



NATIONAL UNIVERSITY OF LESOTHO

Economic Cost of Gender Based Violence against Women and Girls in Lesotho: A Critical Analysis of Lesotho's Dual Legal System

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DECLARATION

I, Puseletso McPherson, do hereby declare that this dissertation is a presentation of my original work. Where the contributions of others have been involved, every effort has been made to indicate and acknowledge the same, with due reference to the literature, and acknowledgement of collaborative research and discussions. It is in regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the degree of Master in Human Rights Laws at the National University of Lesotho.

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This mini-dissertation has been approved by the NUL Supervisor for submission.



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Supervisor

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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPWA	The Children's Protection and Welfare Act 2011
CRC	Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
DFID	Department for International Development
DPSP	Directive Principles of State Policy
GBV	Gender Based Violence
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
ILO	International Labour Organisation
PRWA	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa SDGs
(SADC)	Southern African Development Community
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
VAWG	Violence against Women and Girls
WHO	World Health Organisation

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CHAPTER ONE

1. Introduction

1.1 Statement of the Research Problem

An ideal world remains a world in which the fundamental values of all people are recognised, where there is no discrimination on the basis of masculinity or femininity of a human person.¹ A global obligation for all states is the protection, fulfilment and respect of all the rights of human beings and this can be achieved through the enactment of proper protective laws.² In 2017, ‘the United Nations estimated the global cost of violence against women (VAW) at US\$1.5 trillion’.³ As such, Violence against women and girls (VAWG) adversely affects their right to non-discrimination, equality and equal protection by the law. It has been reflected as one of the most pervasive human rights violations.⁴

A study by the Commonwealth Secretariat in 2020, projected that ‘violence against women specifically, costs Lesotho M1926.0 million (5.548% of Gross Domestic Product GDP).⁵ This was computed using the estimated direct cost of M1250.4 million which amounted to 3.602% of GDP in the year 2020 and the economy-wide indirect cost of M675.6 million which costed 1.946% of GDP annually’.⁶ This is a resultant effect from the direct cost of violence perpetuated towards women and girls and these includes incurred medical treatment costs due to various forms and degrees of physical violence, mental and emotional abuses. It also includes medical costs for psycho-social support which is another area that imputes costs to the state and individual concerned. The extent of the costs also depends on whether the health care facility is publicly or privately funded.⁷ The cost of seeking justice includes policing, transport costs associated to attending to remands and pre-trial obligations, court trial proceedings, as well as penal and related costs, such as paying damages for costs to victims, managing community service related punishments to see to it that the hours of punishment are taken to finality, together with sourcing funding to maintain

¹ Filho, W.L. et al, *Gender Equality: Encyclopedia of the UN* (Springer: Cham, 2021).

² Josef, L.K. ‘The nature of Customary International Law’ (American Journal of International Law, 1953, 47(4), 662, 669).

³ 11th Women’s Affairs Ministers’ Meeting, Samoa, September 2016. Commonwealth Priorities for Gender Equality and Women’s Empowerment 2017-2020 and Beyond.

⁴ The Commonwealth ‘The Economic Cost of Violence Against Women and Girls: A Study of Lesotho’. (Commonwealth Secretariat, 2020). See also Commonwealth Priorities for Gender Equality 2017 – 2020 and Beyond.

⁵ Commonwealth Secretariat, n 4.

⁶ Commonwealth Secretariat, n 4.

⁷ Constitution of the World Health Organization as adopted by the International Health Conference, (New York, 19–22 June 1946); signed on 22 July 1946 by the representatives of 61 states (Official Records of the World Health).

an estimated 3000 Basotho who are incarcerated.⁸ It was estimated that in 2015, the total state expenditure on prisons was M1.2 million per annum.⁹ Most of these costs are borne by the government.¹⁰ Looking at civil cases – this is the most expensive as there is no law regulating how lawyers charge fees in civil cases. The Law Society Act¹¹ leaves charges to the discretionary powers of each private legal practitioner depending on the subjective merits of the case. An example is the case of divorce, which in most cases, is the resultant effect of GBV,¹² regardless of it being contested costs around M30 000 to M50 000 and uncontested costs which stands at not less than M15000.¹³

Then there are ‘indirect costs’¹⁴ which consist of the loss of income of people found guilty of Gender Based related crimes and sentenced to imprisonment, as well as cost for social services, which stems from assisting the victims of GBV with psycho-social support and counselling to mitigate their ordeals as well as the correction of the perpetrators of violence.¹⁵ Other costs are education costs; children are affected by violence in various ways. Children who witness violence experience behavioural problems,¹⁶ and learning difficulties could be one of the resultant effects. As such, school programmes must be adjusted to cater for their needs, including programs aimed at reducing violence against children and how to handle violent situations at home.¹⁷

Another form of cost is the business and employment cost. A violent home affects a woman’s performance at work and as a result it lowers her prospective earnings.¹⁸ The consequences are lost tax revenue from the reduced output and income and consequently, lower gross domestic product (GDP) for the country’.¹⁹ These expenses

⁸ Lesotho Government Report to the UN Human Rights Council 2019.

⁹ Trends in Prison Population and Spending: Lesotho country Reporting UN human Right Council (2015).

¹⁰ <https://www.worldbank.org/en/news/opinion/2013/03/07/putting-a-price-on-violence-against-women-and-girls>. Accessed on 4 January 2021.

¹¹ 1983.

¹² Hollie, N. Dillion, *Family Violence and Divorce: Effects on Marriage and Expectations* (East Tennessee State University Press, 2005).

¹³ Law Society Act 1983: Bill of Costs and Taxation for Legal Practitioners Item 9.

¹⁴ Commonwealth Secretariat, n 4.

¹⁵ Commonwealth Secretariat, n 4.

¹⁶ Fangm X.M., Brown, D.S; Florence, C.S.; Mercy, J. A. The Economic Burden of Child Maltreatment in the United States and Implications for Prevention. (Published on Child Abuse Neglect 2012, Feb; 36(2):156,165. Cited in Commonwealth Priorities for Gender Equality) 2017-2020 and Beyond.

¹⁷ Judicial Bench Book on Violence against women in the commonwealth East Africa, (Commonwealth Secretariat Publishers. Marlborough House, Pallmall, London, 2017).

¹⁸ Gracial-Moreno, G. and Zimmerman, C, *Addressing Violence against Women, A call for Action*, (The Lancet 385, 2015) 1685, 1695.

¹⁹ University of Limerick and NUI Galway, *Economic and Social Costs of Violence against Women in South Sudan: Summary Report*. (Galway: NUI Galway (2019) 9. At government level, the economic impact also results in loss of GDP.

negatively affect household intake, diverting its usage contrary to the good and services it was intended for in the absence of violence.²⁰ This is attributed to Lesotho's legal system which is dual in nature and its conflicting laws and inadequate provisions for the protection of women and girls.

This research on the economic cost of GBV seeks to critically analyse Lesotho's legal system that is dualist in nature, to determine how customary law, which is governed by the Laws of Lerotoli and its inadequate provisions when it comes to protecting the right to equality between males and females and between a girl and a boy child on the one hand, and the inadequate protection in statutory law that originate from the Roman Dutch Law, which is codified in domestic statutes, contribute to gender based violence. The study also aims to investigate how the failure to harmonise these laws and to domesticate the international treaties that Lesotho has ratified, contributes (by omission) to violence founded on the grounds of gender and the negative effects of them on Lesotho's economic growth, development and social stability.²¹

1.2 Research Questions

1. What are the harmful norms and gaps in customary and statutory laws regarding the protection of women and girls against GBV?
2. What is the economic cost of GBV, resulting from ineffectiveness of Lesotho's dual legal system in guaranteeing adequate protection to women and girls?
3. How can the conflicting laws and norms that make up the dual legal system in Lesotho, be harmonised to ensure sufficient protection of women and girls against GBV?
4. What are the regional and international instruments that Lesotho has ratified aimed at combating GBV?
5. How would the economy of Lesotho be affected if GBV is combated?

1.3 Hypothesis

It is hypothesised that GBV in all its forms, has a negative impact on Lesotho's GDP.²² This is attributed to Lesotho's dual legal system with conflicting laws and inadequate provisions for the protection of women and girls.

²⁰ Commonwealth Judicial Bench Book, n 15

²¹ Levy Economics Institute 'The Micro Economic Loss Due to Violence Against women and Girls: The Case of Ghana' Working Paper No 9 (2019) 939.

²² Gracia-Moreno and Zimmerman, n 18.

1.4 Aim and Objective of the Study

This research is envisioned to achieve the following aims and objectives:

1. To investigate the gaps in customary and statutory laws regarding the protection of women and girls against GBV.
2. To determine the economic costs of GBV resulting from the ineffectiveness of Lesotho's dual legal system in guaranteeing adequate protection to women and girls.
3. To illustrate how a harmonised legal system could aid in combating GBV in Lesotho.
4. To explore how the economy of Lesotho would be affected if GBV is not combated.
5. To show the regional and international instruments that Lesotho has ratified aimed at combating GBV.
6. To show how the economy of Lesotho would be affected if GBV is combated.

1.5. Background to the Study

The phenomenon of the prevalence of GBV is a global human rights concern.²³ It is 'rooted among other things, in gender discrimination, the misuse of power and detrimental norms'.²⁴ It comprises of human rights violations such as harmful practices and this occurs globally surpassing socio-economic status, country of origin, religious denomination and language. These intensely affect both women and girls.²⁵ Several reports together with numerous cases - nationally, regionally and internationally – reveal escalating levels of violence against women and girls all over the world.²⁶ Any harm perpetuated against another person due to their sexual orientation falls under the umbrella term GBV. It impacts on their capability to appreciate their human rights.²⁷ It affects the global shared values of 'dignity, fairness, equality, respect and independence'.²⁸ It is a defilement of the rights of human and it manifests in several ways, including physical violence that has resulted in multitudes of femicide cases, choking and beating; emotional or verbal violence, psycho-social violence, physical and sexual harassment, domestic and intimate

²³ https://www.who.int/health-topics/violence-against-women#tab=tab_1 'Violence against women' WHO. Accessed on December 1, 2020.

²⁴ Akinola, O. and Liaga, E.A. *Contemporary Issues on Governance, Conflict and Security in Africa* (Palgrave Macmillan Cham publishers, 2023).

²⁵ World Bank Group. *Working Together to Prevent Sexual Exploitation and Abuse: Recommendations for World Bank Investment Projects*. Washington, DC: World Bank Group, 2017. <http://documents.worldbank.org/curated/en/482251502095751999>.

²⁶ UN Women. 'The Convention on the Elimination of All Forms of Discrimination against Women'. <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

²⁷ Nancy Felipe Russo and Angela Pirlott, *Gender Based Violence: Concepts, Methods and Findings* Annals of the New York Academy of Sciences 1087(1) (2006), 178.

²⁸ The Universal Declaration of Human Rights 1948.

relationship violence which includes marital rape, as well as the all-encompassing economic violence.²⁹

Lesotho is a patriarchal society where lineage is drawn from the male side of the family.³⁰ Lesotho is in addition, a monarchical state where the Head of State is the King and the highest law that all other laws derive their authenticity from is the Constitution.³¹ Next in the line of hierarchy is The Prime Minister endowed with executive powers. He follows the King. He is democratically elected by the people and he heads the government.³² The government has three arms being, the Parliament which is the arm of the government ceased with enacting laws and it comprises of two houses: the democratically elected lower house -National Assembly being the House of representatives and the Senate, comprising of 'privileged' Principal Chiefs and a small number of nominated members.³³ This composition of the parliament of Lesotho is where the dualistic nature of Lesotho's legal system, consisting of the customary law system and the statutory (received) law system is maintained.³⁴ Secondly is the Executive branch of the government. Its function is to enforce the laws made by parliament. The third leg of the government of Lesotho is the judiciary. It administers the laws through the courts and administers the customary law, which is coded in the Laws of Lerotholi.³⁵ It administers the statutory laws through the subordinate courts. It has the High Court and at the apex is the Court of Appeal both with unlimited jurisdiction.

The Basotho nation was founded by King Moshoeshoe I. Between 1786 and 1870 the Basotho encouraged and practised cultural relativism. They lived culturally and in 1903, codified their cultural laws under the Laws of Lerotholi. Life then was simple and arable land was massive. Basotho men used to work in the mines in South Africa and were providers to their families while the women were left behind to manage the fields, graze the land and cater for the children's needs. The economy was booming, and less social problems existed.³⁶ Patriarchy was an accepted norm.³⁷ As time went by, Lesotho became a state party to international human rights instruments that guarantee protection of all human rights of every individual. Through those

²⁹ The Commonwealth (2018) Economic Cost of Violence against Women and Girls: An Application of Seychelles. Commonwealth Secretariat, London.

³⁰ Letuka, P.; Mamashela. M.; Matasane. K.M.; Morolong. B. and Motebang, S. *Family Belonging for Women in Lesotho*. (Moriya: Morija Print Works 1998).

³¹ Constitution of Lesotho Sect 2.

³² Letuka, P. Matasane-Marite, K, Gender and Election in Lesotho: Perspective on the 2002 elections. (Electoral Institute of Southern Africa Publishers, 2004).

³³ Khabele Matlosa, 'Elections in Lesotho and the Nature of the BCP Victory', African Journal of Political Science Vol 2, No 1, (1993) 140, 143.

³⁴ Buhle Angelo Dube *The Law and Legal Research in Lesotho* (Houser Global Law School Program, 2010).

³⁵ Laws of Lerotholi 1903.

³⁶ Nkhala Isdorinah Mokhethi *Analysis of Trade Structure and Pattern of Wool and Mohair Export of Lesotho* (2015).

³⁷ Letuka et al, n 30.

international human rights instruments, including the Universal Declaration of human rights,³⁸ Lesotho committed itself to the obligations to respect, protect and fulfil the human rights of all Basotho.³⁹

Lesotho subscribes to the dualistic school of thought and thus, views international law and domestic law as two separate legal systems. Except for customary international law that is a global consensus of all states of which no derogation is condoned, for international law to be applicable at a domestic level,⁴⁰ domestication of such an instrument by an act of parliament is a necessary precondition.⁴¹ There is also customary law and the statutory laws operating side by side on equal footing in Lesotho.⁴² With these legal regimes, Basotho would choose which system to use in seeking legal redress. According to section 3(b) of the Administration of Estates Proclamation, a mode of life test was introduced in order to determine which law should govern each case. In terms of this test, Basotho would choose to use the statutory law provided they have ‘abandoned’ the Basotho mode of life and adopted the European way of life.⁴³ The courts have applied this mode of life test in inter alia, the case of *Mokorosi v Mokorosi*⁴⁴ wherein the mode of life test was illustrated; that a test entailed finding out whether a person wears European clothing, ate, slept on a bed and lived with family in the European way, attended church, none of his children circumcised, and puts money in the bank, among others. This caused, and has to date, caused confusion among the Basotho when they seek legal redress in the courts of Lesotho because of its inherent inconclusive nature and was held to be a difficult hurdle to surmount.⁴⁵ This is one of the colonial paradigms that have held back progress in Lesotho, defeating the purpose for which independence from British rule was achieved in 1966.⁴⁶

On the other hand, Lesotho enjoys constitutional supremacy. Section 2 of the Constitution of Lesotho maintains that the Constitution is the supreme law of Lesotho and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.⁴⁷ The Constitution further stipulates in section

³⁸ Universal Declaration of Human Rights 1948.

