until and unless they were first incorporated into municipal law by legislative enactment.⁹⁴

However, as the awareness of human rights and states' international obligations in that regard gained more prominence, the courts took another shift and started emphasising the need to interpret domestic laws in line with Lesotho's international human rights obligations. For instance, when interpreting the right to legal representation in *Director of Public Prosecutions v Masupha Sole and another*,⁹⁵ the court made reference to several international human rights instruments including article 7(1) of the African Charter besides its express domestication through legislative enactment. The practice was further endorsed in the case of *Judicial Officers Association of Lesotho v The Prime Minister*⁹⁶ in which the Court referred to articles 7 and 26 of the African Charter and stated that Lesotho is a state party to the African Charter which imposes on it, the duty to guarantee independence of the courts.

⁹² (n 88).

⁹³ Constitutional case No.5/2002) [2003] LSHC 6 (unreported).

⁹⁴ Itumeleng Shale (n 75).

⁹⁵ [2001] LSHC 101 (unreported).

⁹⁶ [2006] LSHC 32.

Later on in case of *Molefi Ts'epe v The Independent Electoral Commission and Others*,⁹⁷ the highest court in the land confirmed the emerging paradigm shift by referring to several ratified but undomesticated instruments including the African Charter, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the SADC Declaration on Gender and Equality, and the International Covenant on Civil and Political Rights (ICCPR). The court specifically referred to article 18(4) of the African Charter despite the fact that the Charter is not domesticated. In an unprecedented move, the court also referred to but did not apply the Women Protocol, which Lesotho had already ratified at that stage but had not yet come into force due to the fact that there were inadequate ratifications.⁹⁸ In the case of *Fuma v Lesotho Defence Force*,⁹⁹ when dealing with the right to freedom from discrimination on the basis of disability occasioned by being HIV positive, the court held that the unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter, but that by default, it technically assumes the effect of municipal law in the country.¹⁰⁰

2.7. Conclusion

This chapter sought to answer the sub-question ‘What is the actual nature of the corpus of human rights as established by international standards and has Lesotho been able to reflect this in its laws?’¹⁰¹ In response, the chapter has demonstrated and affirmed the argument that the bill of rights in the Constitution of Lesotho¹⁰² does not reflect an authentic depiction of the actual fabric of human rights as defined in the corpus of international human rights standards, customary international law, treaty agreements and common law. The bill of rights per the Constitution of Lesotho has only recognised political rights while it has not equally recognised social, economic and cultural rights of the people. Consequently, this a partial recognition of the full fabric of the people’s fundamental human rights.

⁹⁷ (C of A (Civ) No. 11/05 CC 135/05) (NULL) [2005] LSHC 93.

⁹⁸ Itumeleng Shale (n 75).

⁹⁹ Case no. 08/2011 [2013] LSHC 68.

¹⁰⁰ Itumeleng Shale (n 75).

¹⁰¹ Itumeleng Shale (n 75).

¹⁰² Constitution of Lesotho 1993.

Chapter Three: Concept and Theories on Extractive Industries

3.1. Introduction

There is little comprehensive, legally binding international framework to monitor, review, hold to account and redress the activities of foreign direct investments when it comes to protection of human rights. Coupled with gaps in national legislation, inefficient judicial systems,¹⁰³ as well as the frequent absence of political will to prosecute investors, this lack of an overarching legal framework means that violations committed against communities by extractive industries often go unpunished.¹⁰⁴ Additionally, the complexity of ensuring responsibility for violations committed by corporations within and beyond their borders contributes to perpetuate impunity for these violations.

Large-scale commercial mining in the Kingdom of Lesotho largely comprises of foreign companies holding majority shareholding in all local mining companies.¹⁰⁵ Absent clear justification, the Government of Lesotho holds the minority shares alongside the foreign companies,¹⁰⁶ a factor believed to be a tool towards attraction

¹⁰³ M. Ramafole and Others, 'Justice Sector Reforms' (Lesotho National Reforms Authority Report 2019) 3-4. This is a report establishing gaps necessary for reform in the Lesotho's judicial system. It records that there are structural systemic deficiencies in the justice system that have undermined the rule of law and denied the people of Lesotho from having equal access to justice with fair outcomes. Also, most justice institutions, due to lack of basic infrastructure and material resources are centralized in the capital city Maseru, the net result being slow output of cases, long trials and high backlog of cases. These includes costly legal services and long distances to access services, resulting in most Basotho especially in the rural areas opting instead to rely on the lay-manned central and local courts. The report remarks that while these mechanisms offer an accessible, affordable and efficient means of resolving disputes, they often fail to follow due process or to comply with human rights standards thus undermining the quality of justice they dispense. Lastly, it acknowledges that the National Human Rights Commission is not yet in place and this creates a vacuum in national efforts to protect and promote human rights.

¹⁰⁴ Inmaculada Barcia, 'Women Human Rights Defenders Confronting Extractive Industries: An Overview of Critical Risks and Human Rights Obligations' [2017] Women Human Rights Defenders International Coalition. See also Anneke Meerkotter, 'Marriage and succession regimes in Southern Africa: Has law reform addressed the rights of women and girls to customary land?' [2021] Women's Land Rights and Extractive Industries in Southern Africa 54, which records that systemic corruption by politicians fraudulently benefiting extractive industries results in FDIs often not being prosecuted for human rights violations.

¹⁰⁵ These companies are, *inter alia*, Letseng Diamond Mine which is an FDI of a British company called Gem Diamonds Ltd, the company owns 76% shareholding to 24% of the Government of Lesotho. There is also Liphobong Diamond Mine, an FDI owned by British Firestone Diamonds holding 75% shareholding against 25% of the Government of Lesotho. <https://www.gov.ls/ministry-of-mining/> Accessed 15th March 2022.

¹⁰⁶ Thabo Lerotholi, 'Large-Scale Diamond Mining in Lesotho: Unpacking its Impact on Adjacent Communities' [2021] Available at <https://www.kpcivilsociety.org/publications/publications-from-the-coalition/grassroots-research-on-local-diamond-miningimpact> accessed 13th March 2022.

of international investors. Consequently, the mining activities have imposed devastating impacts on the adjacent communities to the mining sites and no entity has assumed the responsibility of restoration of destroyed amenities upon which the communities depended for support of life. Therefore, to regulate mitigation of these impacts either by the government or the mining companies themselves, there seems to be little to no frameworks at all intended to hold the mining companies responsible to restore the damage effected on the communities. Instead, government has turned a blind eye to the deteriorating quality of life in the affected communities and the burden has been left on the shoulders of the incapable communities to restore themselves. As this research endeavours to demonstrate, the impacts have been far worse on the lives of women, a category of persons with the burdens of daily responsibilities of family care and support primarily dependent on the destroyed amenities to support life and livelihoods.

Absent clear points of reference in the kingdom to hold the government or the companies accountable, this chapter will explore concepts and theories that investors are obliged to observe. Such will include *inter alia*, recommended international best practices and UN frameworks of soft law, in respect of human rights to protect communities from potential negative impacts of their operations, as well as national and international rules and obligations. This will also be a platform to assess and analyse how much the Kingdom of Lesotho has taken recognition of these rules and to evaluate the extent to which they have been ensured to be implemented in respect of human rights protection in the extractive-industries affected communities. Lesotho is also a signatory to and obliged by the UN General Assembly Resolution on Sustainable Development Goals¹⁰⁷ which include, amongst others, poverty reduction,¹⁰⁸ clean water and sanitation,¹⁰⁹ gender equality,¹¹⁰ good health and well-being,¹¹¹ life on land,¹¹² and peace justice and

¹⁰⁷ See (n 22).

¹⁰⁸ Goal 1- end poverty in all its forms everywhere.

¹⁰⁹ Goal 6- ensure availability and sustainable management of water and sanitation for all.

¹¹⁰ Goal 5- achieve gender-equality and empower all women and girls.

¹¹¹ Goal 3- ensure healthy lives and promote well-being for all at all ages.

¹¹² Goal 15- Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

strong institutions,¹¹³ and failure to sufficiently protect human rights in the extractive industries renders the country incapable of meeting these targets.

3.2. Principles governing business and human rights

3.2.1. Corporate social responsibility

Before commencing on the operations of land extraction, companies undergo due processes of obtaining permissions from the relevant departments of government. In the mining sector, one of the prerequisites is that a mining company conducts an environmental impact assessment to presuppose impacts of its operations on the adjacent communities and analyse cost implications, learn about the community and consult all with everyone who will be affected by its operations. Technically, this assessment becomes the baseline for the responsibilities of such an extractive company over the general welfare of the people whose well-being it stands to disturb.

The concept of corporate social responsibility has been widely used to define responsibilities and obligations a company should have for its stakeholders. Proponents of the concept argue that it is conventionally associated with business responsibilities for society in terms of compensating for negative externalities and contributing to welfare¹¹⁴ and responsibility to society in terms of accountability. Additionally, social responsibility does also extend to legal expectations, compliance and commitments to respect environmental and human rights standards.¹¹⁵ This means that, the concept is both a responsibility of self-imposition as much as it is a legally enforceable obligation on the part of companies. On the one hand, companies should voluntarily put in place mechanisms to restore

¹¹³ Goal 16- Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

¹¹⁴ Yaw Brew, 'Corporate Social Responsibility Activities of Mining Companies: The Views of the Local Communities in Ghana.' [2015] American Journal of Industrial and Business Management, 457-465. Available at <http://dx.doi.org/10.4236/ajibm.2015.56045> accessed 15th March 2022.

¹¹⁵ Marina Nehme and Claudia Koon Ghee Wee, 'Tracing The Historical Development of Corporate Social Responsibility and Corporate Social Reporting.' [2008] James Cook University Law Review 129. Available at <http://www.austlii.edu.au/au/journals/JCULawRw/2008/6.html> accessed 15th March 2022.

damages caused by their operations on communities. On the other hand, companies should also be held legally liable restore such destructions.

3.2.2. Corporate social responsibility as a social contract

Treading further, the social contract theory has been advanced as the theoretical basis for explaining the emerging practice of social responsibility of corporations. The development of the concept finds that it is no longer practical for a separate social contract between society and business because, as a result of the modern understanding of the legal status of today's corporations; with a juristic legal persona capable of holding legally protectable rights and interests, corporation have become new entrants into the existing social contract between humans as homo-sapiens.¹¹⁶ This means that modern corporation have acquired a status that is akin to that of a natural person under the law and should be treated as such in determining its social responsibility and its responsibilities under international human rights law.

The original comprehension of the theory of a Social Contract provides that society decided to transition from a situation of undefined rights and incessant conflict over resources to a society under a social contract whereby individuals agreed to honour the rights of others in return for guarantees that their own rights will be respected and protected.¹¹⁷ In the parallel, proponents of Corporate Social Responsibility further argue that the notion denotes a form of a corporate social contract, which concerns corporates' indirect societal obligations and resembles the reciprocal social contract between citizen and legally established entities with juristic personalities. Thus, corporations should act in a responsible manner because as such, they become part of the society and enter into a social contract with societies. This argument led scholars into coining Corporate Social Responsibility as an obligation stemming from the implicit 'social contract' between business and

¹¹⁶ Olufemi Amao, 'Corporate Social Responsibility, Social Contract, Corporate Personhood and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations.' [2008] Australian Journal of Law and Philosophy, Available at <http://www.austlii.edu.au/au/journals/AUJILawPhil/2008/1.html> accessed 16th March 2022.

¹¹⁷ Ibid.

society for firms to be responsive to society's long-run needs and wants, optimizing the positive effects and minimizing the negative effects of its actions on society.¹¹⁸

Conversely, I believe CSR to have been wrongly coined 'social' and this has led to its implementation being a voluntary and non-enforceable undertaking on the part of corporations. It is an adversely improper approach to adopt non-enforceable approaches to protect enforceable amenities such as human rights. Appropriately, CSR should be re-coined corporate legal responsibility in order to demonstrate its compulsory enforceability.

3.2.3. Corporate responsibility to respect

Corporate Responsibility to Respect was a further development of the Corporate Social Responsibility by the UN Secretary General's Special Representative on Human Rights and Business policy paper.¹¹⁹ The document established the UN's baseline applicable to all types of companies in terms of respect, protection, and remedial frameworks for human rights violations by corporations. The UN held a position that corporate responsibility to respect human rights, or, put simply, to not infringe on the rights of others, has become an enforceable universal soft law¹²⁰ denoting that companies must take due diligence steps to become aware of, prevent and address adverse human rights impacts caused in the executions of their operations. The document emphasises the principle that corporations have a responsibility to respect human rights in their operations whether or not doing so is required by law and whether or not human rights laws are actively enforced.¹²¹

¹¹⁸ Ibid. See also Geoffrey P Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18 *Journal of Consumer Marketing*, 595-632.

¹¹⁹ UN Commission on Human Rights adopted resolution on Human rights and transnational corporations and other business enterprises Human Rights Resolution 2005/69. Available at <https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN-4-RES-2005-69.doc> Accessed 16th March 2022.

¹²⁰ Organisation for Economic Co-Operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, revised ed, 2008) 14 ('OECD Guidelines') and International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (International Labour Office, 4th ed, 2006) 3 ('ILO Tripartite Declaration'), which states that companies should respect the Universal Declaration of Human Rights' and other international instruments mentioned in the Declaration.

¹²¹ Wesley Cragg, 'Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework.' [2015] Cambridge University Press. Available at <https://doi.org/10.5840/beq20122213> accessed 16th March 2022.

