



Gender Inequality in Lesotho: The Right of Succession to Chieftainship

by

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DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and has not previously in its entirety or in part been submitted at any other university for a degree.

Signature.....

Date.....

ACKNOWLEDGEMENTS

I would like to dedicate this paper to my parents, my late father Mr Mokutlane Metsing & my mother Mrs. 'Mateboho Metsing and all of my family members for their undying support and encouragement. I would like to thank the Almighty God for the strength to complete the paper, a special thank you to my supervisor Prof. M Hansungule for accepting the task of supervising this paper and for his invaluable contribution. I would also like to thank and acknowledge the encouragement from all my friends and colleagues - A sincere thank you to you all and may God's grace and love abound to you all.

ABSTRACT

Like many other African countries, the system of traditional leadership and chieftainship in Lesotho is strongly embraced and deeply embedded. Under customary law chiefs have been regarded as and served as “governors” of their societies with power over different aspects of life. However the traditional leadership systems have been and continue to be predominantly male. The study therefore will examine the institution of chieftainship in Lesotho under both the Constitution and customary and; how this has led to gender inequality and infringement of international human rights law. Under customary law which is recognized by common law women, daughters in particular are denied the right to succeed to chieftainship on the basis of gender and sex. As a result, this has led to gender inequality and discrimination against women. Although the kingdom of Lesotho practices a dual system, obligating itself to incorporate international law into domestic law, it has been evident that both the constitution and customary law are inconsistent with international law particularly Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, which aims to protect and promote human rights; In this case women’s rights. Although chieftainship perceived to be important and relevant, it has been argued that the institution of traditional leadership no longer has a place in the modern world therefore should be abolished.

The study further examines some similar cases and judicial responses as well as the application of international law in addressing the issue of gender inequality that results from customary law. I also question under what or which circumstances shall customary law take precedence over international law and when should international law precede over customary/ domestic law. I therefore argue and recommend for the reformation and amendment of Chieftainship Act as well as the Constitution of Lesotho which continues to advocate for gender inequality based on cultural practices and customary law and lastly, the adoption of positive practices from the other African states the paper look at.

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CHAPTER ONE

1 Introduction

The kingdom of Lesotho formerly known as Basutoland is a landlocked country completely surrounded by the Republic of South Africa. Lesotho gained independence from Britain on 4 October 1966 and adopted a new Constitution.¹ However, Lesotho adopted a new Constitution in 1993 which was amended in 1996, 1997, 1998, 2001, and 2004 as well as twice in 2011.² The Constitution establishes a hereditary monarchy based on a dual system of governance.³ The dualistic governance system comprises of a modern “democratic parliamentary government” on one hand, and a traditional (customary) system on the other.⁴ The Constitution specifically creates the Office of the King⁵ who is the constitutional monarch and Head of State, as well as the house of Parliament.⁶ While the prime minister and the cabinet members are voted into Parliament through a democratic process of election, the chiefs are nominated and appointed in accordance with customary law which is still widely respected in Lesotho.⁷ The institution of chieftainship is also recognized under both customary and common law.⁸ The Constitution of Lesotho recognizes the operation of custom and tradition as one of the legitimate sources of law.⁹ Under dualist systems of law, customary and common law norms do not operate in parallel

¹ Africa.co.ls *Lesotho its people, issues and history* Available at: <http://africa.co.ls/aboutLesotho.html> (accessed 14 August 2014).

² Constitution of Lesotho (1993) as amended in 1996, 1997, 1998 and 2001. Available at: <http://www.content.eisa.org.za/old-page/lesotho-constitution> (accessed 13 August 2014). See also the Amendment made in 2006 on the Prevention of Corruption and Economic offence Act available at: <http://www.lesotholii.org/ls/legislation/act/2006/8>. The Sixth amendment was made on Section 31 on the protection of Victims. Available at: <http://www.lesotholii.org/ls/legislation/act/2011/13> and the seventh amendment on the Section 69 (1) of the Constitution of Lesotho in 2011. Available at: <http://www.lesotholii.org/ls/legislation/act/2011/15> (accessed 26 August 2015).

³ See Sec 44 (office of the King), Sec 54 (House of Parliament) and Sec 86 (Establishment of the Executive) of the 1993 Constitution of Lesotho.

⁴ T Quinlan & M Wallis ‘Local governance in Lesotho: The central role of chiefs’ (2003) in PS Reddy & DI Ray *Grassroots governance? Chiefs in Africa and the Afro-Caribbean* 145.

⁵ Chapter V, Sec 1 of the 1993 Constitution of Lesotho.

⁶ Chapter VI, Sec 57 of the 1993 Constitution of Lesotho.