³⁹ UDHR, n 38.

⁴⁰ Pholo, M. *Lesotho Justice Sector and the Rule of Law: (A Review by AfriMap and the Open Society Foundations, 2013).*

⁴¹ Flora Alohan Onomrerhinor, A. ‘Re-Examination of the Requirement of Domestication of Treaties in Nigeria’ *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 7 (2016) 17, 25.

⁴² Poulter. S. *Legal Dualism in Lesotho* (Oxford University, 1976) 33.

⁴³ Administration of Estate Proclamation No 29 of 1935.

⁴⁴ *Mokorosi v Mokorosi* 1967-70 LLR.

⁴⁵ Poulter, n 42.

⁴⁶ Wanki, J.N. and Ngang, C.C. ‘Unsettling Colonial Paradigms: Right to Development Governance as Framework Model for African Constitutionalism’ *African Studies Quarterly Journal* Vol 18, No 2 (2019).

⁴⁷ The Constitution of Lesotho 1993.

18(1) no law shall make any provision that is discriminatory either of itself or in its effect. Section 18(4)(c) maintains that section 18(1) shall not apply to any law to the extent that, that law makes provision 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.⁴⁸

Between 1990 and 1994 most Basotho men were retrenched from the South African mines, which meant no more income for the homestead.⁴⁹ Due to the stress of no longer working, and the cultural burden on men as providers for the family, most of the men started abusing alcohol and other drugs and thus, domestic violence escalated.⁵⁰ Most women and girls were on the receiving end and accordingly, suffered most.⁵¹ The nominal household income was then, mainly utilised for travel cost to health centres due to physical violence and emotional abuse which consequently, took a toll on the physical health and psych of the abused women.⁵² Some of the domestic violence cases went unreported as women and children most often, suffered in silence due to cultural inhibitions. In Lesotho women and girls were groomed to suffer in silence. This is referred to in Sesotho as ‘mosali o ngalla mots’eo’, fairly translated in English to mean, a woman should not report any act of violence in her house but should rather stop crying and sulking, go into the kitchen and cook for her husband.⁵³ Also, in Lesotho there is a standing practice that children are supposed to maintain their parents and elders. This subjects children to undue pressure as they feel compelled to seek employment or other means of making money and thus, put their lives in potentially dangerous situations to satisfy this expectation. This kind of thinking has forced many young girls and women to move into the district town areas to search for employment. When faced with the difficulties of life in the towns, many are forced by circumstances to turn to prostitution, thus risking their lives with possibilities of being abused, killed and even trafficked.⁵⁴

Basotho became aware of their human rights and the fact that the customary Laws of Lerotoli were not protective of women and girls as they remained perpetual minors under that law. Even with the received law, though a bit protective of the rights of women and girls, there was a realisation that there are other laws that do not guarantee protection to women and girls and as such making them prone to GBV, which in turn triggers economic consequences that affect the country as a whole.⁵⁵

⁴⁸ United Nations CEDAW/C/LSO/Q/1-4/ADD.1. Note 32 Chapter IV.8, Multilateral Treaties Deposited with the Secretary General (2011).

⁴⁹ Letuka et al, n 30.

⁵⁰ Hahlo, H.R. *The South African Law of Husband and Wife* (Juta & Co, Cape Town 1975).

⁵¹ Hahlo, n 50.

⁵² Letuka et al, n 30.

⁵³ Letuka et al, n 30.

⁵⁴ UNAIDS, INICEF, USAID, *Children on the Brink* (2006 A joint report of new orphan estimates and framework of action. www.Unicef.org/publications/index_22212.html accessed 13 March 2023).

⁵⁵ CARE International, ‘Counting the Cost: The Price Society Pays for Violence against Women’ (CARE International 2018) 13.

For one Maloti lost, represents more than just one Maloti but in actual fact, it is a loss of tax revenue accrued to that one loti and all the benefits attached to it are a loss to the house hold and the society at large.⁵⁶

1.6. Significance of the Research

By exploring the economic cost of GBV and the ineffectiveness of Lesotho's dual legal system in guaranteeing sufficient protection to women and girls, this study is intended to make a significant contribution to the prevailing discourses and the existing body of knowledge about GBV. Lesotho is considered one of the countries in the sub-Saharan Africa doing not so well economically- with about half of the population barely having ends meet to their daily lives.⁵⁷ In general, millions of Maloti and of resources are spent annually in attending to health care cases of women and girls being violated physically, emotionally and psychologically. This money and resources could have been directed towards other development projects and thus, help to develop a non-violent economy.⁵⁸

One of the driving forces behind this economic loss is the dualistic nature of Lesotho's legal system, which continues to side-line women and girls thus, undermining their potential. On the one hand, customary law sees them as perpetual minors with no say in decision making, rendering them prone to all kinds of abuses. On the other hand, domestic laws also have conflicting averments that potentially expose women and girls to GBV. In addition to the lack of domestication of international instruments Lesotho has ratified means that women and girls cannot assert the protection guaranteed to them in those instruments if not domesticated. The way this chain affects the country's economy is worth looking into because the country is losing lots of money because of GBV.⁵⁹

1.7. Literature Review

According to the World Population Report, more than one in every three women experienced GBV during their life time.⁶⁰ In the past five years, approximately one in

⁵⁶ <https://www.unwomen.org/en/digital-library/multimedia/2020/4/infographic-covid19-violence-against-women-and-girls>. Infographic: The Shadow Pandemic, (Violence against Women and Girls and COVID-19, 2020). Accessed on December 18, 2020.

⁵⁷ World Bank, 'World Development Report 2021: For Better Lives' (E-library, World Bank.Org. 2021) accessed at <https://doi.org/10.1596/978-4648-1600-0>.

⁵⁸ Commonwealth Secretariat, n 4.

⁵⁹ Commonwealth Secretariat, n 4.

⁶⁰ Violence against Women: The Different Types, the Laws, and how it Can Be Ended. (Themepoweredme.com). Accessed on 4 January 2021.

five women aged between 20 and 24 years were married before the ages of 18',⁶¹ and mostly not by choice but because of the economic status at home that exposed them to child marriage.⁶² The World Population Review maintains that 86% of Basotho women have experienced GBV in their lives.⁶³ Over 40% of women in Lesotho have been subjected to violence from their intimate companions.⁶⁴

It is reported every year in the United States of America (USA), about 4.8 million women and children have been subjected to household family related physical assaults and rape.⁶⁵ In 2008 Michigan State University referenced a study in their research brief, in which 103 survivors were interviewed about the various forms of abuse they experienced in their intimate partner relationships and 99% of the survivors admitted to have experienced economic abuse at least once in their relationship.⁶⁶ In Asia as well, domestic violence is prevalent with the results from a survey showing that 56% of Indian men condoned physical violence over their wives due to bad cooking, disrespecting in-laws, giving birth to more girls than boys, among other reasons.⁶⁷ In Nigeria, it is reported that 86% from a sample of 3000 married women experienced physical violence from their partners.⁶⁸ It is noted that 'A third and in most cases two-thirds of women are believed to have been subjected to physical, sexual and psychological violence carried out primarily by their husbands, partners and fathers'.⁶⁹ In Nigeria, there is a practice of young girls being forced into being married at a very young age⁷⁰ and are not be welcomed back in their own homes or even be chastised or subjected to any form of violence if they try to escape from their husbands.⁷¹ An overwhelming 97.2% do not even attempt to alert the Nigerian police when subjected to violence instead; they endure and sometimes

⁶¹ Verma, S. and Petersen, A.C, Developmental Science and Sustainable Development Goals for Children Youth. (Springer Link, 2018).

⁶² World Health Organization, 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence', (Geneva, World Health Organization 2013). Available at: <http://apps.who.int/iris/bitstream/10665/85239/1/978924156>.

⁶³ Ministry of Social Development 'Violence Against Children' (Survey of 2019 – High Level Priority Indicators, 2019 Maseru, Lesotho).

⁶⁴ World Health Organisation n 73.

⁶⁵ Rhys, O.; Barnaby, A.; Stephen, R. and Miriam, W. 'The economic and social cost of domestic violence' (Research Report 2019) 107.

⁶⁶ Institute of Social Development and Justice Oppermans Inc (83 Miller Street, Gordons Bay) Western Cape.

⁶⁷ Aihie, O.N. Prevalence of Domestic Violence in Nigeria: Implications for Counselling (Batu and Pratihthan, 2007).

⁶⁸ Oladepo, O.; Yusuf O.B. and Arulogun. O.S. 'Factors Influencing Gender based Violence in Selected States in Nigeria' African Journal of Reproductive health 15(4), (2011), 78, 86.

⁶⁹ Nigeria Afrol News (I-RIN, 2007).

⁷⁰ Nigeria Amnesty International Report 2007.

⁷¹ Aihie, O.N. 'Prevalence of Domestic Violence in Nigeria: Implications for Counselling' (Edo Journal of Counselling, 2009).

die in silence, either based on the belief that the law will not protect them or from cultural and religious inhibitions.⁷²

Regarding the issues of GBV, the current Lesotho Legal policy and institutional framework is very complicated.⁷³ It is criticised for having inconsistent averments when it comes to Children's rights in particular the age of marriage of the girl child as given by the Marriage Act and consent to sex as given by the Sexual Offences Act. These are some of the indicators of the said confusion.

Regionally, Lesotho is a state party to the African Charter on Human Rights and Peoples Rights (ACHPR).⁷⁴ The African Charter provides that 'every individual shall have a right to the respect of the dignity inherent in a human being and prohibits all forms of exploitation'.⁷⁵ This is affirmed by the Maputo Protocol and the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999) and the International Conference on Population and Development (ICPD), 1994.

At the heart of the Commonwealth priorities for sustainable development and economic growth, is an endeavour by the international community through commitments to attain gender equality and end violence against women and girls (VAWG).⁷⁶

Lesotho is a state party to a number of international human rights instruments such as the Universal Declaration of Human Rights (UDHR) adopted in 1948,⁷⁷ the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) adopted 1979,⁷⁸ and the Convention on the Rights of the Child (CRC) adopted in 1989.⁷⁹ These instruments affirm the principles of 'fundamental rights and freedoms of every human being'.⁸⁰ The CEDAW covers the rights of women. Its Article 1 describes GBV as discrimination that is directed at a woman just because she is a woman. GBV includes inflicting physical, psychological, emotional suffering, and sexual harm. It impairs women's enjoyment of human rights and fundamental freedoms under general international law and the rights guaranteed under human rights conventions. The CRC covers the rights of children, which

⁷² Aihie, n 71.

⁷³ Francis, K. Noko 'Lesotho legal policy and institutional framework' National Report Lesotho, June 2021.

⁷⁴ African Charter on Human and Peoples Rights (adopted in Nairobi 27 June 1981) Entered into Force 21 October 1986.

⁷⁵ ACHPR, n 74, Art 5.

⁷⁶ Commonwealth Secretariat, n 4.

⁷⁷ 'Resolution 217 at the Palais de Chaillot in Paris, France', adopted by the United Nations General Assembly at its third session on 10 December 1948) accessed 15 August 2019.

⁷⁸ Ratification and accession by General Assembly resolution 34/180 of 18, adopted and opened for signature, December 1979) entries into force 3 September 1981.

⁷⁹ Article 19 of the CRC, Articles 1 and 5 of the UDHR, Articles 1 and 5 of the CEDAW.

⁸⁰ UDHR.

obligates in Article 2 that all children's rights be respected without any kind of discrimination. Both the CEDAW and the CRC are guided by a broad concept of human rights that stretches beyond civil and political rights to the core issues of economic survival, health, and education that affect the quality of daily life for most women and children. The two Conventions call for the right to protection from GBV and neglect.⁸¹

The strengths of these treaties rest on an international accord by all countries, with the notion that 'all practices that harm women and children, no matter how deeply they are embedded in culture, must be eradicated'.⁸² The treaties oblige governments not only to protect women from crime of violence, but also to investigate violations when they occur and to bring perpetrators to justice.⁸³

Many economically established countries have measured the economic cost of GBV in their respective jurisdictions. The results indicate that the economic costs of GBV are in billions of dollars annually.⁸⁴ In 2017, the United Nations estimated that the global cost of VAWG was US\$1,5 trillion.⁸⁵ For New Zealand, the estimated costs was \$N5.3 billion, \$CDN 4.2 billion for Canada, \$12.6 billion for the US, and £23 billion for Britain.⁸⁶ In Lesotho, the total cost of VAWG under the full coverage case was estimated at M1,926 million (5.548% of GDP). This was made up of estimated direct cost of M1,250.4 million (3.602% of GDP) and the economy-wide indirect cost of 675.6 million (1.946% of GDP) per annum'.⁸⁷ When violence is curtailed, these resources are saved up and can be used in alternative economic activities.⁸⁸

1.8. Research Methodology

The research was conducted principally through desk review of relevant scholarly literature, existing laws of Lesotho both customary and statutory laws that condone VAWG and are in contradiction with Lesotho's international law undertakings and recommends for their review and/or repeal as well as jurisprudence on VAWG.

⁸¹ General Recommendation 19, (CEDAW Implementation Committee 1992).

⁸² Saini, P. *Discrimination against Women with Special Reference to Female Foeticide in the State of Rajasthan*, (Kota, 2015).

⁸³ Jan, Klabbers. *The Concept of Treaty in International Law* (Martinus Nijhoff Publishers, 1996).

⁸⁴ Grof, S.P. 'The Economic and Social Cost of GBV to Development in Asia and Pacific Region' (Asia Development Bank, 2012).

⁸⁵ 'Counting the Cost: The Price Society Pays for Violence Against Women' (CARE International 2018) 3.

⁸⁶ Rhys et al, n 65.

⁸⁷ Commonwealth Secretariat, n 4.

⁸⁸ Day, T., McKenna and Bowlus, A. *The Economic Cost of Violence Against Women: An Evaluation of the Literature*. (The University of Western Ontario, London 2005).

In order to calculate the full coverage of the economic cost of VAWG, structural inter – linkages within the real economy must be captured holistically.⁸⁹ Thus, the method will include measuring the three types of costs, namely: ‘direct costs (measurable costs), indirect costs (costs that are difficult to measure directly) and induced costs (costs leading to further linkages and that will have secondary effects)’.⁹⁰ Although a review of the literature and statistics on VAWG will be conducted, administrative documents including cases and databases from some government ministries, as well as other stakeholders responsible for addressing VAWG in Lesotho will also be included. In estimating and computing the cost of VAWG, the important source of information is the administrative records or data from the ministries, non-governmental organisations, and the data from the judiciary.⁹¹

The scope and nature of VAWG will be identified and the existing data both captured and uncaptured due to the extent of under reporting of VAWG will be consolidated. This exercise will aid in the realisation of the current VAWG prevalence rates, and specific VAWG pointers, as well as the gaps both in the customary laws and the statutory laws as part of information collection and on prevailing conditions for protection, deterrence, and response; evaluate the strengths and weaknesses and loopholes and develop recommendations for the way forward.