Scholars¹²² have broken down this notion into two critical stages of responsibilities namely, a responsibility to become aware and knowledgeable about a businesses' misconduct through, for example, undertaking human rights impact assessments or monitoring and auditing, on the one hand, and a responsibility to act on such information and do something in terms of prevention and remediation, on the other hand.

To achieve these responsibilities, the paper outlines four key steps states must enforce to ensure its national companies to comply with the set standards. These steps are, to adopt a human rights policy; conduct human rights impact assessments; integrate human rights policies throughout companies; and track performance.¹²³ This is simply a due diligence¹²⁴ measure to comprehensively and proactively attempt to uncover human rights risks both actual and potential as a consequence of company's operations over the entire lifespan of its activities, with the aim of avoiding and mitigating such risks.

The UN 2011 final report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations¹²⁵ also imposes a set of mandatory obligations on the state to ensure fulfilment of these steps. In Article 7, it makes it mandatory for the state to support companies in order to ensure and make it easy for them to respect human rights by;

- (a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

¹²² Radu Mares, 'A Gap in The Corporate Responsibility to Respect Human Rights' [2010] Monash University Law Review 33. Available at <http://www.austlii.edu.au/au/journals/MonashULawRw/2010/26.html> accessed 18th March 2022.

¹²³ John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights — Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' 8th session, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008) paras 51–81 ('Protect, Respect and Remedy').

¹²⁴ Radu Mares Ibid.

¹²⁵ Passed on 21 March 2011 with a binding effect on all states.

- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation: and
- (d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

In its commentary paragraph, the provision emphasises that it is important for all States to address issues early before situations on the ground deteriorate.¹²⁶ To achieve this, it is recommended that states should ensure greater policy coherence and assist business enterprises adequately in such situations. Assistance can be by fostering closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors. Also, by developing early-warning indicators to alert government agencies and business enterprises to problems; and attaching appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

3.3. International human rights laws

Besides the international law principles, some human rights treaties and other law-making instruments may be interpreted to apply to business corporations as well. The Universal Declaration of Human Rights focuses on the obligations of states, and also mentions the responsibilities of individuals and of ‘every organ of society’, which technically includes business corporations.¹²⁷ In this regard, the instrument goes by far to prohibit even such human rights violations as may be committed by

¹²⁶ (n 120) page 11 para 1-6.

¹²⁷ Universal Declaration of Human Rights, G.A. Res. (1948). 217A, at 71, preamble art. 30, U.N. GAOR, 3rd Session, 1st plenary mtg., U.N.

any other organ of society such as legally established non-human persons, besides the state and natural persons. Under the International Covenant on Civil and Political Rights (ICCPR), each state party undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognised in the Covenant.¹²⁸ Accordingly, if a corporation endangers the rights of an individual, the State has a duty to ensure the respect of human rights¹²⁹ and thus to take preventive action.

However more directly contrary to the UDHR and ICCPR, international law regulate(d?) the business of corporations based on the premises of other international instruments of soft law such the Draft UN Code of Conduct on Transnational Corporations,¹³⁰ the Organization for Economic Cooperation and Development (OECD) guidelines on Multinational Enterprises,¹³¹ and the International Labour Organization (ILO) Tripartite Declarations.¹³² Collectively, these instruments are more specifically intended to regulate the behaviour of business corporations in protection of human rights.

The OECD has a comprehensive code of conduct also named as ‘Guidelines for Multinational Enterprises’¹³³ adopted by a group of nations and has been in the forefront of the movement for defining the obligations of multinational enterprises. They clearly state that business corporations should respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.¹³⁴ With regard to attracting FDI, the guidelines sought to ensure all states parties would ensure, via national contact points and

¹²⁸ *UN General Assembly, International Covenant on Civil and Political Rights* (1966) Part II Articles 2 (1) (2) and (3).

¹²⁹ Leeladhara Mangalpady Bhandary, ‘Corporate Social Responsibility and Human Rights – Role of the International Organisations to Regulate Business Corporations for Violating Human Rights: A Socio-Legal Study’ [2019] *Journal of Business and Management Sciences* 91-99.

¹³⁰ Draft UN Code of Conduct on Transnational Corporations. (1990), UN Doc. Resolution-E/1990/94.

¹³¹ OECD. (1976). Declaration on International Investment and Multinational Enterprises, *ILM*, 15, 967-975.

¹³² ILO. (1978). Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. (1978) *ILM* 17, 422-129. initially set up in 1976 and revised in 2000.

¹³³ Leeladhara supra, see (n 126).

¹³⁴ OECD. (2001). The OECD Guidelines for Multinational Enterprise: Text, Commentary and Clarifications, Section II.

cooperation with the OECD Investment Committee a certain level of control over business corporations within their respective jurisdictions.

The International Labour Organization (ILO) has been dealing with the issues of ‘business corporations’ since the 1970’s and finalised the Tripartite Declaration of Principles on Multinational Enterprises and Social Policy.¹³⁵ The aim of the Tripartite Declaration of Principles is to encourage the positive contributions of the business corporations and to minimize and resolve the difficulties, taking into account the United Nations resolutions advocating the Establishment of a New International Economic Order.¹³⁶ Moreover, the Declaration also contains a general provision relating to the obligation to respect human rights. It provides that all the corporation should respect the sovereign rights of states, obey the national laws and regulations, give due considerations to local practices and respect the UDHR and the corresponding international covenants adopted by the General Assembly of the United Nations, as well as honouring commitments which they have freely entered into, in conformity with the national law and accepted international obligations.¹³⁷

UN Draft Code of Conduct on Transnational Corporations which was finalised in 1990,¹³⁸ also included a provision requiring that business corporations shall respect human rights. This is read with further developments adopted in 1999 by the then Secretary-General of the United Nations under the UN Global Compact.¹³⁹ The Compact was launched with ten core principles relating to human rights, labour, environment and anti-corruption measures.¹⁴⁰ The principles are primarily derived from the Universal Declaration of Human Rights, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, the Rio-Declaration on Environment and Development, and the UN Convention Against

¹³⁵ Leeladhara (n 126).

¹³⁶ ILO. (1977). Para 2 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

¹³⁷ Ibid.

¹³⁸ *Draft UN Code of Conduct on Transnational Corporations* (1990), UN Doc. Resolution-E/1990/94.

¹³⁹ *The Un Global Compact and The OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions* (2005).

¹⁴⁰ Annan, K. (1999). Address at the World Economic Forum in Davos, Switzerland, in *UN Doc. SG/SM/6448*.

Corruption. These principles are a set of objectives, said to have been condensed from international law, which, it is suggested, should be implemented as part of corporate policy. Principle 1 and 2 relate to human rights and urges business to support and respect international human rights within the sphere of their influence and make sure the corporations are not complicit in human rights abuses.¹⁴¹ Principle 3 highlights on the elimination of all forms of forced and compulsory labour; Principle 4 deals with the effective abolition of child labour; Principle 7 explains the precautionary approach to environmental challenges; and Principle 9 has taken initiatives to promote greater environmental responsibility.¹⁴²

Also, the United Nations Sub-Commission on the Promotion and Protection of Human Rights in 2004 also adopted Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.¹⁴³ Contrary to the soft law effect of the Compact, Norms were intended to be non-voluntary¹⁴⁴ and impose binding obligations on companies directly under international law the same range of duties that states have accepted for themselves: to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights. Therefore, the UN was slowly transitioning the soft law on regulation of businesses in respect for human rights into legally enforceable instruments.

Finally, there are also organisations that have made critical policy recommendations and programmatic interventions such as the Freedom House and the Mo-Ibrahim Foundation. In its report titled *'The Global Expansion of Authoritarian Rule'*¹⁴⁵ the Freedom House made a policy recommendation that governments and companies should facilitate efforts incorporating human rights

¹⁴¹ Leeladhara, see (n 126).

¹⁴² Leeladhara, see (n 126).

¹⁴³ Ibid.

¹⁴⁴ The non-voluntary nature of the Norms is said to be reflected in the implementation provisions that require reporting and oversight. See Dennis G Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights, *Business Ethics Quarterly*.' [2010] 20(3), 374-379. Available at <https://doi.org/10.5840/beq201020327> accessed 22nd March 2022.

¹⁴⁵ Sarah Repucci and Amy Slipowitz, Freedom House, Freedom in the World 2022. See also Ines Schultes 'An Africa of Good Governance and Rule of Law: Citizens' Perspectives' Mo-Ibrahim Foundation. 2021, which envisions that another important aspect as outlined in the targets of Aspiration 3 is that citizens believe that there is a culture of respect for human rights and the rule of law.

due diligence into core business programs across the companies' value chain; speaking out against abuses when they occur by exerting influence on business partners, government officials, industry associations, and multi-stakeholder initiatives; and enabling remedies for stakeholders who are affected by abuses to which the company is linked or has contributed.¹⁴⁶

3.4. Conclusion

It is evident that there is a plethora of authorities that could help aid a state in facilitating legislative and policy frameworks in its jurisdiction in protection of human rights from FDIs. However, as an incentive to attract foreign investors, countries like the Kingdom of Lesotho have overlooked their international obligations in promotion and protection of human rights and provided a lee-way for human rights violations by multinational corporations in the land extractive industries. This is because government failed to critically cater for protection of human right in the land extraction laws such as the Mines and Minerals Act,¹⁴⁷ which is the primary legislation regulating the business of extractive industries. A comprehensive overview of national laws further facilitating this atrocity follows in the next chapter.

¹⁴⁶ (n 145) 32.

¹⁴⁷ Act No. 4 of 2005.

Chapter Four: Extractive Industries and Women's Human Rights in Lesotho

4.1. Introduction

The Kingdom of Lesotho has had traceably inadequate state interventions in general promotion and protection of human rights. This is evident from, amongst other, international Tier Watch-list,¹⁴⁸ which has seen the Kingdom being constantly at Tier 3 Watch-list until 2021 when it was slightly upgraded to Tier 2 after certain efforts in the fight against human trafficking.¹⁴⁹ The upgrading was partly attributable to enactment of water-tight legislation to address the problem and the police investigating certain high-profile offenders to conviction.¹⁵⁰ In respect of

¹⁴⁸ This is a US Department of State grading system to gauge countries performance in response to human rights protection through prevention and elimination of Human Trafficking.

¹⁴⁹ US Department of State Trafficking in Persons Report June 2021. The report provides that Lesotho was upgraded from tier 3 category to tier 2 after 5 years when it finally presented significant efforts in elimination of trafficking in persons although it still did not meet the minimum standards.

¹⁵⁰ *Anti-Trafficking in Persons Amendment Act* No.1 of 2021. The amendment Act was meant to rectify gaps identified in the principal Act; *Anti-Trafficking in Persons Act* No.1 of 2011, and to intensify the gravity of punishments to supplement force of deterrence provisions. The principal Act had omitted instances of child trafficking which would not have elements of threat, use of force, coercion, abduction, fraud, deception and or abuse of power. The Amendment Act in section 2 rectified the gap by adopting the definition of trafficking as it appears in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000, which provides that in instances of child trafficking, all the above elements will not be necessary to inform the crime. In this instance, high profile persons who lure children and women into acts that subtly exploit them will also be subjected to the TIP Act.

human rights violations in the extractive industries' sector, the opposite has been a reality. The UN has regularly expressed concern about how the rush for land and extracted resources has led to human rights violations especially against women in relation to their rights and access to land;¹⁵¹ a situation also manifest in the affected communities of Lesotho.

Amongst many other impacts, large-scale 'land grabs'¹⁵² in Polihali and Liqhobong have displaced communities without due compensation;¹⁵³ and extractive industries have encroached on indigenous and communal lands.¹⁵⁴ Women, a category of persons who already face patriarchal challenges in access to land and property because of discriminatory laws and practices at all levels, have been the most harshly affected. Whilst it can be argued that communities in general have felt the impact of extractive industrialization such as loss of land, evictions, environmental degradation, food insecurity, and social disruption,¹⁵⁵ land-consuming industries such as extractives, agribusiness and dam construction, impact women and men differently, and affect women more negatively.¹⁵⁶

The chapter will demonstrate how extractive industries have perpetrated human rights violations in Lesotho. A visit will be taken into the legal framework to clearly paint a picture that government had intentionally relaxed protection of human rights

¹⁵¹ Claude Kabemba and Others, 'Women's Land Rights and Extractive Industries in Southern Africa' [2021] Advancing Rights in Southern Africa Programme https://www.sarwatch.co.za/wpcontent/uploads/2021/03/Women-Land-Rights-and-Extractive-Industries-in-Southern-Africa-Report-v8-1_compressed.pdf accessed 29th March 2022.

¹⁵² Land grabbing in this context refers to land expropriation that is not authorized by the affected land title holders. In Lesotho, per the *Land Act* of 2010 and the Constitution, government hold unlimited power over land and can take it from any one at will. This resulted in these extractive industries grabbing land from the villagers absent consent and or compensations equivalent to the value of the land expropriated. See Kabemba Ibid.

¹⁵³ During community dialogues with affected women conducted by WLSA in Polihali under a study titled 'General Support to Strengthen Women's Voices and Participation in Natural Resource Governance in Southern Africa Focusing on Mozambique, Zimbabwe, Lesotho And Zambia', it was revealed that other families received M2000.00 once-off payment in respect 2 to 3 fields each a size of approximately 1.5 hectares, while other families cited receiving M145.00 only in respect of similar number and size of fields.