⁷ Quinlan & Wallis (n 4 above) 149.

⁸ Chieftainship Act of Lesotho, Act 22 of 1968.

⁹ Sec 7(6) and Sec 18(4) (c) of the 1993 Constitution of Lesotho.

vacuums but should be complementary. However, it is inevitable that clashes between certain aspects of the two systems of law will arise. In such instances, the law will provide for ways of resolving the clash.¹⁰ However, one of the most problematic aspects between the customary and common law of Lesotho has been the issue of equal treatment of women with regard to assumption of traditional leadership roles.

Under customary law, a woman may act as chief but cannot assume the position of chief on a permanent basis.¹¹ The institution of chieftainship may therefore be viewed as one of the ways of reinforcing patriarchy and male dominance backed by tradition as well as the Constitution. This cultural and Constitutional order creates an environment which normalizes discrimination of women and fails to take into account the evolving perceptions of equality today. The elimination and abolition of inequality and discrimination against women has been one of the primary objectives the kingdom of Lesotho has undertaken. However the country continues under the Constitution to have discriminatory laws that clearly disadvantage women based on sex and gender.¹²

The Lesotho Chieftainship Act of 1968, Section 10 is an example of laws that formally embodies discriminatory provisions against women. Today the kingdom of Lesotho can be viewed as a state which formalizes discrimination and inequality against women regardless of contemporary efforts to bring to an end such unfair treatment. The 1968 Chieftainship Act addresses the issue of the succession to the chieftaincy office. Section 10 states that “the first born or the only son of son of the first or only marriage of the chief succeeds to that office ...”¹³ Section 10 (4) further states that the only wife of the chief can “act” as the chief if there is no one to take up the throne.¹⁴

¹⁰ Basutoland National Council *Report on Constitutional Reform and Chieftainship Affairs* (1958).

¹¹ Chieftainship Act of Lesotho, Act 22 of 1968.

¹² Southern Africa Litigation Centre (17 April 2014) *News release: dark day for women's rights in Lesotho as highest court upholds discriminatory Chieftainship Act* Available at: <http://www.southernafricalitigationcentre.org/2014/04/17/news-release-dark-day-for-womens-rights-in-lesotho-as-highest-court-upholds-discriminatory-chieftainship-act/#> (accessed 13 August 2014).

¹³ The Chieftainship Act of Lesotho, Act 22 of 1968.

¹⁴ *See also*: Sec 7(6) and Sec 18(4) (c) of the 1993 Constitution of Lesotho.

It must be noted that chieftaincy in Lesotho is composed of the Paramount Chief (King), Principal Chiefs, Ward Chiefs and Village Chiefs. While succession to the position of village chief is not strictly hereditary, the assumption of the other three first categories of chieftaincy is strictly based on lineage. Under the Constitution and Chieftainship Act, women may only act as regents but can never assume the position of chief in their own right. It must be emphasized that only widows of deceased chiefs may act as regents until the time when a rightful heir assumes the throne.¹⁵

Chiefs in villages are usually ordinary citizens who may be appointed under the recommendation of the paramount or principal chiefs. The office of village chief is not as high ranking as the Paramount, Principle and Ward chiefs who are endowed with a number of powers and in charge of significant assets. The village chiefs mainly deal with simple duties for instance settlement of small disputes between residents of that locality. In this case, women may be appointed as village chiefs because the position does not have significant proprietary consequences. Regardless of the fact that a woman may be appointed as a village chief, the institute of chieftainship still remains male-dominated. Section 10 of the Act does not offer a justification as to why women cannot succeed the throne even if they are first born children.

Chapter II of the Constitution of Lesotho upholds the principle of equality and non-discrimination.¹⁶ However, the same Constitution contains provisions that legitimize customary law which embodies discriminatory practices that disadvantage women. It has been argued that the Constitution is patriarchal in nature, and it is the very same nature that continues to undermine women's abilities in respectable positions, such as that of the chieftaincy.¹⁷ As a result women under the both the Chieftainship Act and Constitution continue to suffer human rights violations on the basis sex and gender as demonstrated in the case of Senate Masupha, (Senate

¹⁵ Sec 46 of the 1993 Constitution of Lesotho.

¹⁶ Sec 4 (1) of the 1993 Constitution of Lesotho.

¹⁷ J Laurence 'Chieftainship, succession and gender equality in Lesotho: Negotiating the right to equality in a jungle of pluralism' (2013) 22 *Texas Journal of women and law* 2 208.

Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea (Mr. Kolobe) and Others.¹⁸

The Kingdom of Lesotho is a signatory to several treaties aimed at the promotion and protection of human rights not only universally but also domestically. As a dualist state, it undertakes and obliges herself to domesticate the international laws. However, Lesotho made a reservation on Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as it was said to be incoherent with the kingdom's customary law on succession to chieftainship.¹⁹

The main issue the paper seeks to address and unpack is the plight of inequality and discrimination women are subjected to on the basis of gender and sex. Women are denied the right to succeed to the throne based on their gender. This argument is based on Section 10 of the Chieftainship Act 22 of 1968. This further proves the incapability of the Constitution to protect women's rights and abolish inequality and discrimination on the basis of sex and gender. It is empirical to also determine whether issues relating to inheritance may be another reason as to why women under customary law are denied succession. It is therefore my proposal to advocate for reformation of both the Constitution and the Chieftainship Act in order to be consistent with the international human rights treaties Lesotho signed, aimed at abolishing discrimination and inequality between men and women. It is therefore important that the law be used as tool to achieve social change and reformation.

1.1 Problem statement

Women under customary law cannot succeed to chieftaincy in their own right. According to the Chieftainship Act 22 of 1968 Section 10,²⁰ women can only act as regents not chiefs. In addition,

¹⁸ Constitutional Case No.5/2010 available at: <http://www.lesotholii.org/ls/judgment/high-court/2013/9> (accessed 20 August 2014).

¹⁹ Art 2 of the Convention on the Elimination of the Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

²⁰ Chieftainship Act of Lesotho, Act 22 of 1968.

according to Constitution of Lesotho section 46,²¹ one becomes a regent only if the “rightful” heir is unable to succeed as a result of an infirmity or that he is under age.

As a result women in Lesotho continue to endure the harsh realities of discrimination and inequality based on gender and sex under customary law. This has led to the infringement of women’s human rights and dignity. The undermining of women’s capabilities in respectable positions, such as that of the chieftaincy is further fuelled by some sections provided by the Constitution as well as the reservation Lesotho made on Article 2 of CEDAW based on customary law in support of male dominance. Despite the Constitution’s emphasis on non-discrimination and equality for all, women remain victims of discrimination and inequality.

1.2 Research questions

- For how long is the reservation valid? Can the reservation be regarded as valid if it is against international law and human rights law?
- To what extend given the reservation on CEDAW can discrimination and inequality be justified? And can this justification be seen as legitimate in the light or under human rights law?
- To what extend is Basotho customary law in consistent with international human rights law?
- Can we use the law as a tool for engineering social change and the perceptions of the Basotho customary law that serves to bring about injustice?

1.3 Methodology

The main focus of the study will be on Lesotho’s legal position on gender equality and particularly in respect of succession of women to the position of paramount and principal chiefs. The study will compare Lesotho’s position to other southern African countries including Zambia, Botswana

²¹ Sec 46 of the 1993 Constitution of Lesotho.

and Namibia to mention a few. It is imperative to focus on these countries as they are amongst many African countries which continue to embrace chieftainship and regard the cultural practice of chieftaincy as important under customary law. However it is important to note that the very same practice of chieftainship has led to gender inequality and the violation of human rights, especially women's rights. Therefore, the prime objective of the study is to examine the extent to which customary law plays a major role in the violation of human rights. The information will be obtained through the following.

The research will be a desk research and the data collection will be through the process of reviewing the relevant literature on human rights, customary law and international law dealing with gender inequality. The study will make use of both primary and secondary sources. Primary sources include Constitutions, Charters and Conventions, reports from the direct source of information, newspaper articles and legislation. Primary sources give first-hand information concerning the actual experiences that will be investigated. This therefore enables one to understand the depth of the problem at hand. The secondary sources that will also be examined include: online articles, journal reports, books and reviews amongst others that may be of relevance to the study. Secondary sources help understand the past by giving an interpretation and analysis of the primary sources. Both sources of information are very important as they form the basis of analysis and understanding of the research discussions. After the data has been collected, data analysis is the next approach. Data analysis helps to gain more knowledge about the study and the information gathered can be used to draw conclusion and help bring about solutions or changes. Different data analysis methods will be employed. These include the descriptive, comparative and analytic approaches. The descriptive method is utilized in investigating incidents of discrimination and inequality subject to women based on gender and sex, and defining the key concepts within the study. The descriptive approach is important in determining the trends of the problem of inequality of women as well as tracing any progression in the status of women in Lesotho and the countries of comparison. An analytic approach will be employed to help with understating the problem and also with the aim of helping to bring about solutions and recommendations to the problem at hand. Lastly, the comparative analysis will so be utilized.