1.9. Outline of Chapters

Chapter Two

This chapter highlights the gaps in customary laws and norms, and statutory laws that contribute to the failure to protect women and girls against GBV. It provides evidence of the economic cost of GBV, resulting from the ineffectiveness of Lesotho’s customary law and the statutory laws in guaranteeing adequate protection to women and girls.

3. Chapter Three

Chapter three looks at prospects for harmonisation of the conflicting laws that make up the dual legal system in Lesotho in ensuring sufficient protection of women and girls against GBV. It further examines the provisions in regional and international instruments that Lesotho has ratified aimed at combating VAWG and meant to aid states in their obligation to fulfil, respect and protect the human rights of its individuals.

4. Chapter Four

⁸⁹ Commonwealth Secretariat, n 4.

⁹⁰ Commonwealth Secretariat, n 4.

⁹¹ Commonwealth Secretariat, n 4.

Chapter four explores how the economy of Lesotho would be affected if GBV is combated. It proceeds to look at measures for preventing VAWG and investing in gender equality and empowerment is vital for economic growth.

5. Chapter Five

Chapter five draws conclusions and proffers recommendations.

CHAPTER TWO

2. Highlights of gaps in customary law and norms, and the lapses in statutory laws in protecting women and girls against GBV

2.1 Introduction

Lesotho subscribes to a system of law that is dualistic in nature, which upholds the customary law and the statutory law operating on equal footing.⁹² There is no harmony between customary law and statutory laws, which evidently operate under Lesotho's dual legal system, resulting in inadequate or compromised protection of women and girls from GBV.

Lesotho is a patriarchal society.⁹³ Patriarchy is a societal system which reckons all lineage through the male line. Men are in the position of power and women are subordinate in many spheres to men.⁹⁴ Over the years in Lesotho, patriarchy has designated men as providers.⁹⁵ As a result of economic decline, the majority of men are no longer able to play the role as providers and as such, due to stress, violence in the family and in relationships often erupts, with women and girls bearing the brunt of it.⁹⁶ In Lesotho, beating children is still considered as disciplining them. Women and girls are considered as minors. Husbands also beat their wives and this they term as disciplining them.⁹⁷ Most women are dependent on men economically as men are most of the times bread winners and woman left home to raise children as such subordinate to men.⁹⁸ Domestic violence is thus, employed within the customary society as a means of enforcing conformity of women.⁹⁹ Domestic violence has left an ugly, pain-ridden mark on Lesotho's past and present.¹⁰⁰ The COVID-19 pandemic worsened the situation, with thousands of people trapped at home with their abusers.¹⁰¹ For the whole duration, news headlines depicted an increasing number of complaints of women of physical and sexual abuse that women experienced at the instance of intimate partners. What stories seldom cover is how partners' controlling behaviour, due to patriarchy seeps into a relationship's finances

⁹² Poulter, n 42.

⁹³ Poulter, n 42.

⁹⁴ Letuka et al, n 30.

⁹⁵ Letuka et al, n 30.

⁹⁶ Letuka et al, n 30.

⁹⁷ Letuka et al, n 30.

⁹⁸ Poulter, n 42.

⁹⁹ Onuemo, V.O. and Ogboghodo, E.O. Ending Domestic Violence against Women: Assessment of the knowledge and perceptions of women in Bernin City, Edo state (University of Benin city Nigeria, 2016)

¹⁰⁰ Chikowore, K. 'GBV Legislation not enough to end violence against women: Analysis' (2022) Lesotho Times 16 March.

¹⁰¹ Chikowore, n 100.

in the form of financial abuse;¹⁰² and how that also encroaches into the economy of the country.

2.2. Customary Law – The Laws of Lerotholi 1903

Like patriarchy, the Laws of Lerotholi also do not recognise any woman or a girl child. They are only perceived as perpetual minors who cannot hold any position of power. This was anchored by the court's decision in the *Senate Khabasheane Masupha v Seniors Resident Magistrate Berea*¹⁰³ case where, by virtue of being a woman, the daughter of the chief was denied succession to be a chief after her father died.¹⁰⁴ Section 10 of The Chieftainship Act¹⁰⁵ maintains that succession to chieftainship is the realm of only biological males of married mothers and no females except when females act as regents. This is discrimination based on gender. Section 11 of the Laws of Lerotholi discriminates against a girl child for it makes provision for heirship to the properties of the parents to be for only male children. There can never be a female heir and girls cannot inherit immovable property. That is the terrain of only male children. Under section 13 and 14 of the Laws of Lerotholi, a customary widow has only the right of use over her own property. She cannot dispose of the property nor sell it in any way without getting permission from the male side of his dead husband's family. This is the sort of discrimination that is condoned by the Lesotho customary law and has contributed to the escalation of VAWG in the country. This kind of discrimination undermines women and girl's dignity and economic potential in that for most women and girls, they do not see any need to strive to acquire any immovable properties for they will be working hard only for the males to benefit. Some women accept the situation and suffer in silence for the atrocities they endure are backed by the law. Some choose to leave their villages and go to the towns in search of employment. There, most often, get exposed to even more violence ranging from cheap labour, exorbitant cost of living that exposes them to prostitution, human trafficking, delinquency, adult criminality, depression and other forms of violence due to its interrelatedness for violence begets violence.¹⁰⁶

2.3 The Constitution of Lesotho 1993

The Constitution promulgated in 1993, which is the mother of all laws in Lesotho, went against Lesotho's undertaking under the 1993 Vienna Declaration and Programme of Action and Human Rights to not discriminate on the bases of gender.

¹⁰² Sello, L. 'Patriarchy Fuelling GBV: Say Of' (2021) Lesotho Times, 24 August.

¹⁰³ *Senate Khabasheane Masupha v Senior Resident Magistrate Berea* C of A CIV/29/2013.

¹⁰⁴ *Senate Khabasheane Masupha* case, n 103.

¹⁰⁵ The Chieftainship Act 1968, sect 10.

¹⁰⁶ Cathy, Spartz, Widom, *The Cycle of Violence*, Science 244 (4901) (1989) 160, 166.

Lesotho enjoys constitutional supremacy. The Constitution provides in section 2 that it is the supreme law of the land and if ‘any other law is inconsistent with the Constitution that other law shall, to the extent of that inconsistency, be void’.¹⁰⁷ The Constitution further stipulates in section 18(1) that no law shall make any provision that is discriminatory either of itself or in its effect. Section 18(4)(c) maintains that section 18(1) shall not apply to any law to the extent that, that law makes provision 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. That is, any discrimination that is done under customary law is condoned. It means that any statutory laws or international law that goes against customary law, that law shall be invalid and customary law shall prevail. This goes against the international instruments Lesotho has ratified on the eradication of all forms of discrimination. Thus, like under the Constitution, the way patriarchy is applied under the laws of Leretholi needs serious working on in addressing the prevalence GBV in Lesotho. To prove further that Lesotho is still very far in addressing GBV, under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Under Article 2¹⁰⁸ Lesotho made its reservation as follows:

The Government of the Kingdom of Lesotho declares that it does not consider itself-bound by Article 2 of CEDAW to the extent that it conflicts with Lesotho’s constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession and chieftainship.’ Furthermore, the Lesotho Government declares it shall not take any legislative measures under the Convention where those measures would be incompatible with the constitution of Lesotho.¹⁰⁹

The anomaly subjects women in Lesotho to discrimination that fuels GBV, erodes their self-worth and undermines their economic potential, which in turn affects the economy of the country. Hence, under the 2011 United Nations Report,¹¹⁰ Lesotho is urged to fast track its constitutional reviews and repeal sections of the Constitution that condone gender intolerance and to reconsider revoking its reservation under article 2 of CEDAW, for that is contrary to the object and purpose of the Convention and the principles of international law to not discriminate based on gender.

The Lesotho Human Rights Report¹¹¹ also contains evidence of forced elopements, a customary practice condoned by the Laws of Leretholi (Chobeliso). In this practice, young women and girls are abducted by men with the intention of forcefully marrying them. In the process of this abduction, they are sexually assaulted. This is a

¹⁰⁷ The Constitution of Lesotho, 1993.

¹⁰⁸ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979.

¹⁰⁹ United Nations CEDAW/C/LSO/Q/1-4/ADD.1. Note 32 Chapter IV.8, Multilateral Treaties Deposited with the Secretary General (2011).

¹¹⁰ United Nations Report, n 87.

¹¹¹ Lesotho Human Rights Report 2021.

criminal offence according to the Sexual Offences Act 2003. However, if the perpetrators' family is well off economically, the practise under custom is that, instead of reporting the said crime to the police, and letting the law take its course, the perpetrators parents usually are sentenced by the court to compensate the raped girls' family with six heads of cattle. This subjects women and girls to gender based violence¹¹² in that they are forced to stay in loveless marriages with people they hate and cannot go away because cattle were paid for them to stay. They cannot run back home; they will be expelled. They cannot go to court for in the local courts, it is where such cases are handled. This barbarism is treated as an accepted norm (business transaction) where her parents are paid six heads of cattle with less care of her physical, emotional and psychological wellbeing. A proper law does not need to condone such injustices but should rather protect the rights of all regardless of gender and status.

Initiation is another accepted traditional practise in Lesotho that is not protective of young girls. The purpose of initiation is to mark the transition of young men into adulthood, teaching them and preparing them to be responsible men in society.¹¹³ The problem with this tradition is that it is attended by young boys of about 12 to 15 years of age. The UNICEF report of 2007¹¹⁴ notes that when these young boys graduate from the initiation school, they refuse to go back to school and hence, the right to education is affected. Further, they consider themselves as men and as such they engage in child marriages and all its problems and complications ranging from the young brides also dropping out of school becoming parents at an early age. Getting a job without education is a problem that leads to alcohol and drugs abuse and related socio legal problems. It is over 20 years since the Protection and Administration of Custom at Initiation School Bill has been proposed to curb the adverse effects of child initiation and to regulate how initiation is to operate. To date it has not been made law and the GBV associated to it continues.

2.4. Conflicting Statutory Laws

2.4.1 Counter Domestic Violence Act 2022

Most of Lesotho's domestic statutes do not complement but contradict each other, which makes it difficult to apply the law due to different interpretations by law enforcers. Children are generally, fully dependent on the adult figures in their lives. When they do not feel safe at home, this could have a variety of detrimental medical, psychological, and emotional impact on them. Children witnessing domestic violence

¹¹² Brundel, M.C. 'More than a woman issue' (Tilburg Law School, 2011).

¹¹³ Malisha, L.; Maharaj, P and Rogan, M. 'Right of passage to adulthood: Traditional initiation schools in the Context of HIV/AIDS' *Journal on Health Risk and Society* (2008) 10(6) 585, 598.

¹¹⁴ UNICEF Report on Child Marriage and initiation (Centre for Child Wellbeing and Development, University of Zurich 2007).

or exposed to any act of domestic violence are being emotionally abused and this, the Counter Domestic Violence Act 2022 has added it to its list of criminal offences. Domestic abuse can have the following effects on children: They can experience anxiety or depression; difficulties in sleeping, flashbacks or nightmares, stomach aches, bed wetting, exhibit tantrum behaviour, act much more immaturely than they are, have issues at school or begin skipping classes, and may get hostile. Also, they could internalize their suffering and isolate themselves. Older children might start abusing alcohol or drugs, overdosing, or cutting themselves, self-harming and/or have eating disorders.¹¹⁵ These kinds of behaviours affect their quality of life, which in turn affects their contribution to the economy of the country and the country's budget.

In seeking to redress the devastating effects of domestic violence, South Africa enacted the Domestic Violence Act in 1998. The Kingdom of Eswatini also enacted the Domestic and Sexual Offences Act in 2018. Lesotho unlike these neighbouring countries never had a domestic violence act until recently in 2022 when the Bill that had been pending for over 20 years was finally promulgated. Until 2022, domestic violence crimes in Lesotho were treated as mere assaults that would differ according to its kind and degree. Hence, no readily available statistical data from the courts that can assist the government in drawing up their budget to curb GBV.

The promulgation of the Counter Domestic Violence Act in 2022 is an achievement in the prevention of violence among couples in a marital setting. The Act aims to regulate the elevating rate of violence based on gender in the country. It introduces tough measures against perpetrators while ensuring the protection of victims. For the first time, Lesotho has a law that is more victim-centred than other laws that mainly only protect perpetrators. The Act criminalises domestic violence and addresses issues of protection of victims and compensation in the event of a violation. Unlike the Children's Protection and Welfare Act of 2011, which is silent on child marriage, the Counter Domestic Violence Act makes provision for the repeal of the Marriage Act of 1974, which up to date condones child marriage.

The scope of domestic relationship under the new act is very broad and includes issues of cohabitations, same-sex relationships, economic abuse, as well as detailing the procedure for protective orders. Thus, the fact that the law criminalises child marriage is commendable, and it is the prudent move to reaching the goal of eradicating VAWG. The downside in the Counter Domestic Violence Act is that it imposes low sentences for sexual offences contrary to what the Sexual Offences Act of 2003 provides, which is likely to cause confusion in the application of the laws. There is no justification why the sentences have been reduced, yet they address sexual offences which are already governed by a comprehensive legislation. Moreover, the death sentence contained in the Counter Domestic Violence Act is of no force and effect as per the recent constitutional case of *Mahabe Khongoana v*

¹¹⁵ Palemo, T. Bleck, J. and Peterman, A. 'Tip of the Iceberg: Reporting and Gender based violence in Developing countries' (2014) American journal of Epidemiology 175(5) 602, 612.

Director of Prosecutions where sections 30 and 32 of the Sexual Offences Act where the Counter Domestic Violence Act drew its powers from was declared unconstitutional, going against the right to life and freedom from discrimination.¹¹⁶ In addressing the adverse effects of GBV, this repeal has left a vacuum in the law that can be able to address the penal aspect of heinous crimes against victims.

Another vacuum in the law is the aspect that directly criminalises femicide. In 2021, it was reported that at least 47% of women murdered in Lesotho were killed by their intimate partners.¹¹⁷ Despite this reality, femicide is treated as mere murder and as such, no concrete measures by the government in view of its eradication. It is only section 28(1)(c) of the Counter Domestic Violence Act that maintains that if murder was a resultant effect due to GBV, the perpetrator is liable if found guilty to life sentence. However, it is only partners in the domestic setting that are protected under that law not every woman killed is covered and this is one of the gaps that still fuels GBV in Lesotho.