¹⁵⁴ These includes graveyards, communal grazing lands, medicinal herbs reserved grounds, community forests supporting wood for fuel and water streams such as wells. See also Charles Fogelman and Others 'Mapping for investability: Remaking land and maps in Lesotho' [2017] (Geoforum, Volume 82) 252-258.

¹⁵⁵ Kabemba (n 4) 12-13.

¹⁵⁶ Ibid.

as an incentive for attraction of foreign direct investments (FDIs). The chapter will also demonstrate the importance of establishing human rights protection as a necessary screening measure in attraction of foreign investments in the extractive industries in Lesotho. In this line, an argument will be raised that failure to align investment regulations with human rights principles is a critical political misdirection that results in worsening economic conditions in the Kingdom despite vast investment opportunities.

4.2. Rights and women in Lesotho

To fully express this research's argument that the impacts of extractive industries in the communities of Polihali and Liqhobong have been far devastating on the human rights of women than any other group of society, it is critical to analyse the general context defining human rights in respect of women in the Kingdom, especially in rural communities where public services delivery is very little and consequently implementation of human rights protection less advanced. This approach will aid in the long run towards understanding how the advent of extractive industries within these target communities has changed the narrative for protection of rights of the vulnerable groups such as women and children.

The general landscape of women's rights in the kingdom of Lesotho is defined by the dictates of customary laws and traditional practices prior to legislation. Under these systems, women are generally considered minors, a condition rendering them with very limited authority in decision making.¹⁵⁷ A woman before marriage is under the guardianship of her father; upon marriage, her husband takes over guardianship from her father and upon his death, guardianship is transferred to his heir.¹⁵⁸ Also, a woman is considered a legal minor and therefore cannot own

¹⁵⁷ Mala Htun, *State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law* (18 Indiana Journal of Global Legal Studies 2011) 145.

¹⁵⁸ UN Food and Agriculture Organisation, 'Customary norms, religious beliefs and social practices that influence gender-differentiated land rights.' Gender and Land Rights Database, [2022] [General Introduction | Gender and Land Rights Database | Food and Agriculture Organization of the United Nations \(fao.org\)](#) accessed 29th March 2022. These conditions were however nullified by introduction of the *Legal Capacity of Married Persons Act* of 2006.

property or enter into any binding contract without the consent of her husband or, if her husband is deceased, the head of the family, who is always male.¹⁵⁹

Furthermore, the social status of women in Lesotho is defined by predetermined normative gender roles. Gender roles are the responsibilities or behaviours learned by a person as appropriate to their gender, determined by the prevailing cultural norms. They determine how males and females should think, speak, dress, and interact within the context of society.¹⁶⁰ Based on this notion, women are strictly confined to household care work such as bearing and raising children, conducting household chores, and generally remaining subservient to male counterparts. In rural communities, gender roles have presented systematic gaps between males and females whereby men freely explore social and economic opportunities both locally and extra-territorially or spend the day herding cattle in the fields, while women are expected to stay home tending for the general welfare of the household in terms of daily sourcing and preparing of food, and finding water and fuel.¹⁶¹

These systems have eventually presented psychological barriers to women from exploring activities beyond their normative gender roles, and these barriers are generally acceptable at society level. Psychological barriers refer to the internal belief, emotions, opinions, and status of consciousness of an individual that stops her from effectively participating in entities and activities beyond the convictions and the programme of their mind.¹⁶² Women have been rendered psychologically incapable of exploring opportunities within the gender role ascribed to men as a result of such consequences as, amongst others, societal stigmatization and general ostracization from family and society.¹⁶³ For instance, although the law on inheritance rights in Lesotho has evolved to create an opportunity for inclusion of

¹⁵⁹ Ibid.

¹⁶⁰ Pholoho Morojele, 'What does it mean to be a girl? Implications of girls' and boys' experiences of gender roles in rural Lesotho primary schools.' (DPhil thesis University of Kwazulu Natal 2011) <https://doi.org/10.1080/16823206.2011.565286> accessed 29th March 2022.

¹⁶¹ Puleng Letuka and Others, *Family Belonging for Women in Lesotho* (Women and Law in Southern Africa Research Trust 1998) 152.

¹⁶² Samantha Sinclair, 'Social psychological barriers to a gender balanced labor market: The role of gender identity threats, friendship priorities, and perceived discrimination.' (Doctoral Dissertation of Lund University 2015) <https://portal.research.lu.se/en/publications/e9138075-be65-4161-a5ca-e375e3227fee> accessed 29th March 2022.

¹⁶³ Ibid 13.

female children,¹⁶⁴ the practice in rural communities is still that only male children can inherit property of their deceased parents as per the dictates of customary laws,¹⁶⁵ which have formed the acceptable norms of society. Despite challenges this practice has brought against the general welfare of women, such as property dispossession which has seen more women starting life in extreme poverty situations than men, rural women generally still hold this practice as the acceptable and protectable way of life, remain unwilling to challenge or deviate from it, and subject to stigma for women who may dare to challenge it.¹⁶⁶ This means that, despite the frameworks of laws and policies in place, psychological convictions still dominate everyday life practices and laws are only invoked, reluctantly so, as a post-care intervention rather than preventive measure or a form of behavioural correction.

Furthermore, with insufficient access to information in the rural communities and high rates of illiteracy, coupled with inadequate human rights awareness campaigns, rural communities are not aware of their fundamental rights that they should endeavour to protect. Where a little effort is made, communities' reception to human rights interventions is *prima facie* construed as dismantling the society by teaching women and children to rebel against men and traditional normative systems which the society believes were put in place to shield certain values meant to maintain the society's stability, peace and security.¹⁶⁷ Unfortunately, this

¹⁶⁴ *Law of Inheritance Act* No.26 of 1873. Part II Section 5 affords anyone bequeathing property in a will powers to include or exclude any of his/her children at wish.

¹⁶⁵ *Laws of Lerotholi* Part I Section 11 (1) defines an heir in Lesotho as the first male child. See also Puleng Letuka and Others, *Inheritance in Lesotho* (Women and Law in Southern Africa Research Project 1994) 31 which provides that the Laws of Lerotholi were a codification of Basotho laws and customs in a text form.

¹⁶⁶ Samantha Sinclair (n 32). The research adds that abusive customary practices remain entrenched in people born in such practices and are largely regarded as a normal way of life also hardly interpreted as harmful. When a person amongst them endeavours to challenge them, they are often rejected by society and their conduct held repugnant.

¹⁶⁷ US Department of State- Lesotho 2019 Human Rights Report reveals that there were reports of forced elopement, a customary practice whereby men abduct and rape girls or women with the intention of forcing them into marriage. If a perpetrator's family was wealthy, the victim's parents often reached a financial settlement rather than report the incident to police or allow cases to proceed to trial. The report also notes a media report that a former Minister of Law and Constitutional affairs Mootsi Lehata was accused of raping and impregnating a 17- year-old orphan in January 2018. He was arrested and charged with rape. Before his case was tried, Lehata's lawyers negotiated an out-of-court settlement that included building a house for the victim and paying her a monthly maintenance allowance of 1,000 Maloti (\$69).

conviction is also shared by women. In this regard, there is little will in rural communities to implement respect for human rights of vulnerable populations such as women and children, on the part of both potential perpetrators and victims themselves.¹⁶⁸ Also, this has generally affected the reporting of experienced human rights violations on the part of women and children.

Consequently, the normative practices resulted in dominating patriarchal systems, oppressive gender relations and unequal power relations between men and women in all spheres of life where women are not expected to voice their opinion over and against men or where women naturally expect men to dominate decision making platforms in society.¹⁶⁹ Eventually, as a result of this background, when land extractive industries came, despite constituting the majority of people living in rural areas and representing a large proportion of those working on land for subsistence, women were never adequately consulted as a separate constituency of society when access to their land was negotiated nor during compensation processes, and their direct interests were not catered for.

Where does this place the effectiveness of legal frameworks in protection of human rights? While Lesotho has been commendable for enactment of laws, adoption of policies and ratification of treaties, efforts have been lacking on the part of government in sensitizing communities of the developments to influence social and behavioural change at grassroots level to promote law-abiding citizenry and invoking the society's preparedness in implementing such laws or utilizing institutional frameworks. This means that laws in the Kingdom are only existent at the one end of the yardstick and are a tool of the privileged, while vulnerable populations such as rural communities are hardly aware of their existence and rights created by them. Consequently, as earlier articulated, legal frameworks in the Kingdom do not prevent problems of the communities at grassroots level, but are a

¹⁶⁸ Ibid.

¹⁶⁹ Jessica Newirth, 'Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and through the Beijing Platform for Action', [2005] 18 *Harvard Human Rights Journal* 19-54.

post-care intervention invoked after an injury has been sustained and for those fortunate enough to have access to them.

On the other hand, albeit the intervention of Civil Society Organisations (CSOs) in addressing human rights issues at community level, the efforts have been hindered by the impermissibility of public interest litigation in Lesotho's justice system. For nearly three decades since 1993, Lesotho's superior courts have battled over the standing of individuals or voluntary organisations seeking to litigate in the public interest. In general, and on constitutional questions in particular, the courts have unconscionably preferred the restrictive approach to standing.¹⁷⁰ In Lesotho, standing to litigate is still based on the private law doctrine of *locus standi in judicio*.¹⁷¹ This doctrine requires the person who institutes an action in a court of law, regardless of whether it is in the private or public interest, to satisfy the court that he or she is directly and substantially interested in the outcome of the decision. Section 22(1) of the Constitution of Lesotho provides that any person who alleges that the Bill of Rights in the Constitution has been violated 'in relation to him' may approach the court of law for redress. Although the Constitution is silent about the enforcement of the other non-Bill of Rights parts of the Constitution, the courts have readily invoked section 22(1) to exclude litigants who are not 'directly and substantially' interested in the outcome of the case.¹⁷²

4.3. The advent of extractive industries

Before commercial extractive industries visited the Kingdom of Lesotho, rural communities in the districts of Mokhotlong and Butha-Buthe such as the Liqhobong society largely depended on artisanal small scale mining in diamonds and other minerals such as rubies and other rare earthly provisions like ilmenites.¹⁷³ The

¹⁷⁰ Hoolo 'Nyane and Tekane Maqakachane 'Standing to litigate in the public interest in Lesotho: The case for a liberal approach ' (2020) 20 African Human Rights Law Journal 799-824 <http://dx.doi.org/10.17159/1996-2096/2020/v20n2a20> accessed on 30th March 2022.

¹⁷¹ *Mosito v Letsika* [2018] LSCA 1.

¹⁷² *Justice Maseshophe Hlajoane v Letsika* [2019] LSCA 27 para 57, where the court stated: 'The law on locus standi in this country does not permit any constitutional litigation outside section 22(1) of the Constitution. In this case the respondent had no sufficient interest to pursue litigation pursuant to section 125 of the Constitution.'

¹⁷³ Esther L Makhetha, 'Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho' (Doctral Thesis of University of Pretoria 2016) 114. This mineral is

industry was largely dominated by local women and children and dates as far back as 1930s.¹⁷⁴ Research reveals that the practice was encouraged by Basotho men who were migrant workers in Kimberly diamond mines in the Republic of South Africa, who realised similar rocks in the villages as those mined in Kimberly, brought hand tools and taught their wives to mine while they themselves were away.¹⁷⁵ Eventually, artisanal diamond mining became widespread practice in the communities whereby women spent every day of their lives digging the ground for diamonds and sieving for some on the river banks across the villages, and were joined by children after school.

Artisanal diamond mining became the backbone of rural economy for women amongst many other means of livelihood such as gathering and selling of bundles of shrubs for fuel, brewing and selling of homemade beer, old age pension social welfare grants and farming.¹⁷⁶ Women also participated in sharecropping where poor households combined efforts with others to carry out farming activities as a strategy towards elimination of abject poverty in the communities. However, diamonds supplemented the traditional pastoral and agricultural activities.¹⁷⁷ Women artisanal miners sold their diamonds to black market transient buyers who came from South Africa into the communities especially for the purpose of buying diamonds in exchange for cash. Also, besides selling to the transient buyers, these diamonds served as an instrument of barter system in the communities to exchange and pay for alternative goods and services.¹⁷⁸

When commercial diamond mining first visited Lesotho, these communities became a source of contestation of FDIs, communities and the government, with the state opting to side with the mining companies most of the time.¹⁷⁹ The contestation was over the land and natural resources that have belonged to the

locally known as Sekama (ilmenite), a shiny mineral found in association with kimberlite, used for cosmetic purposes, processed through crushing and mixing with sheep fat.

¹⁷⁴ Motlatsi Thabane, 'Individual diamond digging in Lesotho, 1955-1970: A study of an aspect of the social and economic history of Lesotho' (PhD Thesis of University of Trondheim 1995).

¹⁷⁵ Makhetha Ibid 122.

¹⁷⁶ Motlatsi Thabane Ibid 16.

¹⁷⁷ (n 168) 113.

¹⁷⁸ Ibid 113.

¹⁷⁹ Makhetha (n 168) 195.

communities and formed its basis for subsistence. The conflict lasted until the year 2000 when government adopted law ousting participation of the communities in artisanal diamond digging and criminalizing it to pave way for commercial diamond mines or FDIs. This was also undertaken through government stopping issuance of diamond digging licenses to individual diggers from the communities, and offered international mining companies exclusive rights to extract the diamonds.