The study will make comparisons between Lesotho and other several countries in Africa which continue to embrace chieftainship including Zambia, Namibia and Botswana to mention but a few. As stated previously, the institution of chieftainship has been seen as a tool for the propagation of gender inequality and discrimination against women in Lesotho. The study will therefore compare the countries' approaches to chieftainship, standpoints on culture and customary law, judicial responses to gender based discrimination and as well as the positions on international and human rights law. This will help find informed solutions and provide educated recommendations aimed at protecting human rights in Lesotho.

1.4 Motivation

Issues around succession to chieftainship have not been an issue of discussion in Lesotho until recently, as the laws have already stated who the rightful heir-to-be is. However this has left many, especially women in an underprivileged position of subordination. Culture has been invoked as a justification for such discriminatory legislation in which women cannot inherit and succeed to the throne. As a result, this raises the need for scholarship on the subject to examine and develop laws inclusive of women's participation in chieftainship.

1.5 Literature review

Discrimination is defined as any differences made, marginalization or limitations as well as differential treatment based on sex and gender, which put sexes or genders in compromising situation, the treatment destroys recognition of all as equals, therefore hinders the enjoyment or the exercise by women, irrespective of their marital status, their rights and fundamental freedoms in cultural, political and economic spheres.²² In the case of chieftainship in Lesotho this definition proves to be evident as women are denied the privileges of being chiefs on the

²² Art 1 (2) para 4 of the Southern African Development Community Protocol on Gender and Development signed on 17 August 2008. Available at: http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf (accessed 21 August 2014). See also definition of discrimination by the Protocol to the African Charter and Human and Peoples' Rights on the Women's rights Adopted in July 2003. Available at: http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (accessed 21 August 2014).

basis of gender and sex. This therefore leads to gender inequality, a problem that seems to face the whole of Africa.

According to Dube,²³ the kingdom of Lesotho has several codes of law and these include customary law; international law; the Constitution; the legislation; authoritative texts; common law and judicial precedent. Important to this paper are the customary law and the Constitution as well as international law. Customary law is defined in Black's Law Dictionary as a "law established and based on custom rather than common law or statute."²⁴ Lesotho customary law therefore consists of Basotho's different customs or practices. Although customary law is in most Africa states is unwritten, some aspects of Lesotho's customary law have been codified in the laws of Lerotholi.²⁵ The customary practices and laws have been passed from one generation to the other. The laws of Lerotholi (customary law) have codified the traditional authority that is chieftainship.²⁶ Customary courts have been legal tools ensuring that Basotho cultural practices are upheld. However the very customs are the causes and reasons as to why inequality and discrimination against women on the basis of gender prevail.

According to the SADC Gender Protocol Barometer,²⁷ the Constitution of Lesotho is characterised by claw back clauses relating particularly to customary practices. It is argued that Section 4 of the Constitution is an example of such a clause.²⁸ This Section denies women to succeed to chieftainship. This therefore results in discrimination against women particular chief's daughter. The recognising customary law and traditional practices has led to the justification of discrimination against women and gender inequality.²⁹

²³ BA Dube *The law and Legal Research in Lesotho* (2008) Available at: <http://www.nyulawglobal.org/globalex/lesotho.htm> (accessed 23 August 2014).

²⁴ BA Garner *Black's Law Dictionary* (2004) 413.

²⁵ Dube (n 23 above).

²⁶ as above.

²⁷ SADC Gender Protocol Barometer: Chapter 1 '*Constitutional and Legal Rights*' Available at: file:///C:/Users/Residences/Downloads/19378_chap1_baro_2014_c&lrfn.pdf (accessed 26 August 2015) 50.

²⁸ n 27 above.

²⁹ as above.

Quinlan and Wallis³⁰ contend that the question as to what chieftainship is amongst the Basotho nation is a difficult one to answer, however many will define what a chief is. Therefore we can conclude that chieftainship means the institute of chiefs in Lesotho. What is a chief would then be the next question to pose. The Black's law dictionary defines a chief as "a leader, ruler or head of a people or a clan and displaying eminence in power."³¹ From this definition, it is important to note that there is no distinction as to who the chief may be. Quinlan and Wallis³², asserts that chiefs are normally associated with the name relating to the ancestors who were previously chiefs. For instance names such as Masupha, Molapo and Lerotholi to mention a few. Chieftaincy is therefore inherited, the author argues. Chiefs also have the jurisdictional authority over a given territory. Lesotho has at least 1558 chiefs;³³ these include the paramount chief which is the king, the district chiefs/ principle chiefs, ward chiefs, sub ward chiefs and village headmen. Although chieftaincy is inherited, this is applicable mostly to the royal families, which are the paramount and principle chiefs. And this has resulted in inequality and discrimination against women as men are the only people allowed to succeed to the throne. Although the culture of succession has been on-going for years, the institution of chieftainship has been evolving. However, remaining rigid and not accepting the cultural dynamics in the name of customary practises as put in the Chieftainship Act 22 of 1968 remain the plight of inequality and discrimination against women facing Basotho nation today.