2.4.2 The Sexual Offences Act, 2003

Thus far, the Sexual Offences Act has a deterrent factor against GBV - rape looking at its penal sections. However, it still exposes children to sexual assault by requiring children to consent to sex. The Children's Protection and Welfare Act¹¹⁸ and the Constitution are clear that the age of a child shall be 18 years and younger.¹¹⁹ As such, section 8(4) and (5)(a) and (b) of the Sexual Offences Act encourages and exposes children to GBV in clear contradiction of the above laws. What the law neglects is the fact that sex involving children, regardless of it being consensual, has physical implications ranging from teenage pregnancy that may result in preterm labour, placental abruption or premature uterine rapture¹²⁰ because their bodies are not mature enough, emotional and psychological implications¹²¹ ranging from loss of time in school, and post-natal depression when children cannot cope with being parents at an early age.¹²² All the cost incurred there as a result are borne by both the individuals and the state.

¹¹⁶ Constitutional case number /05/2020 Delivered on the 25 October 2022.

¹¹⁷ Mungoshi, R. 'Activists call for Action as Femicide Wreaks Havoc in Lesotho and Beyond' (2021) Public Eye.

¹¹⁸ The Children's Protection and Welfare Act 2011.

¹¹⁹ The Children's protection and Welfare Act 2011, sect 2.

¹²⁰ Shumway, J. et al, 'Preterm Labour, Placental Abruption, Premature Rapture of Membranes in Relation to Maternal Violence or Verbal Abuse' (J. Martern Fatal Med Inc 8(3) (1999) 76, 80.

¹²¹ Baeten, J. 'Getting Ready for Pregnancy' American Journal of Public Health (2001) University of Maryland Baltimore Washington Medical Centre.

¹²² Baeten, n 121.

2.4.3 Harmonisation of the Rights of the Customary Widow with the Legal Capacity of Married Persons Act, 2022

In many countries in Africa, including Lesotho, land allocation, ownership and transfers of land title from generation to generation, are governed by customary laws, which do not recognise women and girls as people entitled to have ownership of immovable properties and inheritance.¹²³

After the death of a father or husband, women and orphans especially when those orphans are girls, they are dispossessed since they are regarded as perpetual minors who cannot hold title to land or any immovable properties. They are often left homeless and on the receiving end of GBV.¹²⁴ This dispossession weakens women's dignity, financial confidence and independence thus affecting their way of making a living, providing food and lodging for their household.¹²⁵ Where such harmful inheritance practices are present, such countries are characterised by stunted economic developments and the feminisation of poverty.¹²⁶ To curb this gap, Lesotho after 120 years, repealed the minority status of the customary widow by the enactment of the Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons Act, 2022. This Act makes provision for the enhancement of the economic status of customary widows enabling them to exercise their economic and property rights in line with provisions of the Married Persons Equality Act of 2006.

The legislation gives the customary widows the right to be sole heirs of their joint estate after the death of their husbands. The restrictions on the rights of a customary widow due to her husband's marital power are removed. This is mirrored in the case of *Ramoabi v Ramoabi* which granted a widow right to the property of the joint estate after the death of her husband.¹²⁷ Unlike other laws, the Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons Act 2022 provides in Section 6(4) that 'This Act supersedes all provisions of customary law on the legal status and rights of customary widows where the customary law is in conflict with the provisions of this Act'. It means any law that contradicts the Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons Act, shall be declared null and void, which has prevented different interpretations of the law as is the case with many laws in Lesotho.

With its perfect provisions on protection and promotion of the rights of the customary widow, the problem is that discrimination based on gender under customary law is endorsed by Section 18(4) C and section 2 of the Constitution. The Constitution is the

¹²³ Buvinic, M. *Women and Poverty in the Third World* (John Hopkins University Press 1976).

¹²⁴ Buvinic, n 123.

¹²⁵ Kimane, I. 'Images of Basotho Women in Society: The Contribution to Development' *Journal of Eastern African Research and Development* Vol 15, (1985).

¹²⁶ Kimane, n 125.

¹²⁷ *Ramoabi v Ramoabi* CIV/T/206/1991.

supreme law, meaning that any law that goes against it is null and void. Without the repeal of section 18(4) C, it means that the protections guaranteed by the Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons Act cannot be exercised and enjoyed. By implication, widows remain at the receiving end of discrimination and perceived as perpetual minors.

2.4.4 Anti-Trafficking in Persons Act 2011 as Amended

A report by UNICEF¹²⁸ illustrates that globally, the estimated number of people trafficked across international borders annually is approximately 600,000 to 800,000. It goes further to show that 1.200.000 children were trafficked globally in 2006.¹²⁹ The majority of trafficked persons are women and girls, making approximately 80% of which half of them are minors.¹³⁰ Among the minors trafficked, majority are girls under the age of 18.¹³¹ Over the past years, there have been reports of increased human trafficking cases in Lesotho.¹³² Traffickers increasingly use social media to identify and recruit victims into forced labour and sex slavery.¹³³ Limited economic opportunities, poverty, gender discrimination, lack of information and education,¹³⁴ harmful socio-economical practices resulted in vulnerable populations, including women and girls enticed by traffickers¹³⁵ with false promises of legitimate employment or educational opportunities with full sponsorship and this is the most problem experienced in Lesotho.¹³⁶ Mostly affected are children in domestic servitude.¹³⁷

Lesotho ratified the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Person, with special attention to protect women and girls in the year 2000. It proceeded to enact the Anti-Trafficking in Persons Act as amended in 2011. This law criminalises labour as well as sex trafficking. The penal section of this law goes up to life imprisonment for anyone found guilty of the trafficking of children and 25 years imprisonment for anyone found guilty of trafficking an adult. As much as the law is there and guarantees protection against trafficking, the problem is that there are currently only three magistrates with criminal jurisdiction of 25 years in the entire Lesotho to prosecute such crimes. This means the disposal rate of human

¹²⁸ UNICEF, State of the World's Children: Excluded and Invisible (2006) (<http://unicef.org/sowc06/index.php>).

¹²⁹ UNICEF, n 128.

¹³⁰ UNICEF, n 128.

¹³¹ UNICEF, n 129.

¹³² Human Trafficking in Lesotho: Root Causes and Recommendations (2007) Policy Paper Poverty Series No 14, 6.

¹³³ Trafficking in Persons Report: [Lesotho Tier 2] (2022).

¹³⁴ UNICEF, n 128.

¹³⁵ UNESCO, Human Trafficking in Lesotho: Root Causes and Recommendations (SHS/CCT, PI/H/7, 2007).

¹³⁶ D'Cunha, Jean Trafficking in Persons: A gender and Rights Perspective (2002) 36, 39.

¹³⁷ Trafficking in Persons Report: [Lesotho Tier 2] (2022).

trafficking cases is very low in relation to the influx of such cases which are increasing at an alarming rate per year.¹³⁸ There would be no use to enact a proper law to deal with trafficking cases and not grant the law enforcers appropriate jurisdiction to handle trafficking cases.¹³⁹

Prostitution is another problem that is fuelling GBV in Lesotho. Prostitution has been increasing steadily in Lesotho, which is another major contributing factor to trafficking.¹⁴⁰ There is a vacuum in the law because in Lesotho, parliament has not yet enacted any legislation that prohibits¹⁴¹ and or regulates prostitution in the country. It is mostly women and girls who are involved in prostitution, which makes them vulnerable to human trafficking as some of their customers are human traffickers themselves waiting to take advantage of their vulnerability.¹⁴²

2.4.5 The 1993 Lesotho Constitution

Under chapter two on the Bill of Rights in the 1993 Constitution of Lesotho, on the protection of fundamental human rights and freedoms, section 18 provides for freedom from discrimination on the bases of sex among others. This is a constitutionally protected right that is justiciable in the courts of Lesotho.¹⁴³ The subsequent chapter three, which dwells on principles of state policy, takes away the right not to be discriminated by maintaining under section 26 that the right to equality shall not be enforceable by any court in Lesotho but is only enforceable subject to the limits of the economic capacity and development of the state. It is self-evident that one cannot assert the right to equality because, it is not justiciable, meaning that woman and girls are not sufficiently guaranteed constitutional protection against discrimination that fuels VAWG. The unenforceability of chapter three rights was tested in the *Khethang Tema Baitso'okoli and Another v Maseru City Council and Others*¹⁴⁴ case wherein litigation was brought against Maseru City Council from evicting street vendors for selling on the pavements in Maseru town centre. The street vendors challenged their eviction. They maintained that their right to life was under threat if they are forbidden to sell in the streets to make a living. The Constitutional Court and the Court of Appeal held that the rights in chapter two do not include the chapter three rights and that chapter three rights are not enforceable in the courts of Lesotho. This has the potential of letting the state to hide behind the lack of resources to ensure realisation of socio-economic rights because they term them directive

¹³⁸ Trafficking in Persons Report, n 137.

¹³⁹ UNESCO, n 135.

¹⁴⁰ UNESCO, n 135.

¹⁴¹ UNESCO, n 135.

¹⁴² Burkhalter, H. 'Sex Trafficking and the HIV/AIDS Pandemic: Testimony of Physicians for Human Rights, before the House International Relations Committee' (2003) 1, 2.

¹⁴³ The Constitution of Lesotho 1993, sect 18(3).

¹⁴⁴ *Khethang Tema Baitso'okoli and Another v Maseru City Council and Others LAC* (2005 -2006) 85.

principles of state policy and could not be taken to court for them.¹⁴⁵ The effect of this is that governments hide behind the lack of resources when called upon to account for the problem of GBV. Non-accountability increases the chances of GBV happening.

The Constitution provides in section 44 for the establishment of the office of the King. This is another discriminatory section that caters for only males to hold office as kings. The section makes no provision for a biological female child born in the royal family or any other house to succeed the King when he dies. She can only act as a regent (holding fort for someone).¹⁴⁶ Similarly, section 10(2) of the Chieftainship Act 1968 makes provision for only a male child to succeed to the office of the chief. The courts have refused to declare these sections unconstitutional as seen in the *Senate Masupha* case, which equally disregards Lesotho's undertaking under international law. This means that in accordance with the above laws, women are regarded as incapable of governing a nation just because they are women.

2.5 Domestication of the Regional and International Instruments that Lesotho has ratified

In Lesotho, the general rule is that the international instruments that Lesotho has ratified have to be domesticated first before they can be applied nationally. In recent years, this has shifted in such a way that there are several cases wherein the courts have invoked protections of the international instruments that Lesotho have ratified without probing into their domestication. This was what transpired in the *Molefi Tšepe v IEC*.¹⁴⁷ In this case, to encourage women's participation in politics and in local governance, as a measure to empowering them as per the dictates of, the regional instruments like the African Charter, as well as the SADC Declaration on Gender Equality and the international instruments like the ICCPR and CEDAW. Lesotho in compliance enacted the Local government Elections Act of 1998 (as amended by an Amendment Act of 2005). This Act reserved one-third quota of all local government seats for women. Applicant in this case approached the court, moving for this law to be declared unconstitutional for discriminating against men. The application was dismissed, and the courts quoted the regional and international instruments that Lesotho has ratified as decisive.¹⁴⁸ The Court held that the Amendment Act was not discriminatory but constituted an affirmative action measure, which Lesotho has an international human right obligation to observe.¹⁴⁹

¹⁴⁵ Shale, I. and Buhle, A. Law and Legal Research on Lesotho (House of Global Law School Program, 2010).

¹⁴⁶ Shale and Buhle, n 145.

¹⁴⁷ *Molefi Tšepe v IEC* CIV/APN/135/2005 [2005] LSHC 96.

¹⁴⁸ Shale and Buhle, n 145.

¹⁴⁹ Shale and Buhle, n 145.

The same courts of Lesotho in other cases involving the invoking of regional and international instruments before them wherein, the applicants wanted to invoke the protections enshrined in those instruments, have instead questioned the domestication of the said instruments as a pre requisite for applying them and pronounced that these instruments cannot overrule either Sesotho customary law or Lesotho domestic statutes if they have not been domesticated into national laws to give them domestic effect'.¹⁵⁰ Where necessary, amend or repeal the laws that contradict the same.¹⁵¹ This was the ruling in the 2013 *Senate Khabasheane Masupha* case¹⁵² wherein the learned judge maintained that the protections enshrined in regional instruments being, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),¹⁵³ and international instruments like the ICCPR,¹⁵⁴ and CEDAW were not directly applicable in Lesotho unless they have been domesticated into national law. It was held that section 10 of the Chieftainship Act, which discriminates against a girl child in denying her a chieftainship right was not unconstitutional. Also, that these instruments, are a mere aid to interpretation if there was uncertainty in the interpretation of section 10 of the Chieftainship Act and not the source of rights claimable by Lesotho citizens and enforceable by Lesotho courts. This was held despite the arguments advanced that Lesotho as a state party to these instruments had an obligation not to discriminate based on sex. The Chieftainship Act was upheld and not tested against international human rights standards against discrimination.¹⁵⁵ The court did not take into account the fact that non-discrimination based on sex is a principle of international law that binds all states even in the absence of ratification of an international human right treaty that outlaws discrimination.¹⁵⁶

The Lesotho constitution lacks a clear constitutional provision on how the courts must treat international instruments, which is another gap that has contributed to VAWG. However, the several commitments under international law have been verbatim in the encouragement of states to domesticate as a major for global response to GBV'.¹⁵⁷ There would be no point in ratifying and not domesticating or invoking protection against the entitlements guaranteed in those treaties. As such Lesotho is not justified in not domesticating, which creates the avenue for gender-based violence

¹⁵⁰ Human Right Law Journal Vol. 19 No 1 (Pretoria Law Press PULP, 2019).

¹⁵¹ Constitutional Case No 3/2005 in the *Senate Khabasheane Masupha* case.

¹⁵² *Senate Khabasheane Masupha*, n 151.

¹⁵³ Shale and Buhle, n 145.

¹⁵⁴ International Covenant on Civil and Political Rights 1966.

¹⁵⁵ Human Right Law Journal, n 150.

¹⁵⁶ Shale and Buhle, n 145.

¹⁵⁷ Shale and Buhle, n 145.

that yields negative impact on Lesotho's economic growth, development and social stability.¹⁵⁸

The lack of implementation of any effective strategic plans or policies on GBV, insufficient monitoring, and evaluation of laws and programmes, insufficient budget allocation to GBV programmes, lack of capacity building/development across all sectors, inadequate awareness raising on GBV and gender equality programmes as well as lack of coordination have been identified as other bottlenecks to effective implementation thus, contributing to economic loss for the country.¹⁵⁹

2.6 Economic cost of GBV resulting from the ineffectiveness of Lesotho's customary and statutory laws in guaranteeing protection to women and girls

The effects of gender-based violence perpetuated by the customary law and the statutory law from an economic perspective is worth looking into. Economics is the study of allocation of scarce resources among competing ends.¹⁶⁰ Policy makers need to have scientifically provable information so as to make informed decisions about the way public resources should be allocated to reach the desired results.¹⁶¹ 'It is common cause that every recognisable effect of violence has a cost implication whether direct or indirect.'¹⁶² Gauging the economic cost and consequences of violence will aid policy makers to observe and optimise on right budgeting for major priorities.¹⁶³

Economic abuse is frequently not acknowledged and, as a result, is not perceived to be a type of abuse. For some victim-survivors, financial abuse has been 'normalized'. Economic abuse behaviour and methods, such as 'economic control', 'economic exploitive behaviour', and 'economic sabotage', have been utilized in home settings for generations and are considered 'normal'.¹⁶⁴ Only a few people know that they can approach the courts for redress on economic abuse. The rest are left out to fend for themselves and sometimes, engage in illegal acts to put food on the table. In an interview by the Reporter newspaper,¹⁶⁵ the prostitutes interviewed explained that they engage in prostitution because they need money to feed their households. A 15-

¹⁵⁸ Levy Economics Institute 'The Micro Economic Loss Due to Violence Against women and Girls: The Case of Ghana' (Working Paper No 9, 2019) 939.