4.4. Law and policy framework violating second and third generation human rights

It should be recalled that second and third generation human rights encompass socio-economic rights and solidarity rights such as the right to development and environmental welfare in respect of the communities.¹⁸⁰ When government sought to advance political interests over the rights and the welfare of the communities, a series of laws were enacted that unfortunately did not protect the interests of communities where diamonds are found, their households and artisanal miners as individuals.

Mining and mineral rights in Lesotho are regulated by the *Constitution of Lesotho* 1993 and various pieces of legislation. The *Constitution* in section 107 provides for rights in ownership of land. It summarily provides that land in Lesotho is vested in the Basotho nation and held in trust by the King. As such, land cannot be privately owned.¹⁸¹ More specifically, diamonds mining is also regulated by the *Mines and Minerals Act*.¹⁸² The Act was enacted in an effort to repeal and replace the *Mining Rights Act*,¹⁸³ which was operational before 2005. Furthermore, there is a *Precious Stones Order* of 1970,¹⁸⁴ and the *Land Act* of 2010,¹⁸⁵ which also repealed the *Land Act* of 1979.

¹⁸⁰ Rajeev Kumar, "Classification of Human Rights" [2015] Volume 5, *International Journal of Engineering and Management Research* 756.

¹⁸¹ See also Sections 108 and 109.

¹⁸² No.4 of 2005.

¹⁸³ No.43 of 1967.

¹⁸⁴ Amended in 2004 through Legal Notice No.160 of Precious Stones Regulations.

¹⁸⁵ Act No. 8 of 2010.

4.4.1. Evolution of the legal framework

(a) Mining Rights Act No. 43 of 1967

The Act was enacted after the independence of 1966. Its stated purpose was to regulate the following activities: allocation of rights to prospect and mine for minerals, the issuing of mining leases and licenses, and the granting of dealers' licenses.¹⁸⁶ The Act further granted mining leases to people living on mineral rich lands, provided the land was free of title for the specific mineral.¹⁸⁷ Moreover, the holder of the lease was allowed to prospect and mine the specific minerals on the land. The licenses stipulated the duration of the lease as well as other conditions such as fees for granting rights, reporting procedures, rentals, royalties and sanctions for non-compliance.

In the Act, provisions were further made for the dealers' licenses. It enabled the dealer to buy, sell, and import and export minerals such as precious stones. A diamond dealer's license was issued provided the applicant met the necessary requirements of a license fee of M1000.00 for a Mosotho national and a M2000.00 for a foreign national. This license was renewed annually and there were no special incentives given to attract investors to the minerals industry in the kingdom. A foreign investor was supposed to register a company in the country before applying for a prospecting and mining licenses.¹⁸⁸ Artisanal and small-scale mining on the other hand required no special conditions.

(b) Precious Stones Order No.24 of 1970

Following the enactment of the *Mining Rights Act*, the Kingdom of Lesotho further promulgated the *Precious Stones Order* of 1970.¹⁸⁹ Under this legislation, the prospecting permit was granted to a holder entitling them to peg a prospecting area during a prospecting period given in a deposit. Each prospecting area was 40,000 square feet in size limited to 10 sites.¹⁹⁰ The prospecting holder could apply for a license provided that they had lodged with the Commissioner of Mines a

¹⁸⁶ Section 6, 14 and 15.

¹⁸⁷ Ibid section 14 (1).

¹⁸⁸ Section 3 and 5.

¹⁸⁹ *Precious Stones Order* No.24 of 1970.

¹⁹⁰ Ibid section 8.

recognizance in the prescribed forms entered into before the resident magistrate of Maseru and for the duration of the license applied for.¹⁹¹ Additionally, the mining license entitled the holder to prospect and mine on the prospecting area for the specified minerals based on the stated conditions.

Unlike the previous Act, *Mining Rights Act*, the *Precious Stones Order* was aimed at regulating dealings in rough precious stones including diamonds and the protection of mining areas. Furthermore, by this *Order*, diamond dealers and all other people were prohibited from entering diamond protection areas unless they were in possession of a valid license to dig in such areas.¹⁹² However, in 2004, an amendment to this *Order* was enacted by government with the aim of tightening the criteria for granting licenses to individuals. A move to oust communities from participation in diamond digging. Unlike in the *Order* where no specified amount of money was required, the Amendment Act provided that a person may only be granted a diamond dealer's license if they produce a diamond dealing capital to the minimum of M100,000.00 and a bank statement as a proof thereto.¹⁹³ Furthermore, the Amendment required production of a tax clearance certificate alongside a certificate of inspection showing that the licensed place has been inspected twice a year.¹⁹⁴ Technically, this was a clear intentional ouster legislation aimed at closing access to diamond digging by villagers in favour of commercial diamond miners of FDI's.

This new measure made it even more difficult for community members or ordinary people or specifically artisanal and small scale miners to obtain licenses. It excluded ordinary citizens and communities from diamond rich areas, who do not have access to capital, bank accounts and the necessary documents from economic participation. As a result of this legislation, the activities of women who had been undertaking artisanal and small-scale mining for ages as a primary means of livelihood were

¹⁹¹ Ibid Section 6(1)(a).

¹⁹² Ibid section 8.

¹⁹³ *Precious Stones Regulations Legal Notice* No.160 of 2004 Section 2(c).

¹⁹⁴ Ibid Section 2(d).

criminalised as they, faced with impossible financial prerequisites for ordinary people to obtain a license, were forced to illegally mine in order to survive.

(c) *Mines and Minerals Act No. 4 of 2005*

This is the currently operational regulatory framework in the mining sector. The Act was an effort to repeal the *Mining Rights Act* No.43 of 1967. Contrary to previous legislation, the 2005 Act focussed on the presence and promotion of commercial diamond mining. In the wake of it, the role of artisanal and small-scale mining was underplayed. The Act provided that an individual who sought to conduct artisanal and small-scale mining shall be granted a license for any other mineral to the exclusion of diamonds and this shall be in an area not exceeding 100 square meters.¹⁹⁵ In this regard, the Act expressly discriminated against and ousted community members artisanal and small-scale miners from participating in the mining industry and afforded the privilege to commercial companies. According to the Constitution of Lesotho, discrimination under this provision means affording different treatment to different persons attributable to, inter alia, property or other status whereby such persons are subjected to restrictions to which persons of the same description are accorded privileges.¹⁹⁶

Even worse, the Act denied even individuals who may acquire mineral permits in respect of any other mineral except diamonds, a chance to accidentally unearth diamonds during their digging operations of any other mineral or earth moving activity. It strictly prohibits use of explosives or any other powered machinery in mining operations of such other minerals and provides that a holder of a mineral permit shall not carry out mining operations beyond a depth of 2 meters.¹⁹⁷ This marked the end of artisanal diamond diggers and consequently excluded affected communities from socio-economic participation in the natural resources within their communities. As women were the primary artisanal miners largely dependent on diamond mining, they were legislatively forced out and left without alternative

¹⁹⁵ *Mines and Minerals Act* of 2005 Section 46(1).

¹⁹⁶ Constitution of Lesotho, Section 18 (3).

¹⁹⁷ Section 53(a)(b)(c).

means and without adequate prior consultations,¹⁹⁸ while diamond mining was left preserved only for FDIs.

(d) Mines and Minerals Policy 2015

In the year 2015, the government of Lesotho realised the error of the country's mining regulatory framework against international standards, e.g. the African Mining Vision,¹⁹⁹ and produced the Mines and Minerals Policy to pave way for enactment of new regulatory framework in mining. The policy identifies that some of the lacunas in the current legal framework is the Government of Lesotho's lack of clarity on the position of Artisanal and Small-scale mining sub-sector.²⁰⁰ To address such challenges as this, the policy envisions future regulatory framework that will mitigate the adverse social and environmental impacts of mineral development and ensure equitable access, transparency and public participation in the sustainable development of the mining sector. Also, the policy proposes to pave way for strategies and guidelines for corporate social responsibility commitments.²⁰¹

In its objective to address legal recognition of artisanal mining, the Government of Lesotho through this policy takes oath to transform the artisanal mining sub-sector from its poverty cycle trap and widespread negative and exploitative practices to a value-adding, poverty-reducing economic activity with special significance for

¹⁹⁸ The process for enactment of the Mines and Minerals Act had no referendum of community consultations with the affected communities, nor were they given a prior warning of the termination of their artisanal mining. This issue was raised in the *Seqhobane* Case (n 52), and the Ministry of Mining argued that they held a community gathering (pitso) for the miners to warn them that government will be deciding not to renew their licenses but they will be reconsulted adequately should that decision materialize. On the contrary, the community argued that the re-consultation was never conducted and this was raised at a gathering (pitso) discussing different issues altogether a very longtime ago so much that they did not even go into critical discussions on the issues, also because it was not a subject matter of such a gathering the Ministry was referring to. When the Ministry's argument that proper consultations were conducted was dismissed by the court, the Ministry shifted to arguing that they had in fact not terminated artisanal mining by the communities, but communities were ousted from the activities by the expiration of their licenses that government decided not to renew.

¹⁹⁹ The Africa Mining Vision (AMV) is a policy framework that was created by the African Union in 2009 to ensure that Africa utilizes its mineral resources strategically for broad-based, inclusive development.

²⁰⁰ Article 1.2 provides that the challenges and obstacles that are hindering the realisation of the country's socio-economic growth from its mineral resources are numerous and include amongst others absence of government's policy position on issues such as CSR.

²⁰¹ Article 2.3.4.

rural development ensuring that the sector is part of integrated rural development plans. Also, the policy ascertains artisanal mining interventions that will ensure gender equality and equity to empower women in the mining sector as women tend to suffer disproportionately from the negative impact of mining/extractive industries. However, the policy is silent on the reparations necessary to address damage already done and continuing to take place on the affected communities. As shall be seen in the next chapter, the fact is extractives, as were legislatively given way by an act of government, have caused affected communities more harm than good, and women suffered the most repercussions.²⁰²

4.4.2. Legal contest of over rights

Following the government's acts, villagers whose livelihoods were abruptly disturbed by government, joined forces to challenge the matter before courts of law. This was through the case of *Seqhobane and 205 Others v Minister of Natural Resources and Others*,²⁰³ in which the court ruled that the government was justified to expropriate the right to livelihood from the people. Although the case occurred in the area of Kao, a village similarly circumstanced of the same events of contesting of mining rights between villagers and FDI as the communities of Liqhobong in this study, it is particularly relevant to this study because it is the only case that was heard in court on the issues and therefore formed precedent across the sector. In this case, villagers argued that it was improper for the government to have suddenly decided to stop their artisanal mining activities and set aside their licenses without offering them any explanation. Many other issues such as the right to the livelihoods²⁰⁴ of the affected villagers being affected were also raised in an attempt to bar government from kicking the villagers out of the mining areas.

In its response to the case, government contended that diamond digging conducted by the villagers and sifting resulted in water pollution to the waters of the Senqu and the Malibamatso rivers, which rivers collected and transferred water to the

²⁰² The Mines and Minerals policy acknowledges this fact in Article 2.6 by providing that with practically no legal enforcement in most ASM areas, potential for human rights abuses of women and children also exists. In article 2.8, it further acknowledges that women tend to suffer disproportionately from the negative impact of mining /extractive industries.

²⁰³ [2001] LSHC 105.

²⁰⁴ *Seqhobane and 205 Others v Minister of Natural Resources and Others* (n 190) 8.

Katse Dam in accordance with the treaty project under the LHWP between the Kingdom of Lesotho and the Republic of South Africa. According to government, this alleged pollution caused it to default under the treaty by failing to deliver clean water to the Republic.²⁰⁵ Government contended further that it was exploring other avenues to prevent water pollution that might result in contaminated water making its way into the Katse Dam. So, government had to weigh the advantages and the disadvantages of allowing continuation of artisanal mining with the possibility that it may result in slimes dams that would cause silting of the Katse Dam. Lastly, government argued that the only solution to excuse the interests of the villagers was to build slimes dams estimates at the cost of M9 million, an amount the ministry could not afford.

The presiding judge acknowledged that granting the villagers their rights back was morally stronger than denying same, and that factors of prior involvement in the business concerned and the villagers existing interests in eking out a livelihood in the diamond digging, were positive considerations not to be ignored without good cause. However, the court nevertheless upheld the arguments of government and justified its action in ousting the livelihoods of the villagers from the benefits of the natural resources in their community. Lastly, unlike a one month's notice that the Ministry had ordered for the villagers to vacate the mining areas, the court ordered a one-week notice.²⁰⁶

The manner in which the court arrived at its decision to favour government's undertakings violating the second and third generation human rights of the citizens raises so many concerns. The first argument is that government was not called forth to produce a scientific report establishing the *causal nexus* between artisanal diamond mining and the government's alleged water pollution into the Katse Dam. This is because, studies reveal that artisanal diamond diggers in the villages did not use any chemicals in the conduct of their diamond digging activities and cleansing,²⁰⁷ but rather made utilization of small handy-craft tools to dig and

²⁰⁵ Ibid 5.

²⁰⁶ Esther L Makhetha (n 168) 183.

²⁰⁷ Use of powered machinery and any chemical producing agents was restricted by section 53 (c).

unearth diamonds.²⁰⁸ The villagers used spades to dig a lump of soil, which they mixed with water in a bowl and sieved in order to lead the soil out with the water in hope to leave diamonds behind. This means that they resorted to natural methods which cannot be said to be contaminating the water in a manner to render their activities intolerable.