The Chieftainship Act 22 of 1968, Section 10 on the succession to the office of chief declares that "the first born or the only son of son of the first or only marriage of the chief succeeds to that office ..."³⁴ However what is controversial in the Section 10 of the Chieftainship Act is the reference made to that of the "first born child or son", what does the first born child entail? Is it boy or girl child? Although it continues to be unclear, there has been an explanation of what the heir is. According to the report by Habitat for Humanity, the heir is, as stated under section 2(11)

³⁰ Quinlan & Wallis (n 4 above) 147.

³¹ See the definition of a chief in Garner (n 24 above).

³² n 4 above, 147.

³³ as above.

³⁴ Chieftainship Act of Lesotho, Act 22 of 1968.

of the Laws of Lerotholi³⁵ is the first born male child of the first wife if married to multiple wives. In the case where the first wife does not have a son then the second wife's eldest son will be the heir. However if, there are no sons at all the first wife will take over as regent. The regent's power may be restricted and will have to continue consulting with her in laws as to how property shall be used.³⁶ It is clear that property is the main important issue as opposed to the society she is to lead. This clearly indicates that women cannot fully inherit or succeed to the throne under customary law.

According to the South African law reform project, customary law of succession deals with what happens to the property of the deceased after death. It is further stated that succession is attained through testate and intestate processes. Testate entails writing of the will and adhering to the wishes of the deceased as stated in the will and this is usually under common law.³⁷ On the other hand, intestate process entails that; the heir identified by the family will inherit the all that belongs to the deceased. This means property, land, livestock as well as the deceased's duties. This is based on customary law, which contends that property has to be kept within the family and enjoyed by all from one generation to the next.³⁸ According to the report, although customary law of succession is globally recognised, it however differs from country to country given the different ways of living. The fact that the heir is usually the child or relative of the deceased further confirms that succession is indeed based on lineage.³⁹ The report contends that the succession follows the male child line. This further proves that only male children are allowed to succeed and inherit from the dead, especially the eldest male children and that a woman cannot inherit or succeed the deceased.⁴⁰ However the problem with the issues of succession and inheritance in this day and age is the fact that, many of those claimed to be heirs are more

³⁵ Habitat for Humanity Lesotho *Training Manual on secure land tenure and inheritance rights in Lesotho: A manual training of trainers, paralegals and/or community trainers* (2009) available at: https://s3.amazonaws.com/landesa_production/resource/1657/HabitatHumanity_Training-manual-secure-tenure-inheritance-Lesotho_2009.pdf?AWSAccessKeyId=AKIAICR3ICC22CMP7DPA&Expires=1426777246&Signature=4rqg_cxmwbIV2MAdQnvg4NCBb%2B%3D (accessed 23 August 2014) 13.

³⁶ Habitat for Humanity Lesotho (n 35 above) 4.

³⁷ South African Law Reform Commission *Project 90, Customary law of succession* (2004) available at: http://www.justice.gov.za/salrc/reports/r_prj90_CustomaryLawSuccession2004.pdf (accessed 24 August 2014).

³⁸ South African Law Reform Commission (n 37 above) 12: Habitat for Humanity Lesotho (n 36 above) 9.

³⁹ Habitat for Humanity Lesotho (as above).

⁴⁰ South African Law Reform Commission (n 37 above) 14.

concerned with property as opposed to their duties as heads families and societies. The customary law of succession fails to adapt to the changes in the modern world today.⁴¹ This brings us to the question of inheritance. We shall therefore look at the Inheritance Act of Lesotho.

Inheritance Act of 1873⁴² was enacted to ensure the principle of freedom of testation which states that wills that are properly executed by a testator should be given effect. However while freedom of testation exists under the common law as provided for by the Inheritance Act, inheritance of property under customary law is limited to male children only.⁴³ Under customary law, women assume the status of minors who are incapable of administering their own affairs without assistance from their parents or guardians.⁴⁴ They are regarded to be reliant on their fathers, husbands and other male family members for guidance and sustenance. Whether single or married, women under customary cannot inherit from their fathers. However, although women cannot be heirs, they can be given property by their family provided that they do not get more than what the heir has to inherit as stated in the laws of Lerotholi Section 14(1).⁴⁵ Under common law however, inheritance is based on the will written by the deceased. Inheritance is therefore to be shared according to the stipulations of the will.⁴⁶ Although this is the case, international law seem not agree with the domestic laws. The country's practice of customary law infringes on the international law that aims to abolish and eradicate discrimination and inequality based on gender and sex.