¹⁵⁹ Lesotho Gender and Development Policy 2018–2030.

¹⁶⁰ Commonwealth Secretariat, n 4.

¹⁶¹ Day, T., McKenna and Bowlus, A. *The Economic Cost of Violence Against Women: An Evaluation of the Literature* (University of Western Ontario, London 2005).

¹⁶² Jhingan, M.L. *Advanced Economic Theory* (Vrinda Publications 2006).

¹⁶³ Scott, M. Singer and others 'Economic Abuse: Untold Cost of Domestic Violence'.

¹⁶⁴ Institute for Social Development and Justice (Oppermans Inc. Attorneys, 83 Miller Street, Gordons Bay 2021), www.oppermansinc.co.za accessed 18 December 2023.

¹⁶⁵ Kajane Refiloe, *The Reporter Newspaper*, 19 October 2021.

year-old orphan interviewed said that she turned to prostitution because she wanted to raise money to go back to school and finance her education.

It is common cause that ‘prevention is better than cure’. Even in every case of violence, putting in proper deterrence interventions and prevention mechanisms in place will cost the country way less than later stage societal crisis and economic cost of care implications’.¹⁶⁶ It is said that investing in GBV detection and eradication against women and girls at an early stage, and in good treatment programmes will result in huge societal savings in the future’.¹⁶⁷ The cost of violence being measured is an accountability method which will prove with facts that, preventing VAWG is most cost effective right thing a country can do.¹⁶⁸ Due to challenges in the methods of collecting data in different government ministries and other stakeholders, coupled with none and under reporting, it is difficult to know the exact absolute economic cost of GBV. The estimated numbers, however, will still aid policy makers to form an informed opinion of the status of VAWG and to act. The types of costs that this study will concentrate on that can be incurred from abuse have been classified into four classes by Day et al. to be the following:

2.6.1 Direct and Tangible Costs

Direct and tangible expenses come from payment of money or in kind of the goods used or services consumed as a result of violence.¹⁶⁹ It is the real money spent for actual expenses.¹⁷⁰ They exist for capital, labour and material inputs.¹⁷¹ Examples include, exchange of money for transport to hospital, salaries for staff in the shelter if the victim goes to the health shelter. The Commonwealth Secretariat goes further to show that ‘these costs can be estimated through measuring the goods and services consumed and multiplying same by their unit cost’.¹⁷²

2.6.2 Indirect tangible costs

Indirect tangible costs do not involve any exchange of money or direct economic value.¹⁷³ They branch from the adverse effects of violence that have a definite cost even though they do not involve actual money paid. Examples are forfeited income or earnings if a person did not go to work or lower income or earnings or reduced profits

¹⁶⁶ Day, McKenna and Bowlus, n 161.

¹⁶⁷ Tanis, D., Katherine, M. and Audra, B. *The Economic costs of Domestic Violence Against Women. An Evaluation of Literature.* (London, Ontario: United Nations and the University of Western Ontario, 2005), 11, 14.

¹⁶⁸ Day, McKenna and Bowlus, n 161.

¹⁶⁹ Day, McKenna and Bowlus, n 161.

¹⁷⁰ Asante, F. et al. *Economic Cost of Violence Against Women in Ghana: Country Technical Report* (NUI Galway, 2019).

¹⁷¹ Rhys, O. Barnaby, A. Stephen, R. and Miriam, W. ‘The Economics and Social Costs of Domestic Abuse’ (2019) Research Report 107.

¹⁷² Commonwealth Secretariat, n 4.

¹⁷³ Commonwealth Secretariat, n 4.

due to reduced output when a person did not go to work the expected days of the month.¹⁷⁴ These indirect costs are also quantifiable, through proper economical estimations. They involve ‘estimating opportunity rather than actual expenditures’.¹⁷⁵ ‘Lost personal income, for example, can be estimated by measuring lost time at work and multiplying by an appropriate wage rate per day’.¹⁷⁶ This is vividly seen in the rule ‘no work no pay’. The amount of time a woman spends away from work due to GBV affects her earnings for that month.

2.6.3 Direct intangible costs

Direct intangible costs, emanates straight from the violent act but its cost cannot be measured but inferred.¹⁷⁷ Examples are the pain and suffering endured due to violence, and or the amount of loss emotionally in the instance where death of a loved one is the resultant effect of the violence. This cost affects the quality of life.¹⁷⁸ Other people loose trust in marriage, they have trouble loving other people or settling in their relationships and this is seen mostly in people who go for divorce.

2.6.4 Indirect intangible costs

Indirect intangible costs refer to the costs that result incidentally from violence and have no value of money that can be put on them.¹⁷⁹ Examples are the negative emotional and psychological effects on children who witness violence that cannot be estimated numerically. It is common cause that children who witness their parents being abused also turn to be abusers and hence, the continued cycle of violence.

Everyone who experiences or is affected by violence either as a victim or a perpetrator is prone to these costs either directly or indirectly. Even the business sector is also affected by GBV. An abused employee’s output at work is affected and thus, reduces productivity, which amounts to loss to the business sector. Governments at all levels and society in general is affected economically due to GBV.¹⁸⁰ When violence is eradicated, the resources to be used in fighting it will alternatively be directed to some other developmental projects that will take the economy of the country forward, in line with Lionel Robbins definition that ‘economics is the science which studies human behaviour as a relationship between ends and scarce means that have alternative uses’.¹⁸¹

¹⁷⁴ Asante et al, n 170.

¹⁷⁵ Scott, M. Singer and others ‘Economic Abuse: Untold Cost of Domestic Violence’ available on accessed 31 August.

¹⁷⁶ Day, McKenna and Bowlus, n 161.

¹⁷⁷ Asante et al, n 170.

¹⁷⁸ Scott et al, n 175.

¹⁷⁹ Day, McKenna and Bowlus, n 161.

¹⁸⁰ Day, McKenna and Bowlus, n 161.

¹⁸¹ Robbins, L. ‘An Essay on the Nature and Significance of Economic Science’ (Macmillan 1932) 15.

2.7 Conclusion

Eradication of all forms of gender-based violence is the utmost target of every state globally.¹⁸² Ending of violence has proven to be beneficial not only to individuals for improving their quality of life but to the business sector, and the society at large. It would also have a variety of advantages that will be accrued to projects aimed at economic growth for the country.¹⁸³ The presence of adequate non-conflicting laws amended and where necessary repealed, new laws enacted in line with the international obligations that Lesotho ratified will prove effective in the fight against GBV.

¹⁸² Fawole, O.I. Economic Violence to Women and Girls: Is it Receiving the Necessary Attention? (Trauma Violence Abuse 9, 2008) 167, 177.

¹⁸³ Tavares, P. and Wodon, Q. Ending Violence against women Girls: Global and Regional Trends in Women Legal Protection against Domestic Violence and Sexual Harassment (World Bank Group, 2018).

CHAPTER THREE

3. Harmonisation of the conflicting laws that make up the dual legal system in Lesotho in ensuring the protection of women and girls against GBV

3.1 Introduction

Lesotho is a patriarchal society. One of the major sources of gender inequality is patriarchy. In Patriarchy women and girls struggle to be on the same footing with males in all economical spheres in Lesotho and mostly negatively affected are women and girls under custom.¹⁸⁴ In patriarchy, it does not matter whether a woman or girl is more educated, has special skills or capabilities, male dominance is a norm and it is upheld.¹⁸⁵ The problem with patriarchal culture is that it has a potential of being abused to validate behaviours like rape, sexual assault, violence, substance abuse, adverse mental health and behaviour, gender based violence and bad parenting practices and attitudes.¹⁸⁶ All these are detrimental to the economy of the country. It is clear from the above that inequality thrives under patriarchy in that lack of equality is seen as ‘natural’.¹⁸⁷ It is apparent that in as much as Patriarchy was meant to maintain social order,¹⁸⁸ its effects are far negatively reaching, and it goes against the principles of customary international law.

3.2 Bridging the gender gaps caused by patriarchy to curb GBV

Lesotho is not justified in upholding inequality. To mitigate patriarchy, people’s mind-sets must change to be equally accommodative to other genders. This involves a critical thinking and using it to pin out, call out, bring down, protest and change the way in which power plays out in Lesotho.¹⁸⁹ As a country, people should consider aligning their value systems to the values protected under customary international law. This should start from within. People should change their behaviour towards respecting women and girls. They should unlearn and eradicate all the practices and behaviours that trample on human rights, prejudice women and girls and encourage discrimination.¹⁹⁰ Moreover, there is need to un-codify gender roles by campaigning and encouraging those who wish to break out of the boxes they have been

¹⁸⁴ Letuka et al, n 30.

¹⁸⁵ Letuka et al, n 30.

¹⁸⁶ Letuka et al, n 30.

¹⁸⁷ Letuka et al, n 30.

¹⁸⁸ Letuka et al, n 30.

¹⁸⁹ Letuka et al, n 30.

¹⁹⁰ Letuka et al, n 30.

conditioned to fit into, do away with the problematic or violent aspects of patriarchy by opposing any system where someone can claim power over another in order to marginalise them.¹⁹¹ There is need to solidify the right to livelihood for women and girls. Too many women are locked out of economic opportunities, and this is not fair. It is harmful to economic growth and resilience.¹⁹²

It is thus, worth fostering a compassionate, equal society where people are cherished for who they are regardless of their gender. Societal values need to be revisited and reformed to attain justice and freedom for all. All systems and laws that degrade, and exploit women and girls should be eradicated. That is the way social justice can be realised.¹⁹³

3.3 Mitigating the effects of GBV under custom

3.3.1 The Laws of Lerotholi

The codified customary Laws of Lerotholi has endured fifty-seven years after Lesotho gained independence from colonial rule. However, in recent years, their jurisdiction is being progressively curtailed by the new statutes enacted, eroded by occasional judicial pronouncements in the resent judgements delivered and the shifting societal perception of the part played by current customary law in contemporary phase of the realisation of human rights. Despite all these, these rules have persisted.¹⁹⁴ They were codified to in order to make customary rules and norms enforceable in the courts of law,¹⁹⁵ and to provide easy access to customary law rules for presiding officers. Through their judgments, presiding officers shape the jurisprudence and do so bearing in mind the ever-changing societal ideologies.¹⁹⁶

In Lesotho, it is a common cause for presiding officers to lean towards a substantial understanding of concepts such as equality before the law, impartiality, and respect for the human rights of all people. The emphasis is that the Laws of Lerotholi are criticised for being static and not evolving with the times. They are unable to cater for an all-encompassing, modern, and progressive legal institutions.¹⁹⁷ Cotran J in his judgement in the case of *Ramaisa v Mpholenyane*, criticised the Laws of Lerotholi in these words:

¹⁹¹ Letuka et al, n 30.

¹⁹² Letuka et al, n 30.

¹⁹³ Randford, F, *Gender Justice and Dismantling Patriarchy* (Friends of the Earth International Secretariat Press, Whales, 2021).

¹⁹⁴ Sebastian Poulter, 'The Place of the Laws of Lerotholi in the Legal System of Lesotho' 71 *Afr. Aff.* 144, 150 (1972).

¹⁹⁵ Juma, L. *The Laws of Lerotholi: Role and Status of the Codified Rules of Custom in the Kingdom of Lesotho* (23 page inte, rev 92, 2011).

¹⁹⁶ Sheleef, L 'The Future of Tradition: Customary Law, Common Law and Legal Pluralism (2000) 82.

¹⁹⁷ Bennett, T.W. and Vermeulen, T. 'Codification of African Law', 24 *J. AFR. L.* 206 (1980).

I think a large part of the difficulties encountered in these cases has arisen because attempts have been made to reduce customs and norms into writing and in haphazard fashion, by a body lacking experience in the art of legislative drafting, into ink and paper with the result that the written words have assumed a quality of rigidity out of all proportion to their true meaning or significance.¹⁹⁸

In recent years, there has been a realisation that there is a widening gap in addressing the law to be applied under the prevailing customary practices.¹⁹⁹ It seems likely that the Laws of Lerotholi have been overtaken by the changing Basotho social lifestyles.²⁰⁰ For example, the elements of a valid marriage under custom have been susceptible to change,²⁰¹ as observed in the ruling in *Ramootsi and Others v Ramootsi*²⁰² where it was held in the High Court and the Court of appeal that absence of payment of dowry (bohali) does not invalidate a customary marriage, which is against the dictates of section 34 of the Laws of Lerotholi on the validity of a customary marriages. This was also the view of Maqutu J as he then was in *Tseli Moeti v Tanki Lefalatsa and Another*²⁰³ when he asserted that he was ‘not prepared to accept that a bare assertion that there was no marriage merely because not a single beast was paid’. It zeros down to the observation in recent jurisprudence that what is perceived as customary marriage nowadays does not tally with the 1903 Laws of Lerotholi that was used in addressing 1903 issues. The value of customary rules is apparently diminishing in these changing times,²⁰⁴ proving that the laws need to be amended constantly to tally with the ever changing Basotho culture.

3.3.2 Inheritance in Lesotho

Under the notion of inheritance, the law that promotes the exclusive right to inherit of an elder male child of the family is provided for in the Laws of Lerotholi. Its section 11(1) makes provision for heirship; that the heir is regarded as a male child of the first married woman in the family. If she has no male children, her female children are overlooked, and heirship passes to the male child of the second wife in succession. This is equally under threat as women and girls are steadily becoming aware of their entitlements in the family and advocacy on non-discrimination rooted on gender.²⁰⁵ In recent times, the principle of male primogeniture has come under

¹⁹⁸ 1977 LLR 149 HC. See also Juma, n 187.

¹⁹⁹ Chanock, M. ‘Neo-traditionalism and Customary Law in Malawi’, 16 Afr. L. Stud. 80, 81 (1978); see Fitzpatrick, P. ‘Traditionalism and Traditional Law’, 28 J. Afr. L. 20, 21 (1984) (advancing the view that African custom loses substantive identity when subordinated to imported law).

²⁰⁰ Juma, n 195.

²⁰¹ Poulter, n 42.

²⁰² CIV/NO14/2008 [2009 LSCA 30].

²⁰³ 1999 – 2001 LLR 511 HC.

²⁰⁴ Letsika, Q. ‘The Place of Sesotho Customary Law Marriage within Modern Lesotho Legal System’, Botswana L.J. 73, 74 (2005).