Secondly, government alleged that the problem could only be stopped by it building slimes dams estimated to be at the tune of M9 million which government could not afford. Also, this is a crossly unfounded argument that the court should have investigated before making an order on its basis. The LHWP is a multi-million revenue generating project for the government of Lesotho through which it sells water to the Republic of South Africa. During the period this case was decided, the Government of Lesotho had collected a total revenue in water transfer royalties under the Katse Dam LHWP establishment to the tune of M226.1 million.²⁰⁹ This was an increase from the previous years of which revenues were recorded as M207.9 million for the 2003/04 period, and another increase beyond this period to M251.1 million in 2005/06.²¹⁰ Furthermore, water from Katse Dam before transferring to the Republic of South Africa passes through the LHWP sub-project in 'Muela Hydro-power Plant generating electricity that government sells both locally and is exported to the Republic of South Africa as another means of revenue generation. It is recorded that since the commencement of the project in August 1998 to March 2006, it was able to generate M376.3 million, M5.2 million of which was generation from exports.²¹¹ *Prima-facie*, these fiscal data demonstrates that government had means to source the M9 million to build slimes dams and control the alleged water pollution from the diamond mining activities of the villagers

²⁰⁸ Motlatsi Thabane (n 169) argues that artisanal diamond diggers used rudimentary tools and mining methods that can be described as labour intensive, such as picks, shovels, bowls, spades and buckets. See also Makhetha (n 170) page 122, where she acknowledges also finding the same practice that the artisanal miners used hand tools to mine.

²⁰⁹ Lesotho Highlands Development Authority Annual Report 2005 – 2006. [Annual Report 2005_06.pdf \(lhda.org.ls\)](#) accessed 4th April 2022.

²¹⁰ (n 204) 13.

²¹¹ Ibid 13.

without necessarily denying citizens the rights to economic benefits from natural resources in their communities.

However, as the research alleges that the Government of Lesotho intentionally overlooked promotion and protection of human rights as an incentive for attraction of FDIs, the forced evacuation of villagers from the diamond-rich areas was not as a result of protecting the country's treaty obligations, but a fraudulent misuse of power to preserve the minerals for commercial exploitation by FDIs and paving a leeway for such FDIs to freely violate fundamental human rights without much accountability. This is because there is no tangible data that the government produced in this case to rebut this presumption, or any found beyond the cases to justify government's acts.

4.5. Land dispossession and women land rights

The other critical issue that came as a result of the advent of extractive industries is the issue of land rights. As these industries came, large amounts of lands were taken from individuals in a manner somewhat failing to protect their fundamental human rights. And when these happened, widowed women and girl children from child-headed households suffered the most consequences. Amongst many other apparent factors, the problem resulted from the discriminatory practices in rural communities which excludes women from holding rights over land. Indeed, government had enacted laws such as the Land Act 2010 in response to address such gaps, but as earlier argued, the effectiveness of laws in the Kingdom is such that they are not concerned with correcting harmful behaviours but are a post-care intervention after an injury is sustained, they are unknown and never implemented at grass-roots level in rural communities as a result of dominant customary norms, rights beneficiaries are not aware of such rights,²¹² and government is not positively responding to address the matter. However, in order to understand the matrix between reigning practices within communities and the balance brought by legislation, it is important to unpack the source of the problem.

²¹² Women and Law in Southern Africa Research and Education Trust- Lesotho, 'General support to strengthen women's voices and participation in natural resource governance in Southern Africa focusing on Mozambique, Zimbabwe, Lesotho and Zambia' (A Study conducted and Supported by Ford Foundation 2021).

4.5.1. Land rights under customary law

As earlier demonstrated, social practices in most rural communities are informed by what is perceived by the same communities as customary law; a system sourced from primitive social practices that happened overtime, became societal norms and were eventually translated into law. Under these systems in Lesotho, land normally evolves from generation to another through inheritance. At first allocation, a man is granted a piece of land by the chief in order for him to benefit from it with his family and dependents. Even the title is registered in the sole names of the man regardless of whether he is married. Inheritance rights under customary laws are an exclusive benefit of male persons that women are barred from participating in.²¹³ When a male figure in whose names title to land is registered passes on and he leaves no male issue to succeed him, the family continues to benefit from that land under the title of the deceased and receives social protection in respect of such land from the chief's knowledge of the status quo and the community's.²¹⁴ This is only if the surviving woman does not remarry outside the family or continues to live her life in a manner approved by the deceased husband's family, otherwise she risks dispossession of the land and in worst case scenarios, even expulsion.

When land was expropriated by government for purposes of advancement of the commercial extractive industries, this means that women did not have much political participation in the discussions as they were largely represented by male figures in the family leadership. Consequently, women did not have a platform to air their views and participate in shaping the discussions to also cater for their interests in land matters. Furthermore, when individuals affected were called forth to claim compensations in respect of their affected land, widowed women and

²¹³ *Laws of Lerotholi Part I Section 11 (1) (n 11)*. See also *Shakha Ramalohlanye v Masefantsi Ramalohlanye* (LC/APN/32/2020) in which a brother of the female respondents lodged a case in court to argue that as the male child he is the sole heir of their deceased parents' property and sought to eject his female siblings from it.

²¹⁴ *Mamokhali Makhutla v Lithebe Makhutla and Others* (CIV/DLC/MSU/0034/2016). The applicant was a widow forced out of her matrimonial home by domestic violence acts of her deceased husband. After the husband's death, her in-laws' family forcefully took over her matrimonial properties and sought to eject her from it. The Form Cs in respect of the property between herself and the deceased husband was registered in the sole names of the husband even though registered after the marriage was subsistent.

orphaned girl children from child headed households were overtaken by extended family members' male figures who, on the basis of customary laws, appointed themselves as the rightful title holders over such land and took the benefits for themselves.²¹⁵ This is because, the custom as practiced in the communities also requires that a family's declaration letter appointing an individual as the rightful successor to land rights be produced, and the appointment is endorsed by the chief,²¹⁶ a condition not favourable for widowed women and orphaned girl children heading households in situations of stale family relations. Also, most cases on these issues ended up in court because they were extracted from the community by voluntary organisations conducting land rights education in the affected communities, whereas the victims themselves were not aware of their rights and were suffering injury when the interventions reached them.²¹⁷

It is therefore evident that in Lesotho there is still lack of adequate provision for women to hold land rights independently of husbands, sons or male relatives as governed by the customary land tenure system. The statutory land tenure system seems to be weak in providing for women's independent rights and the existing legal frameworks are not explicit on the rights of women.²¹⁸ There are no enforcement mechanisms in place, and it appears that government does not have a clear policy and programme to ensure affirmative action. Consequently, as contests

²¹⁵ *Teboho Boniface Hlaele v 'Manthati Hlaele* (CIV/APN/259/2020). In this case, the respondent was sued along with the Lesotho Highlands Water Project by the applicant seeking to deny her title to land she inherited from her late husband. The applicant was the respondent's brother in-law. The land in issue was expropriated by Government for Polihali Hydro-dam construction and compensation had to be effected to the beneficiary. The brother in-law (applicant) sought to claim the compensation for the land against the wife.

²¹⁶ *Makopano Mokeki v Pakiso Mokeki and Others* (CIV/APN/63/2020). In this case, the applicant was a second wife of her late husband. She was married in community by her husband after the passing of his first wife and into the property her husband had with his deceased first wife. Her husband passed on and left her on the property in question. The property was equally affected by the Polihali Hydro-power Dam Construction and compensations for land expropriation had to be paid. Children of the first wife, raised by the applicant beyond the passing of their father on the same property, were lured by paternal uncles to claim to be the only heirs entitled to the compensation and challenged inheritance rights of the applicant as a surviving spouse/ wife to their deceased father, on the basis of customary laws.

²¹⁷ Interview with Advocate Mamosa Mohlabula Nokana, Programmes Director, Women and Law in Southern Africa Research and Education Trust- Lesotho (WLSA Offices 4th April 2022).

²¹⁸ The Legal Capacity of Married Persons' Act No. 9 of 2006 and the Land Act No.8 of 2010 remain not specifically intentional about the independence of women's land rights under the prior circumstances that women in Lesotho had no rights to land at all.

of land rights between men and women erupted at the call of compensations, many women ended up never receiving their due compensations from the extractive industries as a result of delays brought court processes. For those who were unfortunately not reached with voluntary organisations' interventions, the presumption that they were boycotted by their male counterparts over their land rights cannot be ruled out.²¹⁹ To mention but a few, these are some of the human rights violation exacerbated by poorly regulated extractive industries in the Kingdom of Lesotho.

4.5.2. Statutory land rights system

On the other hand, the land system in Lesotho is also governed by the Constitution and the Land Act.²²⁰ However, the Constitution of Lesotho still recognises discrimination on the basis of customary law. In Section 18,²²¹ the Constitution prohibits discrimination in any form or manner. Be that as it may, section 18 (4) (c) has proven to be contradictory, as it provides that section 18 shall not apply to customary law of Lesotho with respect to any matter in respect of persons subjected to customary law.²²² Unfortunately, inheritance laws are one of the dominant customary law means through which land evolves. This section, therefore, may in effect continue to perpetuate the discrimination of women and female children in access to land rights. Customary land rights of women are adversely affected as a greater portion of the land in Lesotho is customary land, and is therefore traditionally administered by chiefs (custodians of customary law) on behalf of the king.²²³

²¹⁹ (n 207).

²²⁰ (n 180) 14.

²²¹ Section 18 Freedom from Discrimination.

²²² The section expressly provides that discrimination does not apply as far as 'for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law'.

²²³ Even though the practice was minimized by the Land Act of 2010 (see sections 14-15) which assigned the authority to Community Councils, community consultations revealed that absent sufficient resource in council offices, very remote rural areas are still dominated by Chiefs allocating land and land holders will only go to the council at a later stage to register for a Title Deed and the Council does not even conduct a physical verification of such allocation for compliance with the regulations.

Indeed the constitutional lacunae as a result of section 18 (4) (c) was slightly addressed by the advent of the Land Act and the Legal Capacity of Married Persons Act.²²⁴ These Acts have created a new environment that is intended to give women rights to access, own and inherit land. Most of urban women and women empowered enough to challenge cultural norms have been taking advantage of this new environment to negotiate and secure land tenure, and the number of women who hold title deeds to land has since increased.²²⁵ However, the coexistence of statutory and non-statutory institutions governing land allocation and inheritance of land, failure to implement laws, limited awareness of the new laws, inconsistencies in the application of the law, and the sustained dominance of patriarchy and male-biased norms continue to undermine women's land rights regardless of the statutory frameworks.²²⁶

It is therefore evident that statutory framework around extractive industries does not protect citizens from the adverse human rights violations committed by FDIs and neither do they prioritize human rights as a critical factor for FDIs to respect in the execution of their operations. As this research also argues, failure to align investment regulations with human rights principles is a critical political misdirection that results in worsening economic conditions in the Kingdom despite vast investment opportunities. For example, on a social-cultural level, social acceptance and high poverty levels amongst women are two of the indicators of women's dispossession of land rights,²²⁷ also factors largely exploited by FDIs in expropriation of land for extractive industries. Consequently, acceptance of these traditional gender roles also underpins unequal power in relationships and access to wealth.

²²⁴ Act No. 9 of 2006. The Act gives women in marriage equal power as men in disposition of marital affairs such as communal holding of title to land.

²²⁵ Booï Mohapi, 'Lesotho: Overview of Women's Land Rights and the Extractive Industries' [2021] *Women's Land Rights and Extractive Industries in Southern Africa* 129.

²²⁶ *Ibid* 131.

²²⁷ (n 220) 130. See also Lesotho Demographic and Health Survey 2004. Ministry of Health and Social Welfare, Bureau of Statistics and ORC Macro; 2005. pp 40-41.

4.6. Conclusion

As this chapter sought to answer the sub-question “What has been the relationship between extractive industries and women’s human rights in Lesotho?”, it clearly demonstrates that human rights violations to communities affected by extractive industries has been have actuated by active participation of government through enactment of enabling laws. Also, the chapter clarifies that the besides government enacted laws, this relationship has also been worsened by customary laws and traditions that have marginalised women. However, we later realise the government’s efforts to rectify these errors through the promulgation of the Mining and Minerals Policy passed in 2015. But is this a guarantee of the change of the laws?

Chapter Five: Case Study on Women’s Human Rights Violations by Extractive Industries

5.1. Introduction

One of the critical components of this research, are the allegations that human rights violations experienced as a result of extractive industries in the communities of Liqhobong and Polihali, have had far reaching implications on the rights and welfare of women. The basis of the allegations rests on the premise that women, the primary artisanal miners and the daily bearers of everyday family responsibilities, have been subjected to worse forms of human rights violations when extractive industries disturbed their natural order of life in the communities. To establish this premise, a community-based consultation/dialogue of women affected by the industries was conducted in the communities of Liqhobong and Polihali aimed to assess the situation of human rights before the industries came, and the situation after the industries began their operations in those communities.

This chapter therefore narrates real-time data of stories of women from the affected communities to demonstrate how human rights violations of women have been perpetuated and exacerbated in the after-math of the establishment of extractive industries. The data is analysed from a questionnaire that was distributed to women, asking questions in respect of social and economic landscape prior to the establishment of extractive industries within their communities and the post experiences lived that this research argues are human rights violations created and worsened by the establishment of this land extractive industries.