The protection and promotion of human rights form the basis of international law; it is within international law that several instruments have been developed in order to uphold and ensure the existence of human rights within the states globally.⁴⁷ In addition, not only is international

⁴¹ n 37 above, 15.

⁴² n 37 above, 31.

⁴³ K Mophethe *The women's legal initiative: Inheritance laws Brochure - Lesotho* (2006) United States Agency for Development. Available at: http://pdf.usaid.gov/pdf_docs/Pnadi185.pdf (accessed 27 August 2014).

⁴⁴ as above.

⁴⁵ as above.

⁴⁶ as above.

⁴⁷ The three main international human rights treaties are the Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948; International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49; International Covenant on Social Economic and Cultural Rights. Adopted and opened for signature, ratification and accession by General

law concerned with issues of human rights but also sustainable development⁴⁸ and universal communication to mention a few and places a legal obligation on the states to protect and promote human rights.⁴⁹ That said, the kingdom of Lesotho like many other states has a dual legal system, meaning it takes upon herself to commit as well having an obligation to domesticate international law through an act of parliament.⁵⁰ The kingdom of Lesotho is a signatory and state-party to several international treaties aimed at the protection and promotion of human rights. Lesotho also has a dual system of law comprising of the common law as well as customary law. While the two branches of law are harmonious in several aspects, there are certain fundamental differences therein. For example, while the common law provides for equality, discrimination of women is permissible under the customary law system. This is particularly evident in the system of chieftainship in which men and women are not treated equally. Women remain victims of inequality and discrimination based on cultural practices.

It is therefore fundamental to look at the numerous instruments aimed at protecting and promoting human rights at the international, regional and sub-regional levels of which Lesotho is a state party to. As we have looked at the domestic legislation, that are the constitution, Chieftainship Act, Inheritance Act, it is vital to establish whether national laws on human rights are consistent with human rights law on all regions. The international instruments include the Universal Declaration of Human Rights (UDHR),⁵¹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Covenant on Economic, Social and Cultural Rights (CESCR) and the International Covenant on Civil and Political Rights (ICCPR) to mention but a few. The continental or regional instruments aimed at promoting and protecting human and women's

Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with Article 27. These three instruments have come to be known as the 'international bill of rights.'

⁴⁸ Sustainable development is through which limited and exhaustible resources are utilized in a way that they not only cater to the needs of the current population, but also future generations. For more on sustainable development, see: M Redclift 'Sustainable development (1987–2005): An oxymoron comes of age' (2005) *13 Sustainable Development* 4 212; SM Lélé 'Sustainable development: A critical review' (1991) *19 World Development* 6 607; EB Barbier 'The concept of sustainable economic development' (1987) *14 Environmental Conservation* 2 101.

⁴⁹ International Law: Global Issues. <http://www.un.org/en/globalissues/internationallaw/>

⁵⁰ JG Starke 'Monism and dualism in the theory of international law' (1936) *17 British Yearbook of International Law* 66; AFM Maniruzzaman 'State contracts in contemporary international law: monist versus dualist controversies' (2001) *12 European Journal of International Law* 2 309-328.

⁵¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

rights include African Charter on Human and Peoples' Rights (ACHPR) and Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women (Maputo Protocol). Southern African Development Community (SADC) Protocol on Gender and Development forms the sub regional framework.

Although The Universal Declaration of Human Rights (UDHR), was said to be founded upon the principles of the west and therefore biased, defining civil and political rights such as "freedom and equality before the law"⁵² it also addresses socioeconomic rights and rights relating to inequality as well as social and political justice.⁵³ Adopted 10 December 1948 is one of the founding documents aimed at protecting and promoting human rights as well as human dignity. Human dignity forms the core of the UDHR.⁵⁴ That is, it was aimed at respecting all humans and treating them equally. UDHR further regards the importance of culture in Article 27 as well as Article 15 of the Covenant of Economic Social and Cultural Rights.⁵⁵ According to Vilanka⁵⁶ the right to participate in a cultural activity not only is it an individual but also a collective right as it includes the involvement of the community. However, in Lesotho it has been evident that matters relating to chieftainship are addressed by a few. As a result this limits public participation in chieftainship matters. For instance limiting women's participation in customary practice (succeeding to the throne) infringes on the rights of women and fails to adhere to international law aimed at promoting and protecting human rights.