²⁰⁵ Juma, n 195.

severe criticism as well, constituting the subject of litigation in the celebrated case of *Moteane v Moteane*.²⁰⁶ This case involved siblings' rivalry. After their father passed on, the elder son – the heir, sued his siblings seeking an order to restrain them from intruding in the estate of their late parents who had died without making a will. His other prayer was that the court should pronounce him as the only heir to their father's estate relying on section 11 of the Laws of Lerotholi. The court of Appeal found that this prayer was vague and as such, dismissed the case and drew the appellant to the observation that; the determination of rights in the claim under section 11 of the Laws of Lerotholi must take into account the 'ethos of negotiation and the obligation of the family to honour the principle of mutual cooperation and sharing, which Basotho family law requires of them'²⁰⁷ The Appeal Court dismissed his claim of wanting to be the sole heir in that, its honouring would be in contradiction to the intentions of the customary law rule that upheld the prerequisite of the family intervention – a long standing practise of traditional African customary alternative dispute resolution process.²⁰⁸ The court upheld the importance of family arbitration as the most important step to dissolve customary inheritance matters.

3.3.3 Inheritance in South Africa

In South Africa, the principle of male primogeniture has been held to be unconstitutional, going against the principle of equality and the right to not be discriminated upon.²⁰⁹ In order to ensure the inclusion of the marginalised people due to this principle, South Africa unlike Lesotho, enacted new legislations like the Intestate Succession Act in which children of the family inherit equally regardless of sex the properties of their parents.²¹⁰

Lesotho as a member of the United Nations and upheld to respect and uphold the human rights of all. In the courts, there is an influx of cases involving human rights violations and gender-based inequalities in all its forms. As such Lesotho's legal system is obligated to address.²¹¹

Moreover, the customary traditional customs as we know them are overwhelmed by the modern government structures put in place.²¹² Customary law is now viewed the

²⁰⁶ *Moteane v Moteane* 1997 (1995-1999) LAC 307 (LSCA) (Lesotho).

²⁰⁷ *Moteane* case, n 206.

²⁰⁸ The Court relied on the case of *Maseela v Maseela* (1971-1973) LLR 132 (LSHC) where it ruled that in a dispute of this nature the dependants of the deceased, including all those who have interest in the matter under customary law, need to be consulted and a family arbitration undertaken before the matter can be taken to court.

²⁰⁹ *Gumede v President of the Republic of South Africa*, 2009 (3) BCLR 243 (CC) (S. Afr.) 188; see also Juma, n 187.

²¹⁰ Reform of Customary Law of Succession and Regulation of Related Matters Act 2 in South Africa (completely removes from the jurisdiction of customary law all matters related to intestate succession).

²¹¹ Shale and Buhle, n 146.

²¹² Cobbah, J. 'African Values and Human Rights Debate: An African Perspective', 9 Hum. Rts. (1987) 309.

same way as the statutory laws are viewed and the expectation is to have an all-encompassing judicial system protective of the rights of women and girls and the customary law is not living up to this expectation.²¹³

Considering the above observations, it can be confirmed that the Laws of Lerotholi no longer take precedence over the informal rules of custom. In recent times, it has been the discretion of the courts to revert to the Laws of Lerotholi only when there is no statutory provision to the same effect. There is lack of interest to have them amended and or enhanced to cater for the modern-day changes in values. Most people are not even aware of their existence for much advocacy is on statutory laws.²¹⁴

It is recommended therefore, that like South Africa, Lesotho should consider repealing section 11(1) of the Laws of Lerotholi for the reason that it is unconstitutional, and this should be done in conjunction with the repeal of section 18(4)(c) of the Constitution of Lesotho because it condones discrimination perpetuated under customary law.

The principle of sharing contained in section 14(3) of the Laws of Lerotholi encourages the sharing of the properties of the deceased parents between the heir and his siblings and not take all properties alone to the exclusion of others. This section should be amended to include a girl child so that the properties of parents are shared equally among all the surviving children of the family. Parents should develop a habit of writing wills or what is called 'Litaelo tsa mofu' – the deceased's written instructions to regulate how the properties should be regulated when they die in alignment with non-discrimination principles enshrined in the international human rights instruments Lesotho is a party to.

The major problem with the Laws of Lerotholi is that they are static;²¹⁵ they do not move with the time as expected and do not align with the binding principles of international law. There is no reason why in elopement and abduction of a girl involving forced sexual intercourse, which in most cases leads to unplanned pregnancy and sometimes gang rape, the boys who commit the offence are fined six heads of cattle payable to the sexually assaulted girl's father or her family according to the Laws of Lerotholi. This is, contrary to human rights compliant and good practice standards.²¹⁶ The girl's physical and psychological wellbeing is abandoned in the process. Abducting a girl and making her pregnant is a sexual offence, matter of which, monetary sentence cannot be imposed. There is need for the passing of the Regulations of Customary Initiation Bill for it to regulate the age a person can go for initiation to avoid children living school to be initiated.

²¹³ Shale and Buhle, n 146.

²¹⁴ Patrick Duncan, *Sotho Laws and Customs* (1960).

²¹⁵ Poulter, n 42.

²¹⁶ The Human Dignity Trust (2019) <<http://www.humandignitytrust.org.news>> article D) 568 last accessed January 2023.

3.4 Harmonisation of conflicting statutory laws to curb GBV

3.4.1 Counter Domestic Violence Act of 2022

The promulgation of the Counter Domestic Violence Act in 2022 is an achievement in the prevention of violence among couples in a marital setting. The Act criminalises domestic violence and addresses issues of protection of victims and compensation in the event of violation. This law conflicts with the sexual offences Act 2003 when dealing with sexual assault under domestic setting. The penal sections of the same sexual assault differ between these two laws. Those of this law are way less than those prescribed by the Sexual offences Act. The recommendation is to repeal all the penal sections relating to sexual assault and insert a clause in the Counter Domestic Violence that; any sexual violence sentences in it shall align itself with the sentences provided for by the sexual offences Act on the same issue. This will eradicate the confusion and forum shopping on which law to use in sexual violence cases. Thus, increasing access to the courts, encouraging reporting and thus mitigating GBV effects and part of the country's budget geared towards the eradication of GBV would be saved.

3.4.2 Children's Protection and Welfare Act of 2011

The Children's Protection and Welfare Act of 2011 in section 2(1) makes a provision that 'this Act was promulgated to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a state party to'.

This is the supreme law after the constitution that deals comprehensively with the safeguarding the rights of the children in Lesotho. Its limitation is that it is silent on the question of child marriage, which exposes girl children to GBV. As such, it should be amended to cater for the criminalisation of child marriage. As a later statute, it had to verbatim, repeal the Marriage Act 1974 which up to date condones child marriage.

3.4.3 Sexual Offences Act 2003

Thus far, the Sexual Offences Act has a deterrent factor looking at its penal sections. However, it still exposes children to sexual assault by requiring children to consent to sex. The Children's Protection and Welfare Act²¹⁷ and the Constitution are clear that a child is a person eighteen years and younger.²¹⁸ As such, section 8(4) and (5)(a) and (b) of the Sexual Offences Act encourages and exposes children to GBV in clear

²¹⁷ The Children's Protection and Welfare Act 2011.

²¹⁸ The Children's Protection and Welfare Act 2011, sect 2.

contradiction of the above laws and the international instruments that Lesotho is a signatory to geared towards the protection and welfare of the child. These sections must be repealed, and sexual intercourse should be left to adults – people above the age of 18 years. This will assist abating the negative effects of child pregnancy and other negative effects that sex have on children.

3.4.4 Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons Act, 2022

This Act makes provision for the enhancement of the economic status of customary widows enabling them to exercise their economic and property rights in line with the requirements of the Married Persons Equality Act of 2006. It removes the marital power under customary law. It has been realised that most people who suffer from depression come from marriages where power is concentrated in one partner to the exclusion of the other.²¹⁹ This is one of the reasons that propelled the repeal of the minority status of women under custom. More women both under custom and the stature law are entering the paid labour force thus contributing to the GDP of the country.²²⁰ Adherence to traditional gender roles and gendered expectations are slowly diminishing within the marriage setting affected by the economic power.²²¹

The contradiction of the Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons Act 2022 in section 6(4) with section 2 and section 18(4) (c) of the Constitution can be cured by copying what the CPWA and the Penal code did by inserting a clause in its preamble that, this act seeks to promote, protect and respect the rights of all women in alignment with customary international law principles and with other international instruments they seek to implement like CEDAW that Lesotho is a signatory to. In this way, regardless of the Constitution being the supreme law of the country, Lesotho cannot hide behind its domestic laws but must comply with contemporary standards. Section 18(4)(c) of the Constitution needs to be repealed so that the protections guaranteed in the Harmonisation of the Rights of the Customary Widows with the Legal Capacity of Married Persons can be enjoyed.

3.5 Criminalising Femicide

Up to date, there still is no law in Lesotho that directly criminalises femicide – gender based killing of women despite its increasing statistics. Hence, in the Penal code, there must be a specific section that caters for criminalisation of femicide cases. This will raise awareness on the reality of gender-motivated killings and improve statistics

²¹⁹ Joseph, L. Saenz, *Marital Power and Depressive Symptoms*. Aging Soc. (2019) 2520.

²²⁰ Jaomotte, F. 'Female labour force participation: Past trends and main determination in OECD countries' OECD Working paper (2003).

²²¹ Joseph, n 173.

that will aid to push for more attention on prevention policies and support of survivors and relatives.²²²

3.6 Mitigation of Human Trafficking

The majority of persons trafficked are young women and girls. In Lesotho over the past years, there have been reports of increased human trafficking cases.²²³ Traffickers increasingly use social media to identify and recruit victims into forced labour and sex slavery²²⁴ and yet to date, Lesotho has not enacted any cyber law to curb this crime. The Computer Crime and Cyber Security Bill is still not law even to date. There is therefore an urgent need to enact this Bill as an act of parliament. Moreover, women and girls must be afforded economic opportunities to alleviate poverty, gender discrimination be eradicated, information about the crime be available to all and education be promoted, harmful socio economical practices resulting in vulnerability of women and girls be exterminated. The penal jurisdiction of magistrates should be enhanced to increase the number of magistrates who can adjudicate upon human trafficking cases thus increase disposal rate. Prostitution, due to its gendered nature, is evidently present in Lesotho and must be regulated by law or the practice should be outlawed to protect women and girls against its adverse effects. At the heart of it, there is need to dismantle harmful traditional customs and change harmful family traditions, ensure implementation of strategic plans and policies on GBV, ensure sufficient monitoring, and evaluation of laws and programmes, ensure sufficient budgetary allocation for GBV programmes, provide capacity building/development across all sectors, promote adequate awareness raising on GBV and gender equality programmes as well as coordination have to be put in place to curb GBV.

There is need for harmonisation of GBV laws so that the laws complement each other for effective response. Parliament should reconcile sections on penalties for sexual offences and Counter Domestic Violence. It should clearly, define child marriage, insert a section on the minimum age for marriage, and consent to sex as it appears in the Marriage Act and Sexual Offences Act. The provision on wilful transmission needs to be removed as the High Court has already pronounced on its discriminatory and retrogressive nature, and thus, declared unconstitutional by the High Court.

²²² Fitz-Gibbon, K. *The Criminalisation of Femicide: Intimate Partner Violence, Risk and Security: Securing Woman's Lives in a global World*. (London: Routledge Inc) 181.

²²³ Human Trafficking in Lesotho: Root Causes and Recommendations (2007) Policy Paper Poverty Series No 14, 6.

²²⁴ Trafficking in Persons Report: [Lesotho Tier 2] (2022).

3.7 The Constitution of Lesotho

As observed by Christopher Heyns, ‘All human rights are indivisible, interdependent and interrelated and of equal importance for the dignity of all human beings’.²²⁵ One set of rights cannot be enjoyed fully without the other.²²⁶ They are intrinsically connected and cannot be viewed in isolation from each other. If one right is denied, it will affect the enjoyment of another. This principle holds Governments accountable for human rights realisations for it is the obligation of each country to realise all human rights safeguarding and promotion for the people. For example, freedom from discrimination though justiciable in the bill of rights, cannot be enjoyed fully without the right to equality in chapter three, which is not justiciable. One of the remedial avenues that can be ventured into to correct this problem can be that time limits should be set for the realisation of state policy rights to hold states accountable. One of the ways to do so is through the SDGs since they set time frames for realisation of the state policy principles.

The Ghanaian Constitution under chapter 6 states that the Directive Principles of State Policy (DPSP) enshrined therein are justiciable.²²⁷ Further, it is recommended that Lesotho needs to emulate the Constitution of Ghana in ensuring compliance with respect to enforcing and implementing the provisions in the DPSP for a just and free society. In the Ghanaian Constitution, it is stated that the President shall report to Parliament at least once a year on the steps taken to ensure compliance to the realization of the policy objectives contained in chapter 6 of the Constitution and in particular, the recognition of social and economic rights. The South African Constitution has a range of social and economic rights enshrined in the Bill of Rights and as such justiciable and legally enforceable.²²⁸ In Lesotho, the Constitution provides in section 25, chapter 3 that the socio-economic rights sections contained therein, are unenforceable in the courts of law. The problem in the Constitution of Lesotho is that the fundamental rights under chapter 2 and the DPSP in chapter 3 are illogically arranged and do not complement each other unlike the Constitution of India where fundamental rights and the DPSP complement each other.²²⁹ As such, the order of our constitutional arrangement must be revisited, and the Constitution reformed to incorporate all rights as equally justiciable without classification.

²²⁵ Heyns, C. and Van Der Linde, M International Human Rights Law in Africa (Domestic Human Rights Law in Africa, Vol 2, 2004).

²²⁶ Ariel, Z. ‘The Indivisibility of Human Rights Law and Philosophy’ Vol 36 No 4 (2017).

²²⁷ *Ghana Lotto Operators Association v National Lottery Authority* [2008] DLSC2458.

²²⁸ *Grootboom & Others v The Republic of South Africa* 2001 (1) SA 46 (CC) wherein applicant successfully sued the government for a claim of right to housing.

²²⁹ *Minerva Mills Ltd v Union of India & ORS* 1981 AIR 1789, 1981(1) SCR 206.

3.8 Regional and international instruments in combating VAWG that Lesotho has ratified and meant to aid states in the obligation to respect, protect and fulfil human rights

Regional and international instruments are the documents that contain the global human rights standards.²³⁰ The United Nations explains human rights as entitlements that people are born with by virtue of being human beings to enjoy and be comfortable with notwithstanding their nationality, or any other identifying status.²³¹ They are inherent and universal. They are accessed without discrimination.²³² They are based on internationally recognised shared values like ‘fairness, equality, respect, independence’²³³ among others. They have no hierarchy; they are indivisible, interrelated and impractical to separate. States have an obligation to ‘respect, protect and to fulfil these rights’.²³⁴ These are basis of customary international law which is defined as international cooperation of civilised states – It is a general and consistent adherence to the globally agreed shared values which governments feel legally obliged to respect through incorporating its norms into their national statutes.²³⁵ These norms are of such fundamental importance that no derogation is permitted. Lesotho is a participant in the United Nations and as such consequently, bound by these customary international law principles. Thus, harmonisation of national laws and international instruments is a state obligation especially when trying to curb VAWG.