5.2. Research communities

The study was conducted in the land-extractive-industries-affected communities of Polihali and Liqhobong. Liqhobong is located at a distance of about 117km from the capital or camp town of the district of Butha-Buthe.²²⁸ The village and its sub-villages, which include Pulane, fall under the community council of Nqoe. According to the 2016 population census report,²²⁹ it had a population of 5 524

²²⁸ Butha-Buthe is one of the 10 districts of Lesotho in north of the country.

²²⁹ Ministry of Development Planning, Bureau of Statistics [2016] <https://www.bos.gov.ls/Publications.htm> Accessed 11th April 2022.

people of which 1792 were males and 3 732 were females. A large scale commercial mine of Liqhobong Diamond Mine was established in this community in June 2014, affecting the villages of Liqhobong and Pulane. On the other hand, Polihali is the valley where the Lesotho Highlands Water Project (LHWP) is currently constructing an ultra-large capacity hydro-power dam alongside the Orange/Senqu River. Unlike the communities of Liqhobong affected by the large scale commercial diamond mines, the Polihali community awaits absolute demolition in preparation of the LHWP Phase II dam which is going to provide water to the Republic of South Africa. The International Amnesty report of situational analysis on Polihali reveal that the construction could be socially and economically disastrous to almost 8000 people living in the affected areas,²³⁰ of which 86.4% are women and children.²³¹

5.3. Community consultations approaches

The field research was allocated two days in respect of each community during the week of the 4th to 8th April 2022. During the 5th -6th, the activity was undertaken in the communities of Liqhobong, while the 7th and 8th, in the communities of Polihali. Invitations were made to community gate-keepers such as chiefs and Community Councillors to call a community gathering (pitso) of all women in the target communities. The implementation of the questionnaire was undertaken in the form of a dialogue or facilitation to a community gathering of women ranging from all ages per community. In this gathering, women were given a platform to freely air their views on the topics of the discussion.

The questionnaire had an introduction part that was meant to give a highlight of the contemporary issues faced by women in mining communities and what efforts have been advanced by some women in other similarly circumstanced countries in protection of their rights and economic interests. The second part of the facilitation

²³⁰ Amnesty International, 'Lesotho: Polihali Dam construction puts nearly 8,000 people at risk of displacement' (News Publication 6 February 2020). <https://www.amnesty.org/en/latest/news/2020/02/lesotho-polihali-dam-construction-puts-nearly-8000-people-at-risk-of-displacement/> Accessed 11th April 2022. It recorded that as the construction of the Polihali Dam begins with work on the road that leads to the site, people are already being moved out of their homes for resettlement. Others face losing grazing land for their animals, or the loss of wild fruits and medicinal plants from which they earn a living.

²³¹ Ibid (n 3).

tool was questions aimed at assessing the means and status of livelihood of rural women prior to establishment of the commercial mines within their villages; looking into dominant means of livelihood in the communities, economic challenges, social and economic status of women especially widowed women and girl-child headed families, and the then status of acts of gender-based violence.

The third section of the tool was a set of similar questions looking into the status post the establishment of the commercial mine looking into the same areas defined under the first questions. Additionally, this second set of questions was also coupled with Covid-19 questions in order to assess the impact of the pandemic on the socio-economic status of these women under the circumstances.

5.4. Community dialogues

5.4.1. Liqhobong Community

(a) Conditions prior establishment of the Liqhobong commercial mine

i. General Overview

The community gathering was attended by forty-four women, both young and old, from the villages of Pulane and Liqhobong, identified by the area chief as the most affected communities.²³² The community of rural women in Liqhobong narrated that survival before establishment of the mine was more affordable than recently after the commercial mine was established in the community. The primary means of livelihood was artisanal and small-scale mining in diamonds sieved in the river running by the village which has since been overtaken by the Liqhobong commercial mine leaving the community absent means of financial sources. Secondly, the community survived on agricultural farming of crops and vegetables; corn, sorghum, wheat, beans, peace, potatoes etc., on the land or fields which have

²³² Area Chief Qhobela Mopeli.

since been overtaken by the mine. It was narrated that there was a large forest at the place of the mine which supplied the whole community with wood for basic fuel. Elderly women who did not have means to travel and transport wood from distant



Liqhobong Women Community during the Gathering

forests relied on the nearby forest for the daily supply of wood for heating and cooking fuel. Also, there were stacks of long-stock

grass which women used to weave for making brooms for sale and household use. The community also relied on the same grass for roofing of houses. Treading further, the community is buried deep in the mountainous highlands of the Kingdom and access to health services is a critical challenge. It was exemplified that due pregnant women are transported on horse-backs for strenuous distances for access of health services and in a couple of incidences some women have lost lives before getting to the distant health centres. As a result, the community of women relied on traditional medicinal plants which were picked from lands overtaken by the commercial mine to mitigate these circumstances. However, the establishment of the mine has left the community absent of these life-supporting resources.

The Liqhobong community is built on a rocky surface of the sloppy mountains. It is a challenge to dig the ground for development of traditional pit-toilet facilities. As an alternative, the community of women relied on shrubs which grew to the size enough to afford them privacy to use as toilet spaces. Both women and children relied on this space for toilet services. However, the same place was equally affected by the mine and the beneficiaries were left with no hiding for toilet. In response to a question requiring of the alternative when such spaces have been destroyed, the women pointed to an open space over a cliff and narrated that some

women now openly use the space where everyone can see them because there is no other option.

ii. Socio-economic welfare of women

The community steadfastly argued that the lives of women in the community were of an independent and economically stable nature. The reasons advanced were that this is because the sieving of diamonds in the river was an open and unrestricted invitation for everyone in the community; child or adult, and families would all go and amass efforts. Women had ample means to support themselves economically even when the male figures in the family were far away in search for jobs in the Republic of South Africa or in the mountains at the cattle posts. There was harmony and prosperous relations amongst the community of women resulting from sharing of mining spaces, self-made tools, and they would always inform each other of the coming of transient buyers and also refer buyers to each other all the time. Also, the practice of mining in the rivers kept women preoccupied from socially degrading activities in village, such as spending days at local beer brewers and engaging in immoral behaviours that have recently tarnished the image and respect of women in the communities.

They narrated further that economic life for women before the coming of the Liqhobong diamond mine was affordable and the economic means were accessible to all persons equally. They indicated that even widowed women were able to independently support their own families and financially support their children's education. Also, the extractives economic market was shared amongst women since they had then formed groups who helped each other mine and shared the market by recommending the produce of fellow women miners to the buyers to see to it that everyone was able to sell and accumulate money. Generally, the community held that the life then was simple and affordable and had no currently experienced challenges. Lastly, they narrated that as a community they were able to live in the deep rural village because, as women, they could individually and independently afford to take care of themselves. Also, practices of child marriages and child desertions were not observed since even women with no husbands and or orphaned

children were able to self-sustain and support dependents without recourse to dependence on male counter-parts.

iii. Access to and use of land

The community of women narrated that it has never been a practice in the villages for women to hold title deeds, especially to land and/or over animals. Even in marriages, the husband alone assumed title over all immovable properties and cattle. The women asserted that they had never been bothered by this practice because it had never proved any obstacle to their general welfare during that time. However, from around the year 2002 when the then government introduced mining licenses to individuals, women artisanal miners began to suffer because some individuals from the external districts and villages came in with licenses and claimed private control of the mining areas that were harmoniously shared by the community before introduction of such mining licenses. The licenses were allocated in respect of other areas of the land, excluding the river.²³³ As a result, all women miners were forced to mine in the rivers and the shared resources became insufficient.

Also, land allocation in the rural areas to families and individuals was done by the area chief. A new family would just point out a preferable space to build a home and provide enough space for a field to undertake agricultural activities and building kraals for livestock.²³⁴ Therefore, families ended up in possession of large areas of land. However, after families were relocated for the Liqhobong mining operations, families were left with only a space enough to erect just a single hut. The impacts on land use also extended to loss of grazing lands, placing more burdens on communities to source food for support of animals.

iv. Exposure to gender-based violence

It was substantiated that acts of targeted abuse against women were not as rampant as is currently the case. Then, women lived in harmony in households because they were able to contribute to the family economic support. As a result, they believe

²³³ This is the Motete River which cuts across the Kao Mine and the Liqhobong Mine drawing into the Malibatso River.

²³⁴ Common livestock in Lesotho are cattle, sheep, goats, horses, donkeys, mules, pigs, and poultry.

there were less conflicting in families from their male-counterparts because they were not very dependent. However, there were still a countable incidences of patent acts of abuse on cases of property dispossession but since women were able to work for themselves and economically self-sustain by mining and selling diamonds which produced good monies in return, they were less recognisable as victims of abuse since they were able to adequately recover.

(b) Conditions post establishment of the Liqhobong commercial mine

i. General overview

The coming of the Liqhobong mine in June 2014 left the community of rural women and women miners with more harm than good. Artisanal and small-scale mining in diamonds by women was ever since halted. It was narrated that the Liqhobong commercial mine had warned the community that no person from the village should be seen or suspected to have been looking for diamonds in the river anymore and or conducting any form of artisanal and small-scale mining anywhere in the area. The community remarked that the imposed punishment for violation of the warning was that should anyone be seen or suspected, no person in the village will be employed in the mine or if such a suspect is identified, themselves or any of their family members would never benefit from any incentive the mine would extend to the community or be employed. Faced with the challenge that the community's mining sites had been overtaken by the mine and access to the river blocked, the community had remained redundant, conspiring and fighting against each other to guard against anyone compromising their opportunities to benefit from the commercial mine. However, the community nevertheless remain unemployed in the mine and absent its economic benefits.

The women argued that during consultative meetings about establishment of the mine, they were promised and made to understand that there would be job opportunities for even the uneducated like cleaning and cooking in the mine. Conversely, none of them was employed and they were left stranded with no means of survival. They could not continue to sieve for diamonds in the river because the mine had blocked and overtaken the lands from which the community believes the river drew diamonds. Also, absent fields for agricultural activity, absent enough

pastures for animal grazing (which was argued to have caused a great decline of cattle), absent diamonds to sieve and absent all other sources of livelihood previously explored, women remain abandoned and without means of survival. Even the remaining fields are no longer as productive as a consequence of the excessive dust from the commercial mining operations. Worst of all, they indicated, the blasting in the mine continues to destroy houses in the villages and they are never compensated.

The new found primary means of survival has become harvesting of a local type of Rose-Hip berries called “*Morobei*” which naturally grows in the dongas and over the cliffs on the mountains. The thorny-stock rose-leafed plant produces a marble



Harvested drying-up rose-hip plant

size round-shaped fruits which the community picks and dries. The harvest is sold to buyers who are apparently canning the product for retail. It only grows once a year and is ripe before winter when it will dry up and die from the snow and sub-zero temperatures of the Lesotho highlands. It was narrated that a

quantity of 12.5 kg is sold for M70.00 /\$4.91. However, since the plant is non-human produced, it is not enough to supply the large communities who depend on it across the villages. The scarce supply has resultantly brewed territorial wars between villages and the community of one village is no longer allowed to harvest beyond the border-lines of its village.

It was also argued that they had alternatively hoped to survive on establishment of small tuck-shops (“*mek’hu-k’hu*”) to sell to the mine workers but they were left in dismay when they learned that the workers would not leave the campus of the mine for any reason except for leave-days and they are mostly from far-away places, therefore commute on mine shuttles. The mine workers never have a chance to

interact with the community. Besides the harvest of berries, the communities have no alternative means of livelihood.

ii. Post socio-economic status of women

The community narrated that the introduction of the Liqhobong commercial mine did away with many of their natural resources which were utilised both for community consumption and general sustainability of livelihoods. Now that such means have been stopped, families remain without means to pay for their children's education and hope for a better future for the children of Liqhobong has become a dying dream. Furthermore, the community narrated that there were some villagers who had died under the employ of the mine but their families never received even a penny in benefits or compensation. Also, the blasting of the mine and dumped rock-debris has been killing their animals and causing fatal bone fractures to both animals and children, however, their complains have never been addressed.

On the other hand, it was articulated that the construction of the access roads for the mine vehicles has diverted rain waters gushing down the mountains onto the community's remaining fields, thereby causing excessive soil erosions and land-degradation so much that crops now hardly ever survive.

Also, absent forest-trees for supply of wood for fuel, women and children now collect cattle dung across the fields and dongas which is stacked in homes to dry in the sun and is used for fuel. However, this becomes a challenge during rainy seasons and snowy winters. Also, the women of the community of Liqhobong narrated that women in the villages have become more challenged than before against their male-counterparts. Without means for women to fend for themselves, women have taken solace in spending days at local beer brewers and participating in immoral activities tarnishing to their image.²³⁵ As a result, even basic necessities like obtaining hygiene utilities is a challenge. Therefore, women are constantly undergoing mockery and disaffection from spouses in families. Furthermore, adolescent girls had taken to prostitution and sex work in attempt to garner financial support for struggling families. It was further emphasised that the situation is even worse for

²³⁵ The mostly cited dominant practice was the selling of sex to male villagers.

widows and child-headed households. Also, this has resulted in absolute dependence of women on their male-counterparts which consequentially exacerbated vulnerability of women to gender-based violence.