CEDAW was adopted given the rampant cases of discrimination against women based on sex (biological) and gender (socially and culturally constructed) globally.⁵⁷ According to Cusack and

⁵² N Reilly 'Women's Human Rights' (2009) Polity Press United Kingdom.

⁵³ n 52 above.

⁵⁴ C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) The European Journal of International Law Vol. 19 4 Available at: <http://ejil.org/pdfs/19/4/1658.pdf> (accessed 27 August 2015).

⁵⁵ Universal Declaration of Human Rights Available at: <http://www.un.org/en/documents/udhr/index.shtml#a27> (accessed 12 June 2012) see also The Covenant of Economic Social and Cultural Rights.

⁵⁶ O Vilanka 'Article 27 of The Universal Declaration of Human Rights And Internet [A Study Evaluating Role of Prosumers, Authors And Corporations In The Information Society' Available at: <http://ihmisoikeuskeskus-fi-bin.directo.fi/@Bin/ca7889e92f021a77cc9ca1455e530927/1440849651/application/pdf/945566/ARTICLE27.pdf> (accessed 26 August 2015).

⁵⁷ S Cusack and L Pusey CEDAW And The Rights to Non-Discrimination And Equality (2013) *Melbourne Journal of International Law* 14 10-11 available at: www.law.unimelb.edu.au/files/dmfile/03Cusack1.pdf (accessed 28 August 2014).

Pusey,⁵⁸ the main objective of CEDAW is to eradicate “all forms of discrimination against women” with the aim of attaining equality by the implementation of gender neutral laws. Both scholars assert that non-discrimination and equality are the core principles of CEDAW. The Kingdom of Lesotho signed and ratified CEDAW in 1980 and 1995 respectively. However it is important to note that the kingdom of Lesotho placed a reservation on this treaty, claiming it is inconsistent with state’s constitutional stipulations relative to law relating to succession to chieftainship.⁵⁹ This section discriminate against women on the basis of sex or gender therefore women find themselves excluded in chieftaincy matters. Although the CEDAW committee has made recommendations that Lesotho should consider withdrawing the reservation, Lesotho rejected the recommendations, thus violating her responsibility to CEDAW. The kingdom of Lesotho legally bound herself to the International Covenant on Civil and Political Rights (ICCPR) treaty through accession in 1992.⁶⁰ According to the Human Rights Committee on ICCPR Fact Sheet No. 15⁶¹ the main objectives of the treaty is to promote and protect political and civil rights within one’s jurisdiction without any distinction. Although the covenant calls for non-discrimination, women in Lesotho remain victims of inequality and discrimination based on their sex or gender as they are denied the right chieftainship that is said to be only for men. Lesotho is found to be in violation of this treaty too.

At the regional level, Viljoen argues that the African Charter on Human and Peoples’ Rights states that every person has rights.⁶² In addition, the charter outlines rights that are to be enjoyed by both men and women without distinction. He argues that these rights include the right to dignity, education and security to state a few.⁶³ Although the Charter makes mention on the members states have an obligation to eliminate discrimination against women, Viljoen argues that the

⁵⁸ n 57 as above.

⁵⁹ Reservation by the kingdom of Lesotho to the Convention on the Elimination of All forms of Discrimination against Women report www.unhrc.org 12 June 2012.

⁶⁰ International Covenant on Civil and Political Rights (ICCPR) Office of the United Nations High Commissioner for Human Rights: The core human rights treaties. June 2006. www.ohchr.org.

⁶¹ Human Rights Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev.1) available at: <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> (accessed 26 August 2015).

⁶² F Viljoen ‘ *An introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women*’ Available at: <http://law2.wlu.edu/deptimages/Journal%20of%20Civil%20Rights%20and%20Social%20Justice/Frans%20Viljoen.pdf> (accessed 26 August 2015) 18.

⁶³ n 62 above.

problem came about women being unable to make use of the organization.⁶⁴ He argues therefore that based on this and the prevalent discrimination against women that continues to be evident in African states a document had to be adopted. As a result in 2003 the Maputo Protocol was adopted. The Protocol did not only complement the Charter but was also seen as a way of responding to the absence of implantation of the Charter. Viljoen argues that although the Protocol was aimed promoting and protecting women's rights, not enough attention was paid to some rights, for instance the right to property. However at the core, the Protocol was aimed at protecting the rights of women against inequality and discrimination on the basis of sex, gender.⁶⁵ However this remains a challenge given that not only in Lesotho but many Africa countries continue to disregard women as rightful heirs and not allowed to succeed to the throne as chiefs thus violating the provisions of both human rights instruments.