Lesotho became a state party to several international and regional instruments and even domesticated them by enacting conforming national laws to give them effect. Member states are also required to give periodic reports on their performance in domesticating international instruments and Lesotho is complying by always submitting reports to the relevant international bodies. Moreover, rejecting or accepting arguments on the application of relevant international instruments have been subject for litigation in several cases in the courts of Lesotho.²³⁶ The constitution in section 2 also indicates that Lesotho considers itself bound by the international and regional instruments it is a party to. There are other pieces of Legislation that explicitly reference regional and international instruments.²³⁷ For

²³⁰ Human Right Law Journal Vol 19 No 1, (Pretoria Law Press PULP, 2019).

²³¹ United Nations Human Rights global issues.un.org.

²³² Ariel, Z. ‘Indivisibility of Human Rights Law and Philosophy’ Universal Declaration of Human Rights 1948. Vol 36 No 4, (2017).

²³³ Universal Declaration of Human Rights 1948.

²³⁴ Universal Declaration of Human Rights 1948.

²³⁵ Jack, L. and Eric, A. Posner ‘A Theory of Customary International Law’, U. Chi. L. Rev 66 Vrinda Publications (1999) 1113.

²³⁶ Shale, I. ‘Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy’ (2019) 19 African Human Rights Law Journal 193-218.

²³⁷ Shale, n 236.

examples, the Penal Code 2010 makes reference in Part IV to crimes like ‘torture and enslavement’ as having the exact meaning as enshrined in the international law.

Moreover, the Children’s Protection and Welfare Act of 2011 (CPWA) maintains that it invokes the principle of the best interest of the child as explicated in the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child.²³⁸ The CPWA integrates the said conventions in the following wording: ‘The objects of this act are to extent, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, The 1990 African Charter on the Rights and welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.’ It is clear from the above that Lesotho’s adherence to international law can be inferred from these above actions.

3.8.1 Regional Instruments on combating VAWG that Lesotho has ratified

Lesotho has committed to be bound by the African Charter on Human and Peoples Rights (ACHPR).²³⁹ The Charter makes provision in article 5 that all human beings be guaranteed ‘a right to respect of the dignity inherent in a human being and the prohibition of all forms of exploitation.’ In addition, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The Maputo Protocol) to which Lesotho is a state party, provides in article 20 and 23 that state parties must enact and enforce laws prohibiting all forms of violence against women, and take all necessary legislative and other measures to eliminate harmful practices.²⁴⁰

GBV is identified and incorporated in Agenda 2063 as a main source of insecurity among humans. It affects peace and human development, ‘often fuelled by armed conflict, terrorism, extremism, and intolerance.’²⁴¹ Further, several sections of the Sustainable Development Goals (SDGs) of 2015 encourage the prevention and mitigation of GBV. SDG 5 talks of gender equality, SDG 8 talks of decent work and economic growth for all and SDG 10 talks of reduced inequalities.

The Southern African Development Community (SADC) Treaty of 1992 recognises gender equality as the core of achieving its vision.²⁴² The SADC Protocol on Gender

²³⁸ Shale, n 234.

²³⁹ African Charter on Human and Peoples Rights Adopted in Nairobi 27 June 1981, entered into force on 21 October 1986.

²⁴⁰ Onyemelukwe, C. Legislating on violence Against Women: Critical Analysis of Nigeria’s Recent Violence Against Persons (Prohibitions) Act of 2015 (Journal of Women, Gender and the Law, Vol 5, 2016).

²⁴¹ African Union’s Agenda 2063 Report of the Commission, The Africa we Want 2063 (African Union 2015).

²⁴² Treaty of the Southern African Development Community (SADC Treaty Windhoek, Namibia 1992) art 22.

and Development was signed by member states in 2008.²⁴³ Lesotho is one of the SADC member states that have ratified the Protocol on Gender and Development. The other area of concern regarding GBV was identified by the 2013 Protocol which was revised in 2016. It suggests the following recommendations aimed at curbing GBV, comprising of the ‘legal; social, economic, cultural, and political practices; support services; training of service providers; and adoption of integrated approaches, including institutional cross-sector structures, to effectively address the challenges of GBV’. The SADC Protocol further provides the context within which member states that have also ratified the Regional Strategy and Framework of Action for addressing GBV 2018-2030, should direct realisation of their anti-GBV programs. The strategic objective that it aspires to achieve is to reduce the incidences of GBV by half in 2030 and to expedite the implementation and monitoring of the SADC Gender Protocol part 6 on GBV.²⁴⁴

3.8.2 International Instruments that Lesotho has ratified aimed at combating VAWG

(a) Universal Declaration of Human Rights (UDHR), adopted in 1948

One of the international human rights instruments that Lesotho has acceded to be bound by as part of customary international law, is the Universal Declaration of Human Rights (UDHR) adopted in 1948. Articles 1 and 5 of the UDHR,²⁴⁵ makes provision for the fortification of universal shared human rights values like ‘equality, liberty, integrity and dignity for all human beings.’

(b) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted in 1979

Apprehension of the fact that violence against women is a major hindrance to the realisation of gender equality, economic development and peace,²⁴⁶ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979. Article 1 of the Convention prohibits discrimination based on sex.

(c) Convention on the Rights of the Child CRC adopted 1989

The Convention on the Rights of the Child (CRC) was adopted in 1989. It provides that no child shall be discriminated upon for any reason, including, based on sex. The

²⁴³ Regional Strategy and Framework of Action for addressing GBV, 2018 to 2030. (Approved by SADC Ministry of Gender and Women Affairs, 2018).

²⁴⁴ Report on the Criminal Justice System Response to GBV on SADC Region, (United Nations Office on Drugs and crime, 2021).

²⁴⁵ Universal Declaration of Human Rights 1948. Adopted by the United Nations General Assembly at its third session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France. accessed 15 August 2019.

²⁴⁶ Neil, A.; Englehart, M. and Millar, K. ‘The CEDAW effect: International law’s impact on women’s rights’ *Journal of Human Rights* 13(1)(2014).

guiding principle it instils is the ‘best interest of the child, the right to life, survival and development of every child regardless of sex’.²⁴⁷ Article 19 of the CRC provides that abuse, neglect, and violence are the sins that every child must be protected against. Also, that every child has a right to be properly supported and maintained.

By virtue of these instruments, all violence levelled against women and girls has to be eradicated by being investigated and being adjudicated upon to finality and perpetrators being brought to justice.²⁴⁸

Lesotho upholds a dual system of laws. Domestication of international legal instruments must be attained first, before individuals can assert the rights contained in them, and corresponding national laws enacted to give them effect. The need to amend and/or repeal laws that are non-conforming cannot be overlooked. Both the CEDAW and the Maputo Protocol ought to be domesticated and the reservations Lesotho made under the CEDAW, revoked.

3.9 Conclusion

The human rights of all citizens must be thoroughly vindicated. A state should be judged by how thorough it protects the women and girls in its jurisdiction. Human beings must be able to exert their internationally protected rights nationally. Domestication must be the ultimate goal of each state, for it is the only process through which harmonisation of conflicting laws for the protection of human rights can be achieved.²⁴⁹ Lesotho is a signatory to several international instruments. Its ratification of those instruments is a demonstration that the state is willing to be bound by the provisions thereof, and hence, domestication ought to follow suit. When international instruments are domesticated, the country will benefit. Not only will Lesotho citizens be able to assert the range of fundamental rights and freedoms guaranteed in chapter two of the Constitution, but there will also be the possibility to harmonise them with the provisions of chapter 3 on directives of state principles will acquire legally binding status once the national laws are enacted to give them effect.

Lesotho has not attained this goal because the customary and statutory laws still contain averments that go against their undertaking under regional and international instruments.²⁵⁰ Considering that Lesotho has currently embarked on a project of widespread national reforms, modifications that can be done to the Constitution as an

²⁴⁷ Ruppel, C.O. *Children’s Rights in Namibia*, (Macmillan Education Namibia, 2009).

²⁴⁸ Onyemelukwe, n 240.

²⁴⁹ Shale, n 234.

²⁵⁰ The World Bank Report 2018 ‘Ending Violence Against Women and Girls: Global and Regional Trends in Women’s Legal Protection Against Domestic Violence and Sexual Harassment’ March 2018.

endeavour to improving protections of the human rights contained in regional and international instruments aimed at curbing GBV and ensuring accountability would be of immense importance. In undertaking reforms on the Constitution, provision should be made on the domestication of regional and international instruments.

CHAPTER FOUR

4. Economic cost benefit to the country if customary law and statutory laws are harmonised to ensure adequate protection to women and girls

4.1. Introduction

From an economic perspective, it is common cause that every identifiable consequence, of violence has an economic cost whether it is direct or indirect, whether it is for the state or an individual.²⁵¹ Quantifying the economic costs and effects of gender-based violence (GBV) will aid policy makers in making informed decisions in the allocation of public resources aimed at eliminating violence against women and girls (VAWG).²⁵² It will assist and improve appreciation of the actual cost of VAWG and thus, draw attention to the importance of raising awareness on the magnitude of the problem. It will intensify the inclination to take action.²⁵³ Moreover, policy makers will be informed on where to start in addressing VAWG, gauge the benefits of potential recommendations aimed to prevent and or manage the effects of VAWG.²⁵⁴ This will include a concerted effort to repeal and amend the laws that enhance VAWG in Lesotho and thus, channel momentum behind establishing an all-encompassing legal culture²⁵⁵ in which both women and girls under custom and under statutory laws are protected against GBV.

4.2. Preventing VAWG is cost-effective

The phenomenon of VAWG is a human rights violation with detrimental effects to its victims who are affected physically, emotionally, psychologically and, their assailants also are affected, and society at large.

Attainment of equality and empowerment of all citizens can be achieved when VAWG is eradicated.²⁵⁶ If the economic cost of violence is measured, policy makers will become aware of what it will cost the nation if it does not act promptly in addressing VAWG and thus, act accordingly and promptly.²⁵⁷ It will also assist governments in observing that Prevention is better than cure.²⁵⁸ Capitalizing in

²⁵¹ Commonwealth Secretariat, n 4

²⁵² Day, McKenna and Bowlus, n 161.

²⁵³ Agarwal, B. and Panda, A. 'Towards Freedom from Domestic Violence: The Neglected Obvious'. *Journal of Human Development* 8(3) (2007), 359, 388.

²⁵⁴ Commonwealth, Secretariat, n 4.

²⁵⁵ Agarwa and Panda, n 253.

²⁵⁶ Torres- Rueda, S. et al, What will it cost to prevent violence against Women and Girls in low and middle income countries? Evidence from seven countries, (Planning, PlosMed, 2020).

²⁵⁷ Commonwealth Secretariat, n 4.

²⁵⁸ Commonwealth Secretariat, n 4.

deterrence programmes addressing root foundations of VAWG remain the most cost effective and saving economically than handling the symptoms and results of VAWG.²⁵⁹ It is therefore critical to invest in all programmes aimed at addressing the root causes of VAWG and this can be achieved through all-encompassing collection of statistical evidence and that clearly indicates the amount of impact and the cost of services for VAWG prevention.

4.2.1. Preventing VAWG through the Collection of VAWG data from stakeholders

The use of VAWG data collected at health centres, police stations and statistical data collected from the courts when cases are reported and adjudicated upon will provide the basis for making decisions based on tangible evidence, which is critical in diagnosing applicable interventions and or policies.²⁶⁰ It will provide an opportunity to ascertain data gaps that need to be filled in ending extreme poverty that fuels VAWG and in ensuring a prosperous healthy life free from violence.²⁶¹

The data will also enable the government to know the prevalence rate and then focus on prevention mechanisms to mitigate the cost of VAWG. A study by the Commonwealth secretariat showed that violence affects health, and this has cost implications. In Lesotho in the year 2020, it was estimated that the cost of health care that the victims of crime incur due to violence (direct costs of medical treatment to be around M140.6 million or 0.405% of GDP).²⁶² These millions could be channelled to other development issues if VAWG is prevented. VAWG is a human right violation that affects the health of the victim, as such knowing its cost will help the government to better improve their health services to better cater for the special needs of VAWG victims.²⁶³

VAWG cost the country millions.²⁶⁴ This amount is enormous, requiring all government departments and stakeholders to collaborate in preventing VAWG. Abrupt actions aimed at formulating effective strategies in order to mitigate and to ultimately eradicate VAWG have to be taken.²⁶⁵ There has been a realisation that there is a need to improve on the collection of the necessary data in order to aid the government in making informed policy decisions geared towards the eradication of VAWG. It entails modification of the forms and registers used for data collection at hospitals, the police and the courts, digitisation and easy sharing of the data collected. It also entails that staff be trained on how to collect data, preserve, assess, and

²⁵⁹ Commonwealth Secretariat, n 4.

²⁶⁰ Commonwealth Secretariat, n 4.

²⁶¹ Commonwealth Secretariat, n 4.

²⁶² Commonwealth Secretariat, n 4.

²⁶³ Heise, Ellsberg M. and Gottemuller, M. *Violence against Women* (John Hopkins University School of Public Health, Population Information Program, Baltimore MD No 11, 1999) 79.

²⁶⁴ Commonwealth Secretariat, n 4.

²⁶⁵ Agarwa, and Panda, n 253.

disseminate all information on VAWG. Referrals to psycho-social, economic, and legal support be provided and be decentralised. There should be development of clear policy guidelines in addressing the adverse effects of VAWG upon its victims and survivors by reconsidering the budgetary constraints across all sectors dealing with VAWG to allocate adequate funds to carry out their functions.²⁶⁶

4.2.2 Preventing VAWG and investing in gender equality and empowerment is vital for economic growth

(a) The right to education

There are multitudes of benefits that obtain from capitalising in VAWG prevention, gender equality and empowerment. For example, it has been argued that if the non-protective Laws of Leretholi and the Marriage Act of 1974 that encourage child marriage are repealed and focus is shifted to acknowledging the right to education of a girl child which is guaranteed by the constitution and investing in her education, the country will gain economically. A girl child's future earning potential and productivity will adversely be affected if she loses time to study because of not being afforded a right to education and this thus has far-reaching implications on the economy of the country.²⁶⁷ The government can improve education services by empowering schools to impart awareness to the teachers on how to handle incidences relating to VAWG; that is, train them on how to handle delicate and proper responses to sensitive information they are told by students and what they observe as teachers related to VAWG and the emphasis being preventing its effects on children.²⁶⁸ Awareness raising on VAWG related issues affecting children, increasing the education budget to ensure adequate allocation of funds to carry out the trainings, increase the experts in school curriculums geared towards handling violence against children and thus invest in the future. This will contribute to the country's economic growth.²⁶⁹

(b) The Right to Reproductive Health

Promoting and investing in the right to reproductive health for girls increases the chances that a girl will mature in good health, finish her studies, increased opportunities of getting a better paying job or opportunity to make her own living and as a result, stand a chance at a better future out of poverty which exposes them to GBV and its legion of effects.²⁷⁰ In the process she will add value to the economy of the country. Repealing the sections of the Sexual Offences Act that encourage

²⁶⁶ Commonwealth Secretariat, n 4.