The community narrated that they are currently living in extreme conditions of dereliction. Their fields were overtaken by the mine and not all them have been compensated. Those who were lucky to receive the compensation were paid a once-off M2000.00, the equivalent of \$140.36 at current United States Dollar rate. They have tried to protest against the mine to fight for their rights but the police would come and assault them to the extent that several villagers have died as a result of use of brutal force by the police. In the light of other land resources like water wells, tree plantations and grasslands lost to the mine, the community remain without relief and in substitution for water wells, a few water taps were constructed by the mine. However, it was argued that the taps sometimes go for a several days without water and this has daring consequences on the community.

iii. Status of gender-based violence against women

The women of Liqhibong narrated that there is a new trend of acts of abuse against women and girl children in the community which have been reported but remain unattended. It was explained that as a rural community with most men having no formal education, the mine did not employ a number of them. Absent any preoccupying activities to participate in, most men and young boys left home into the mountains at cattle posts for permanent or long-term settlement. These men have begun the practice of abducting women (married or not) and girls from the village into the mountains to use them for wifely duties and subjecting them to acts of sexual molestation. It was narrated that these acts have interfered with the freedom and liberty of women in the community who, on a daily basis, wonder into the mountains in quest for wood and animal dung for fuel.

On the other hand, even in community acts of violence against women have been escalating. The community held that, women suffer various forms of abuse from husbands within households as a consequence of worsened dependence of women on male counterparts. Some narrated that they would like to leave for urban areas in search for jobs in the textile industries but have been denied the liberty on the

accusation that they will end up into prostitution business to never return home. Others narrated that several women in the village also undergo physical abuse from the hands of their own husbands who accuse them of having sexual affairs with the mine workers.

iv. Impacts of Covid 19

The impacts of Covid-19 had far reaching socio-economic challenges. Covid-19 came at a critical time when most of the affected women by the commercial mine were holding protests for compensations of expropriated lands and recovery of damages for destruction of houses as a result of the mine's blasting operations. However, when Covid-19 compelled the temporary shut-down of the mine and imposed social-distancing regulations, collective efforts of affected women were rendered futile. Even worse, the commercial mine shut them out from access of the mine authorities and they never heard from them ever again. It is now over two years that these women have been leaving in wall-cracked homes which may collapse any time.

One villager reported that her husband was an employee of the mine and he has been the only linkage to take her concerns along those of her neighbours to the mine authorities. At first, the mine contended that it would not be possible to relocate cracked house or re-construct them but would only cement the cracks in as far as the walls are damaged. The women argued that it was not safe still since the walls would always crack from time to time and cementing was only a temporary solution and objected to the mine's proposal. When they lodged the complaints through her husband, he was immediately expelled from employment without cause. Subsequently, her husband has been emotionally, verbally and physically abusive towards her, blaming her for loss of his employment.

5.4.2. Polihali Community

(a) General overview

Due to the geographical location of Polihali where affected villages are several kilometres apart, two dialogues were conducted in two separate villages in order to cover a fair magnitude of the affected societies. The first dialogue was conducted

in the village of Tsekong and the second dialogue was held in the village of Ha Phohla.

i. Means of livelihood

The rural women community of Polihali (Tsekong and Ha Phohla) narrated that women in the community rely on agricultural farming as a primary means of livelihood. There are large farming lands from which women produce quantities of corn, beans and many other crops and vegetables. The women continued that in that community, every household owns at least two large fields upon which it depends for food production. During harvesting seasons, the food produced from the fields is utilised for both direct and indirect consumption. Excess produce is sold to the feeding schemes of local government schools and to the Letšeng Diamond Mine which is located over 45 kilometres north of Polihali. This was identified as the dominant means of acquiring money by women in the community.

Treading further, it was narrated that women in this community have formed community based committees aimed at amassing efforts to protect economic status



Women Community of Ha Phohla Polihali

of women. The committee is a partnership of women in the villages who assist each other with agricultural activities in the fields to achieve good produce. These women assist one another through the committee to undertake

mechanical and physical methods of weeds control in the fields collectively moving from one field to another across all members of the committee. The same process is adopted even for harvesting seasons. Also, the committee operates a monetary savings platform where women collectively save up monies obtained from crop sales. The monies are shared amongst the members at the end of every financial year which is every Christmas season. The committee was encouraged by a need to support widowed women who did not have male partners in their families to carry out those heavy duties.

Women contended that they now stand, not only to lose their fields and primary means of livelihood as a result of the Polihali dam construction, but also the communal spirit of support that reigned amongst women in the community. It was narrated that this is because the relocation plans assumed that they are going to be scattered across other villages in the district and this leaves them worried about how widows and child headed families are going to survive as total strangers in the new communities. They went further and said that, most of them will be resettled in the urban areas where people practise independent means of livelihood and mostly rely on the cash economy for survival. However, as a rural community, they practiced a habit of supporting each other to survive, the quality they fear they will not find elsewhere. In the village of Tsekong, the women added that they rely on cattle as a means of support for both food and undertaking farming activities in the fields. Each family in the village owns several cattle. However, the community narrated that they are currently being forced by the Polihali project authorities to dispose of some of the cattle and remain with maximum of 3 in each family. This is because, as they were informed, the resettlement sites are not going to be as spacious as the community's current residential plots to accommodate building large kraals for cattle and other livestock.

(b) Proposed intervention of the Polihali Project

It was observed that there have been constant conflicts between the community of Polihali and the Lesotho Highlands Water Project (LHWP). The community of Polihali had established a committee, albeit comprised of men, to negotiate between the community and the project. Failing the negotiations, the project has been taking coercive decision against the community without further consultations. Women as a unit of society were never represented in these negotiations. Even worse, women narrated that they remain powerless against the arbitrary actions the project has been effecting against the community in the current situation that their male counterparts were defeated.

The community narrated that initially the LHWP used to consult the community on several issues before any action was undertaken. They were informed of the agreement that compensations will be paid before implementation on any parts of

the land to be affected by the project. Also, the project had proposed to the community that owners of houses that will be affected by blasting before resettlement commences will be the first to be relocated prior to operations. However, the agreements were not effected. The LHWP started implementation and fields of the community were affected but the project has not consulted the community again nor paid compensations.

The community narrated that they have residential plots large enough to encapsulate a field for home-based vegetable farming for family food support and to also build kraals for their animals. Also, they have large fields estimated to be in the sizes of two (2) or more hectars each for large-scale farming in the area to be affected by the dam construction. However, they were informed that by the LHWP that the resettlement will only afford each family a residential plot of 30x30 square meters but the fields will only be compensated in an unspecified amount to be paid annually for the next 50 years. The community narrated that they argued with the project that the fields have been economic means for families in the area since time immemorial and they had too hoped to leave same for the upcoming generations of their children and therefore demand unlimited time compensations. However, the project did not agree and started randomly taking the fields without compensation nor consultation.

A woman from Tsekong narrated that her fields are already expropriated without prior consultation. When she approached the project with her husband, the husband was offered employment in exchange and promised compensation of which price was not mentioned. The husband took the job and three months later after efforts failed to obtain the compensation, they destroyed the project property on their fields and immediately her husband was dismissed from work. Three (3) days later, some men who identified as being sent by the project came to their home and offered them cash in the amount of M2000.00/ USD138.07 which they were informed is the compensation for their affected 1500 acres of field. Faced with poverty and financial needs in the house, they had no option but to take the money. Some have narrated that they have received as little as M145.00/USD10.00 as compensation while others have not received anything but their lands have already been affected.

5.5. Conclusion

The discussion above reveals that in the aftermath of commercial mining and large-scale land extractive industries, the economic and social vulnerability of women in the affected communities has been worsened. This is in relation to, *inter alia*, resettlement and relocation leading to a change in life style, livelihoods and breakage of the social fabric, loss of access to neighbouring villages leading to disruption of family ties, social influx leading to cultural dilution, introduction of diseases, other related things (i.e. HIV/AIDS, prostitution etc.), loss of rivers and other monumental places (caves, *matśa*),²³⁶ leading to distinction of traditional and cultural practices, loss of forests and other natural resources (natural springs), leading to increase in hardships on the part of rural women who have to collect fire for cooking and water for household use, loss of land leading to loss of means for food production and income generation, non-compensation of affected assets leading to poverty of women affected by the project and inability to secure livelihoods for their families, and dependency syndrome

Unfortunately, this has been linked to the increase in new HIV/AIDS infections in women and girls as opposed to their male counterparts.²³⁷ Research shows that human rights violations, including profound gender inequality and gender-based violence that are observed in rural communities affected by extractive industries, constitute major vulnerabilities to HIV infection, as well as major barriers to HIV and other health issues, on the basis that these “undermine women’s and girls’ ability to protect themselves from HIV infection and cope with its consequences.”²³⁸ Also, this is because, when women and girls are socio-

²³⁶ These are sacred aquatic places used by local traditional healers for ritual purposes and they are believed to be where they draw their sources of ritual powers for medicinal purposes.

²³⁷ MOH (2013): The National Tuberculosis and Leprosy Programme (NLP) Lesotho Strategic Plan 2017/18. See also GA Resolution A/RES/65/277 adopted on 8 June 2011, Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS, para. 80 http://www.unaids.org/sites/default/files/sub_landing/files/20110610_UN_A-RES-65-277_en.pdf.

²³⁸ UNAIDS, ‘The Gap Report: Eliminating Discrimination in Health Care. Stepping Stone towards Ending the AIDS Epidemic’ [2016] http://www.unaids.org/sites/default/files/media_asset/eliminating-discrimination-in-health-care_en.pdf. See also Global AIDS Update, 2016, UNAIDS <http://www.hivlawcommission.org/index.php/report>, UNAIDS (Global AIDS Update 2016) <http://www.unaids.org/en/resources/documents/2016/Global-AIDS-update-2016>. The reports strongly articulate that in Lesotho, these gender-specific vulnerabilities for women and girls often comprise of lack of autonomy, unequal access to educational and economic opportunities, early

economically vulnerable, they are subjected to a compulsory compromise of their sexual reproductive health rights (SRHR) as they are rendered unable to negotiate safe sex and family planning against male partners who assume economic power over them. In worst case scenarios, women also fear to reveal their HIV status or seek treatment because they risk rejection, blame, loss of property and custody rights, and/or violence if their HIV status becomes known.²³⁹

On the other hand, this has also been linked to an increase in instances of early or forced marriages especially among adolescent girls and young women which constitutes a serious human rights violation posing risks of HIV infection and significant reproductive health problems.²⁴⁰ During the community consultations, it was revealed that some families have resorted to marrying off their female children early in order to lessen burdens of children to feed in the families and to also obtain cattle in exchange as a strategy to ward-off poverty. Consequently, there is also experienced high rates of girl children dropping out of school as a result of, amongst other factors, teenage pregnancies,²⁴¹ child marriages and female hygiene problems like scarce availability of sanitary towels. Therefore, this chapter clearly answers the research sub-question ‘What are the case studies of women’s human rights violations by extractive industries in the affected communities of Polihali and Liqhobong?’ and clearly demonstrate the consequences that reflect on women as a result.

marriage and patriarchal values that limit their access to health care, and expose them to various forms of violence in both private or public spaces.

²³⁹ Keiso Matashane Marite and Others, ‘Gender, HIV/AIDS and the Law: Embracing Rights based Approach to address Women Sexual and Reproductive Health Rights’ (Women and Law in Southern Africa Research and Education Trust- Lesotho 2008).

²⁴⁰ (n 6) 16.

²⁴¹ Violet Maraisane, ‘Early and unintended pregnancies rife in Lesotho: 13-year-olds among those bearing children’ (UNFPA 2021)

[UNFPA ESARO | Early and unintended pregnancies rife in Lesotho: 13-year-olds among those bearing children](#). UNFPA reports that one health centre in the rurals of Butha-Buthe confirmed that 87% of those who seek antenatal care services at the clinic are teenagers aged between 13 and 19. It also records that Teenage pregnancy remains a challenge in Lesotho. The adolescent birth rate is high, at 94 per 1,000 girls aged 15-19 (2003-2018).

Chapter Six: Conclusions and Recommendations

6.1. Introduction

Extractive industries have presented various challenges to the affected communities across the world and such challenges are similarly affecting a great magnitude of people's fundamental rights in the affected communities in Lesotho. This chapter will conclude the study by summarizing the key research findings in relation to the research aims and questions, and by discussing the value and contribution of this research. It will also review the limitations of the study and propose opportunities for future research.

6.2. Summary of key findings

As narrated in the first chapter, this study aimed to explore the impacts of foreign direct investments in the form of large-scale extractive industries on the protection of basic human rights in the affected communities of Polihali and Liqhobong. Specifically, the research focused on women as the most vulnerable group affected. It also aimed to examine the subtle practices of foreign investments and their modern trends in violation of human rights in Lesotho. All these were premised on the research question 'What are the human rights violations and legal issues perpetrated and exacerbated by large-scale land extractive industries in Lesotho?'.

It is alleged in chapter 2 that the primary category of rights put in jeopardy by extractive industries in the affected communities stem from the category of second and third generations of human rights. Second generation human rights include the right to work, the right to education, the right to health, right to an adequate standard of living (which includes the right to food, right to water, right to housing and right to clothing), and right to participate in cultural activities,²⁴² while, on the other hand, third generation human rights include group and collective rights, such as Right to self-determination, Right to economic and social development, Right to a healthy environment, Right to natural resources, Right to participation in cultural heritage, and Right to intergenerational equity and sustainability.²⁴³

²⁴² Rajeev Kumar, "Classification of Human Rights" [2015] Volume 5, International Journal of Engineering and Management Research Page 756

²⁴³ Jack Donnelly, 'Satisfying Basic Needs in Africa: Human Rights, Markets and State' [1985], *Africa Today* 32, pg 2.

Significantly, the research reveals that small-scale artisanal mining in diamonds practiced by the community of women in the affected communities was taken from them and reserved for FDIs. In the community of Liqhobong, artisanal mining was the primary source of livelihood for the communities. The arbitrary removal of this economic benefit from the community did not only affect the right to livelihood but also touched on a series of other rights such as the right to adequate standard of living and the right to access to natural resources from both the categories of second and third generations of human rights. When the benefits from use of diamonds for support of life were ceased by government without an alternative left for the communities, money streams of the affected communities were closed, thereby forcing them to look for other unavailable means to sustain a living. Consequently, from that point forward, these communities never experienced an adequate standard of living (which includes many factors such as enough food, clothing and housing), all which were supported by an economy garnered from participation in artisanal diamond mining.

Furthermore, destruction of amenities such as natural plants by extractive industries were never restored. These natural plants included herbs that supported the communities with medicinal benefits for the support of life. Non-restorative destruction of medicinal herbs is a violation to the right to health. Generally, the right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realization.²⁴⁴ Due to the inaccessibility to modern health facilities by the affected communities, the natural herbs played a vital role in supplementing health challenges faced by the people within these communities. Destruction of these herbs amounts to denying of the right to medicinal health benefits gained by the people from them, consequently violating their right to good health.

The communities also indicated that their expropriated lands supported them with the production of food all year round from crops directly produced by them other wild vegetation that grew on its own. When this lands were overtaken without

²⁴⁴ World Health Organisation, 'The Right to Life' Office of the United Nations High Commissioner for Human Rights Fact Sheet No. 31, page 5.

provision of an alternative land for the same purpose of food production, food supplies to these communities were inadvertently cut short. This is coupled with a further allegation that dust and other mining operations waste have affected what little remains of the fields and communities are no longer able to produce any more food from the remaining fields. This is a violation of the right to food and a violation of the right to a healthy environment. The right to food, and its variations, is a human right protecting the right of people to feed themselves in dignity, implying that sufficient food is available, that people have the means to access it, and that it adequately meets the individual's dietary needs. The right to food protects the right of all human beings to be free from hunger, food insecurity and malnutrition.²⁴⁵

Furthermore, the research indicated that these communities affected by extractive industries relied on diamonds mining and farming for the general support of life. Money was not used as a source of economic sustainability. This is because diamonds and agricultural produce were primarily used to exchange for other goods and services since diamond buyers; the market that supported the coming of money into the community, occasionally visited the communities to buy diamonds in exchange for money. However, resettlement of villages in communities of Polihali, moving the people to urban areas, forcefully compels them to migrate to cash-based economy that they are foreign to. This is a violation of the people's right to self-determination which entitles them to determine their own destiny and in particular to determine its own form of economic, cultural and social development.²⁴⁶

Lastly, the community consultations indicate that there have not been adequate community consultations between the communities, extractive industries and the government in terms of the impacts of extractive industries on these communities

²⁴⁵ Cameron McKenna and Others, 'The Right to Food' (Advocates for International Development, October 2011) <http://a4id.org/sites/default/files/user/Right%20to%20Food%20Legal%20Guide.pdf>. See also the South African Human Rights Commission 'Right to Food Factsheet' which narrates that the right to food is a human right recognised under national and international law, which protects the right of human beings to access food and feed themselves, either by producing their own food or by buying it. The right to food is linked to one's right to life and dignity. The right to food requires that food be available, accessible and adequate for everyone without discrimination at all times.

²⁴⁶ Mégret F, "The Right to Self-Determination: Earned, Not Inherent" in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016).

and their resources. This also includes inadequate and inconsistent compensations in exchange and forced displacements. These reveal lack of protection afforded to these communities' traditional ways of life, property, access to natural resources on their land, religious and cultural life, and to development. This is because land expropriation efforts fail to respect and protect the communities' ancestral land rights and fails to provide sufficient compensation or alternative grazing land following their eviction, or to grant restitution of their lands, and similarly fails to include the community within the relevant development processes. This is a violation of the fundamental human right to development. This right denotes that every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.²⁴⁷

The research has therefore revealed that there are indeed human rights violations perpetrated and exacerbated by large-scale land extractive industries in Lesotho, that raise a series of legal issues. The situation is none the least helped or alleviated by government enacting laws that clearly disregard promotion and protection of human rights within the sector of extractive industries, on the one hand, and, on the other hand, by government's failure to take initiative to address these problems and hold those responsible to account. This may be construed to prove an intentional undertaking on government's part to lower standards for protection of human rights as an incentive for attraction of FDIs. This is because community consultations revealed that several complaints have been lodged against these practices by the communities to various authorities but to no avail whatsoever to date. Lastly, the study has also revealed that the consequences of these practices have been far-reaching in their impacts on women more than their male partners. This is because, unlike men who normally migrate to cities for jobs, women permanently reside within the community living their daily lives exposed to these impacts. Also, as an already vulnerable category of society faced with burdens of the responsibility of

²⁴⁷ Ravi Kiran Jain, 'Right to Development an Inalienable Human Right' (People's Union for Civil Liberties 2016) <https://www.pucl.org/writings/right-development-inalienable-human-right>. Accessed 29th April 2022.

daily family support, women tend to proportionately suffer the most as a result of these consequences.

6.3. Recommendations for future research, law and policy reform, and human rights response programming

6.3.1. Future research

In the year 2015, the government of Lesotho realised the error of the country's mining regulatory framework against international standards; e.g. the African Mining Vision,²⁴⁸ and produced the Mines and Minerals Policy to pave way for enactment of new regulatory framework in mining. The policy identifies that some of the lacunas in the current legal framework is the Government of Lesotho's lack of clarity on the position of artisanal and small-scale mining sub-sector.²⁴⁹ To address such challenges as this, the policy envisions future regulatory framework that will mitigate the adverse social and environmental impacts of mineral development and ensure equitable access, transparency and public participation in the sustainable development of the mining sector.²⁵⁰

However, unless otherwise necessarily implied in some of its provisions, the policy proves short of clear strategies eradicating obstacles hindering inclusivity of gender equality and equity against comprehensive participation of women and other vulnerable populations such as people with disabilities. In the likelihood of regulating the ASM through reinstating of mining licenses charged at a fee, women and other vulnerable populations within mineral rich areas would still suffer potential exclusion from economic participation in the extractive industries because previous exclusions, inequalities and traditional discriminations continue to render them without capacity to meet such potential requirements. This means that their rights to economic participation and to benefit from natural resources within their communities will not have been fully realised.

²⁴⁸ Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development" [2009].

²⁴⁹ Lesotho Minerals and Mining Policy 2015 Article 1.2 The Challenges and obstacles that are hindering the realisation of the country's socio-economic growth from its mineral resources, pg 4.

²⁵⁰ Ibid Article 1.5.

Therefore, there is still a need to research further on the impacts of economic laws imposing financial prerequisites as a gateway into economic participation on the fundamental human rights of vulnerable groups in poor countries such as the Kingdom of Lesotho. This research will assist further in establishing the underplayed relationship between a country's economic stability and protection of human rights. It will establish how legislation imposing fiscal burdens of the citizens to obtain rights to economic participation amounts to a state selling to people their own inherent rights and how that is a violation of the same rights. Lastly, it will further inform future enactment of laws to prioritise protection of human rights on an equal footing with a state's economic gains.

6.3.2. Law and policy reform

Lack of requisite affirmative action on the part of government is seen through the absence of enabling laws that fail to put deterrence measures against a violation of human rights by extractive industries. Laws should be clearly specific to hold to account extractive industries who fail to address social problems that are a consequence of their operations on affected communities. Such provisions should take a form of fines that will be used by government to contribute to revenue that will be used to address such problems and or holding such companies under judicial management for a period long enough to generate revenue to mitigate a company's operational impacts on adjacent communities.

On the other hand, government should also create separate Corporate Social Responsibility subvention to which at least 25% of the revenue collected from extractive industries by it will be put in place to undertake Corporate Social Responsibility activities in the affected communities to ensure respect for promotion and protection of human rights. Also since government is a direct beneficiary of FDI's profit making, it should be compelled to make a contribution itself to the Corporate Social Responsibility subvention fund in order to maximise the pool to meet the community needs.

Lastly, laws governing the extractive industries sector should incorporate provisions aimed at securing international human rights standards in the activities of FDI's and these laws should be seen to be enforceable before courts of law. This

will allow FDIIs to invest in the country fully informed of their responsibilities to the communities put in peril of suffering damage as a result of their operations. Also, such laws should make it a specific requirement that CSR-support funds should be held in a separate account from the FDIIs financial accounts and held jointly by the representative committee of the community and the investors while government may only oversee same. This approach would ensure the community's involvement in mitigating violations of human rights suffered by them as a result of the FDIIs and ensure inclusivity of all parties concerned.

6.3.3. Human rights response programming

There is a critical need for human rights response interventions to strengthen and capacitate communities standing to suffer as a consequence of extractive industries. Human Rights awareness campaigns, seminars and workshops should be intensified in these communities in order to place them in a position to understand their rights that are put at risk by extractive industries so that during any stage of consultations, communities are able to effectively participate and speak for themselves fully aware of what it is they agreeing to or not. Also, this will strengthen the communities' effective inclusion in the development of programmes that are intended to address their problems. This includes human rights information distribution in a manner and form accessible and clear to these communities.

Also, civil society organisations which source funding to mitigate these challenges should not solely rely on theoretical researches to undertake problem analysis and to programme interventions. Instead, proposals development should be undertaken within communities and be seen to be speaking to problems that are currently existent. This is because written research has a disadvantage of not including continuous development of communities. daily dynamics and a research undertaken today may not necessarily be able to address an evolving nature of societal challenges on the next day.

Furthermore, government should allocate funding for support of civil society organisations to human rights programming interventions at grass-roots level. This is because international/donor funding that most of these organisations implement are limited in that they are pre-programmed by donors and intended to meet the pre-

set targets and goals of the donor which may not necessarily address our comprehensive human rights problems. However, funding coming from the government of Lesotho may have an advantage of speaking directly to the magnitude of the human rights problems faced by the country, over foreign donor support.

6.4. The research's contribution

Under the presumption that the natural resource sector of the Mountain Kingdom²⁵¹ in water and minerals such as diamonds is currently in its infancy stage, with less than five constantly operating commercial diamond mines,²⁵² and global needs for clean water supply that Lesotho will eventually need to further cater for,²⁵³ there is an impending need for balancing of extractive interests and protection of human rights. Therefore, this research contributes as an introspection document in both theory and practice for the Kingdom of Lesotho to measure her efforts in protection of human rights against violations committed by the state and by its proxies. Also, the research serves as a country's preparedness assessment document measuring her response capacity to crimes committed by multinational corporations in its jurisdiction.

The research also reveals gender gaps between men and women under efforts to promote and protect human rights especially in indigenous and rural communities; a component hardly explored by previous researches on the same theme. It demonstrates that in as much as promotion and protection of human rights is premised on equality of all persons, there are special incidences where human rights violations may impact various groups of society differently, thereby calling for a need for specifically targeted and population-based response interventions. Also, Lesotho is party to various international human rights instruments which impose

²⁵¹ The Kingdom of Lesotho is also colloquially endeared as the Mountain Kingdom.

²⁵² The Ministry of Mining Database for Mining Prospecting Vacant Sites 2021 publishes a set of 15 more potential sites open for commercial diamond mining and attraction of FDIs. This means a potential of more than 15 more communities to be affected in the likely similar manner as the communities discussed in this research.

²⁵³ Sechaba Mokhehi, 'Lesotho: Southern Africa's 'water engine'' (Good Governance Africa 2019) [Lesotho: Southern Africa's 'water engine' - Good Governance Africa \(gga.org\)](https://www.gga.org/lesotho-southern-africa-water-engine) accessed 30th April 2022. The report publishes that the LHWP had a plan for 10 more dams to build in Lesotho 6 of which will supply water to the Republic of South Africa alone.

upon its obligations to protect human rights of its citizenry to a standard pledged by it as prescribed in the text of such instruments. As a result, this research also measures how much of her international human rights obligations Lesotho has been able to meet.

Lastly, the research calls for international need to properly and in a legally enforceable manner, to promote corporate social responsibility international laws and policies to ensure that multinational corporations where ever they operate, they adhere to a similar standard of promotion and protection of human rights despite the inadequacy of national laws of countries in which they operate. Therefore, the United Nations bodies and other relevant international and regional institutions are invited in this research to see the consequences of inadequate regulatory framework of multinational corporations on the protection and promotion of human rights in countries such as the Kingdom of Lesotho.

6.5. Research limitations and weaknesses

Extractive industries in Lesotho are not limited to commercial diamond mining and water extraction only; there is a rapidly growing extraction in sand stone, quarry and dolerite stone.²⁵⁴ Similarly, this sector is dominated by FDI's who extract these stones for national and international supply. The possibility is that they equally present various other human rights violations to their adjacent communities of which cannot be touched upon in this research. There is therefore a need for further research in such areas in order to build a comprehensive research base inclusive of all sectors in the ambit of extractive industries in Lesotho.

6.6. Conclusion

This chapter included an analysis of research findings and recommendation intended to answer to the research question and objectives. It also marks a general conclusion to this research having tackled various components necessary to promote and protect violations of human rights to affected communities by extractive industries. It is therefore concluded that there are indeed human rights violations perpetrated and exacerbated by extractive industries and these violations

²⁵⁴ These companies are found in the district of Maseru in the community of Nazareth Masapong Hantsi and in Morija.

have presented far reaching consequences on women than their male partners in societies.

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