²⁶⁷ Austrian, K. *Economic Strengthening Interventions and Adolescent Girls* (SEEP Network Webinar, 28 October 2014) 314.

²⁶⁸ Austrian, n 267.

²⁶⁹ Commonwealth Secretariat, n 4.

²⁷⁰ Shumway et al, n 120.

children consent to sexual intercourse and delaying early parenthood, which is one of the resultant effects and uprooting violence in the home setting and among intimate partners are also a step in the right direction to curbing GBV.²⁷¹

(c) Women and Girls Economic Empowerment

It is said that if women's opportunities of earning money can be increased, legal ability to own assets both movable and immovable and have control over their own resources to improve their lives, they ought to have more economic power, which they can use to prevent and escape from violence in the home'.²⁷² Thus, the presence of GBV will thus erode any development progress for women and cripple any endeavour to enhance their business performance and therefore jeopardise their income opportunities.²⁷³ In preventing VAWG, women's involvement and inclusion in the economy should be enhanced considerably. To attain economic empowerment status, women must be afforded an opportunity in decision making positions; any opening for leadership can be reinforced in support of women as another way of VAWG prevention methods. This was illustrated in the case of *Molefi Ts'epe v Independent Electoral Commission and Others*.²⁷⁴ In the *Tšepe* case, a constitutional challenge was brought before the court wherein the applicant, a male local government elections candidate from the District of Leribe wanted to stand for elections at the Litjotjela No 5 constituency. He wanted the court to declare the one quota seat reserved for women as unconstitutional and discriminatory. The learned judges of the Court of Appeal however, overruled and held that the Amendment Act was not discriminatory, but constituted an affirmative action measure to ensure women representation in local government, which Lesotho had an international human rights obligation to observe in empowering women.²⁷⁵ This is true in that lack of economic independence exposes women to GBV. To circumvent the situations that make women prone to violence, their economic development has to be enhanced.²⁷⁶

(d) Eradication of Discriminatory Social Norms to enhance women and girls' economic empowerment

Women's economic empowerment is affected by presence of VAWG in their lives.²⁷⁷ Women's economic empowerment embraces a practice whereby women and girls' lives are changed for the better – from a situation of powerlessness in terms of lack of

²⁷¹ Shumway et al, n 120.

²⁷² Georgia, T. DFID, Guidance Note on Addressing Violence Against Women and Girls through DFID Economic Development and Women's Economic Empowerment Programs – Part 1 (London VAWG Help Desk, 2015).

²⁷³ Georgia, n 272.

²⁷⁴ *Molefi Ts'epe v Independent Electoral Commission and Others* (11/05 CC:135/05) [2005] LSCA 14.

²⁷⁵ JUDGES: Steyn Groskopf, Melunsky, Smallberger and Gauntlett in the *Tsepe* case, n 274.

²⁷⁶ Georgia, n 272.

²⁷⁷ Georgia, n 272.

economic asserts to a situation where they are equipped with experience, ‘economic advancement’ and their economic power is vastly improved across all economic spheres.²⁷⁸ This can be done through equipping them with information thus, increasing their knowledge and sharpening their skills both individually and collectively, giving them a sense of ownership, reliance on their capabilities and self-confidence in making economic chances to better their lives. They be given opportunities to learn new job skills to help them to be innovative.²⁷⁹

Women’s economic status must be recognised at household level, community, and local economy (including markets). Women should go beyond what tradition and norms have assigned them and should test their potential even to venture into realms that were traditionally regarded as men’s realms. Like men, they should equally be empowered to gain access to and control over financial, access to employment and income-generation activities, and access to land. They be availed opportunities to be able to organise with others to form societies and enhance economic activities in markets and value-chains. To be afforded opportunities in political and legal environment.²⁸⁰ ‘It is not just looking at whether women and girls have increased their access to income and assets, but also whether they have gained more control over them and are able to use them to have control over other areas of their life’,²⁸¹ including the others that excluded them before. Unless the gender disparities that fuel VAWG are addressed, economic improvement undertakings by the government and other stakeholders will not attain the goal of improving women’s lives but could prove to be detrimental. As such, addressing the inequalities within development programmes and policies will help to expedite women and girls’ economic empowerment.

The International Labour Organisation (ILO) estimates that some US\$5.8 trillion could be added to the world economy and unlock large tax revenues if by 2025, the economic gap between male and female participation rates can be closed by 25%.²⁸² As the World Health Organisation (WHO) stipulated, the international standard for the health sector response to VAWG is the clinical and policy guidelines on responding to intimate partner violence and sexual violence against women.²⁸³ If followed to the core, GBV can be combated and the economy saved.

Violence against women and girls (VAWG) also limits progress of states enroute for the realisation of their duties and time limits as set by the Sustainable Development

²⁷⁸ Georgia, n 272.

²⁷⁹ Georgia, n 272.

²⁸⁰ Georgia, n 272.

²⁸¹ Georgia, n 272.

²⁸² ILO ‘World Employment Social Outlook – Women in Employment’ (2017) accessed 28/02/23 http://www.ilo.org/wcmsp5/groups/public/-dgreports/-inst/documents/publication/wcms_557077.

²⁸³ WHO clinical and policy guidelines on responding to intimate partner violence and sexual violence against women; see <https://www.who.int/reproductivehealth/publications/violence/9789241548595/en>.

Goals (SDGs) by ‘impacting on women’s and girls’ health, education, and participation in work. It violates women’s and girls’ human rights and can have a negative impact on long-term peace, stability and economic prosperity of the country.’²⁸⁴ If VAWG is combated, states will be on time to fulfil their obligations under the SDGs.

(e) Prevention of VAWG and the Private Sector

The costing exercise by the Commonwealth Secretariat in Lesotho exposed that the private sector is also affected negatively by the cost of VAWG. It is reported that in ‘2017, the private sector incurred the cost equivalent of 1.946% of GDP’.²⁸⁵ This means the eradication of VAWG in Lesotho should be of utmost importance for the private sector as well. In response to VAWG, the private sector needs to strike a balance between mitigating the high economic loss to business caused by GBV in conjunction with taking care of the wellbeing of the employees.²⁸⁶ The elimination of VAWG can help save these resources – perhaps for more judicious uses. It is envisaged that several roles can be played by the private sector as the effects of VAWG are all encompassing. Organisations can come up with a plan and device strategies aimed at combating VAWG. It was recommended by the commonwealth that, ‘the business sector should invest part of its corporate social responsibility funds into ensuring the prevention of VAWG’.²⁸⁷ In their occupational health and safety agenda, they should take account of psycho – social (mental health), and general well-being of its employees. For companies to work well regarding GBV prevention, it is recommended by the Commonwealth Secretariat that companies should incorporate GBV issues in their employee training on gender equality and GBV prevention, and that their by-laws should clearly indicate their attitude towards GBV in their employee policy and that domestic risk assessment be carried out for all staff.²⁸⁸

4.3 Conclusion

The most ruthless violation of human rights is GBV.²⁸⁹ Its adverse effects are all-encompassing affecting all people, individually directly or indirectly affecting the community at large as well. It affects both the social and economic sphere of life and the human rights violations resulting from GBV is present and remain a huge economically costly problem in every country surpassing its socio-economic status,

²⁸⁴ DFID Research programme: What Works to Prevent Violence against Women and Girls’ programme, Component 3 will focus on determining and analysing the economic and social costs of VAWG DFID, 2011; DFID, 2012.

²⁸⁵ Commonwealth Secretariat, n 4.

²⁸⁶ Commonwealth Secretariat, n 4.

²⁸⁷ Commonwealth Secretariat, n 4.

²⁸⁸ Commonwealth Secretariat, n 4.

²⁸⁹ Commonwealth Secretariat, n 4.

from the richest to the poorest countries in the world regardless of their religion or language.²⁹⁰ The need for harmonisation of GBV laws so that the laws complement each other for effective response is encouraged. If all indirect or direct costs of VAWG to individuals and the community at large is costed, policy makers would be able to know the status of the problem and gauge their response mechanisms as well as scale the effectiveness of the programmes put in place to addressing the reduction of VAWG and its devastating consequences.²⁹¹ Once the costs have been determined, ‘the cost-benefit or cost-effectiveness of different programs will aid in exploring effective programs for early detection, intervention, treatment, and public education and the need for budgetary changes, for legislation and for effective programs in preventing violence against women and its consequences at the individual, community and national levels’.²⁹² The eradication of VAWG thus needs a consented effort from all fronts. Understanding the extent and costs of VAWG is vital for economic growth.

²⁹⁰ Working Together to Prevent Sexual Exploitation and Abuse: Recommendations for world Bank Project (World Bank group, 2017).

²⁹¹ Commonwealth Secretariat, n 4.

²⁹² Commonwealth Secretariat, n 4.

CHAPTER FIVE

5. Conclusion and recommendations

To effectively protect women and girls against GBV, at the heart of it all, there is need to dismantle harmful traditional customs and to change harmful family traditions that have a potential of exposing women and girls to violence.²⁹³ This can be done through developing educational campaigns on all forms of GBV.

It is time that Lesotho reconsiders the abolition of payment of cattle for criminal acts in all its laws that harm the human rights of its citizens. The Laws of Lerotoli must be reformed to cater for the human rights of its subjects irrespective of gender.

There is a need for new norms based on empowering women.²⁹⁴ These entail capacity building and development across all sectors, adequate awareness raising on GBV and gender equality programmes.

It has been realised that most children suffer abuse in silence because in Lesotho, talking about sex is considered a taboo. It is commonly termed 'ntho tse mpe' fairly translated as 'bad things'. As such, children need to be taught and encouraged to speak about sex and sexuality openly. Regressive practices like child marriage be banned.

It is recommended that the Constitution of Lesotho be amended, and sections 13 and 26 be reconciled. The non-justiciability of section 26 is among the major contributing factors to gender-based violence that is prevalent in Lesotho. Non accountability by governments to have left unattended so many laws that are still discriminatory to women and girls up to date is brewed by this no-justiciability of section 26.

As it has been noted that femicide is on the increase in recent years, Lesotho should emulate South Africa, which in 2009 formulated a Femicide Policy. This will help the Lesotho government raise awareness on the realities of gender-motivated killings. Data collection on femicide must be established, coordinated across all ministries and non-governmental stakeholders in order to improve statistics that will help in pushing for more attention on prevention policies and support.²⁹⁵ There is need to insert a specific section in the Penal code 2010 to cater for the criminalisation of femicide cases.

²⁹³ Hall, D.E. and Helmich, J. *Fixing Patriarchy: Feminism and Mid-Victorian Male Novelists* (NYU Press, 1997).

²⁹⁴ Gupta, G. *Ten Ways to Smash Patriarchy at Home* (Delhi University Press India, 2021).

²⁹⁵ Fitz-Gibbon, K. *The Criminalisation of Femicide: Intimate Partner Violence, Risk and Security: Securing Woman's Lives in a global World*. (London: Routledge Inc) 181.

Both the Ghanaian and Indian Constitutions have provisions in the sections on Directive Principles on State Policy that give effect to and encourage respect for international law and the treaty obligations they have ratified and are legally committed to. The Lesotho Constitution does not have any provision relating to the domestic implementation and enforcement of the international treaties it has ratified and is bound by, which leaves room for inaction on their realisation by the government and hence, the difficulty in invoking and applying the protections encompassed in those instruments as was held in the *Senate Khabasheane Masupha* case.²⁹⁶ Lesotho should therefore, incorporate provisions with respect to the domestic implementation and enforcement of international instruments in the Constitution.

As a recommendation in Lesotho, the minister responsible should be obligated to report on progress in implementing and enforcing the constitutional provisions under Directive Principles State Policy. This will ensure compliance by the government to ensure that discrimination is rooted out in all laws. Another remedy would be to set time frames for the fulfilment of the provisions in the DPSP as a way of holding the state accountable. This can be done through greater commitment to implementing the Sustainable Development Goals since they embody most of the policy principles contained in the Constitution and the fact too that the Sustainable development Goals sets time frames for realisation.

The government may also prioritise the identified strategies over a short, medium, and long-term period considering their importance, resource constraints and implementation capacity.²⁹⁷ The International Covenant on Economic Social and Cultural Rights (ICESCR) makes clear the provisions contained therein, are realisable progressively.²⁹⁸

The Lesotho Parliament should reconcile the sections on penalties for sexual offences in the Counter Domestic Violence Act to align with the penalties for the same offences and sentences in the Sexual Offences Act, which is the comprehensive law in that regard. Parliament also needs to amend the Marriage Act and the Laws of Lerotoli by inserting relevant provisions with respect to the minimum age of marriage, and consent to sex from what currently appear in the Marriage Act and Sexual Offences Act.

The Counter Domestic Violence Act makes provision for the establishment of a family court where domestic violence cases would be handled. Considering the sensitivity in those cases; it is recommended that service providers to handle these cases be trained for the effective delivery of their mandate. Tools for monitoring and evaluating GBV need to be developed and used for assessing policies and programs,

²⁹⁶ *Senate Khabasheane Masupha* n 23.

²⁹⁷ Commonwealth Secretariat, n 4.

²⁹⁸ The International Covenant on Economic Social and Cultural Rights (ICESCR) 1996.

including GBV strategies put in place to respond and be used for harmonising data collection systems and improve data collection by all stakeholders.

It is noted that VAWG is a major violation of human rights and a public health issue, which attracts high economic costs at individual and national level.²⁹⁹ It requires immediate and effective actions by nationals to change their attitudes relating to VAWG and the government should focus on three important aspects that is; ‘prevention, provision and protection’.³⁰⁰ This could be done through its three arms; the legislature, to promulgate and amend conflicting laws and domesticating the international and regional instruments that Lesotho has ratified. The executive, to safeguard that the realisation of the economic, social and cultural rights of the people are effectively realised and accountability maintained and the judiciary in hearing cases and applying national and international laws freely.

To improve economic growth, it is vital to address VAWG for it affects women’s economic potential by affecting their income and earning capacity, also hampers business productivity and efficiency and profitability is also adversely affected and therefore, impacts on economic growth for the country.³⁰¹

Lesotho has the obligation to promote a society based on equality and justice through the adoption of relevant non-conflicting laws and policies and to, further take appropriate measures in promoting equality of opportunities for men and women, boys and girls to enable them fully participate in all spheres of life equally as a means to enhance economic growth for the country.

²⁹⁹ Commonwealth Secretariat, n 4.

³⁰⁰ Commonwealth Secretariat, n 4.

³⁰¹ Taylor, G et al, ‘DFID Guidance Note Part A Addressing Violence Against Women and Girls Through DFIDs’ (Economic Development and Women’s Economic Empowerment Programmes February 2015).

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