According to Munalula, the Southern African Development Community (SADC) Protocol on Gender and Development was seen by many as a document that will bring about change in the SADC region with regards to gender equality and discrimination against women will eradicated.⁶⁶ She argues that, with the progression made by African states it was imperative to move from non-binding to binding agreements.⁶⁷ This therefore meant that all states parties were bound legally to ensure that measures are taken towards achieving gender equality and was also seen another way of implementing the aims of gender equality especially in fields not conceptualized before such as customary practices.⁶⁸ Although there has been a prevalence of inequality based on gender, many African states have made an effort to define equality and have put measures to achieve equality in certain sectors, for instance more women in parliament, mines and executive positions to mention a few.⁶⁹ However, when it comes to cultural practices such as inheriting and succeeding to the chieftainship, men are considered to be the rightful heirs as opposed to

⁶⁴ as above.

⁶⁵ as above 20.

⁶⁶ M Munalua SADC Protocol on Gender and Development: Road map to equality? Available at: http://www.kas.de/upload/auslandshomepages/namibia/SADCLJ/11-1/SADCLJ-2011_section_9.pdf (accessed 27 August 2015). See also Article 18 (3) of the African Charter.

⁶⁷ n 66 above.

⁶⁸ as above.

⁶⁹ as above.

women. This is currently the case in Lesotho following the case of Senate who has been denied right to succeed to throne on the basis of gender and sex. As a result the kingdom of Lesotho is in contradiction with the SADC Protocol.

Although cultural customs and norms have been used as the reasons as to why women in Lesotho cannot succeed to and inherit the throne, there is more to what meets the eye. With the culture evolving and changes taking place in the world; many may argue that culture cannot be the reason for discrimination and inequality. I believe that the reasons why women continue to be denied chieftaincy or inheritance is a power issue. In a patriarchal society like in Lesotho men want to be dominant therefore leaving women in subordinate places.⁷⁰ Chieftaincy is about retaining men's power over women and maintaining patriarchy. On the other hand, chiefs continue to enjoy economic privileges, for instance they are remunerated, given state cars and other benefits. This way, men remain the provider of the family. In addition, men retain not economic power but also the power to control his family. Many of the heirs in the current modern world are not concerned with the duties of chiefs but the power and economic privileges as well as family possessions.⁷¹ In an article recently written, it was argued that if women are allowed to be chiefs more problems of succession may arise. According to chief Mohale, "a woman is expected to be married"⁷² therefore if the women (chief) is married, her children will have the right to succeed her when she dies, he further states that in such a case, chieftainship will be taken away from the rightful heirs or "original family" to another family.⁷³ Marriage is used as another cultural tool that denies women the right to succeed their father's throne. Although this is a viable argument one could argue it is not viable enough. For instance, when a women gets married her children culturally belong to the fathers' family not the mothers' therefore this might

⁷⁰ T Monyane 'The influence of culture in shaping the lives of Basotho women: Patriarchy in perspective' (2007) 14 *The International Journal of Learning* 6 87; L Molapo 'Deconstructing Patriarchy in Lesotho: A Case of Peka' (2008) 3 *International Journal of Development and Management Review* 1.

⁷¹ n 37 above.

⁷² T Tefo Maseru- *Senators are strongly opposed to daughters succeeding to their fathers as chiefs, insisting allowing it would destroy Basotho culture*. Public Eye Newspaper available at: www.newsafrique.info/?senators-adamant-daughters-have-no (accessed 23 August 2014). See also MA Kapa *Lesotho: Political participation and democracy*. (March 2013). A review by AfriMAP and the Open Society Initiative for Southern Africa. Available at: http://www.osisa.org/sites/default/files/afriMAP_lesotho_political_participation_main_web_0.pdf (accessed 23 August 2014).

⁷³ n 72 above.

make it hard for the children to claim the throne, secondly in instances where a woman is not married (for example Senate Masupha), there is no reason as to why she cannot inherit the throne because she does not have children. However I will not discard totally the idea that if a woman is married her children cannot inherit her throne, but there should be provisions stating clearly that the throne belongs to the woman's family not her own family, that said her children cannot inherit her throne.

1.6 Scope of the study

Chapter one

Gives an introduction of the study and what the paper is expected to be about. Definitions of the key concepts such as inequality and discrimination against women, seek also to define customary law and what it entails as well as how customary law is seen to fuel and deepen the already prevalent levels of inequality and discrimination. In this chapter research problem is identified. Research questions, research methodology and literature review are also stated.

Chapter two

Chapter two is on the theoretical framework these include theories on equality, gender and discrimination. The chapter also looks at issues around, the nature of laws, for instance on succession to chieftainship, the Bill of Rights as stated in the constitution and the states international obligations.

Chapter three

Chapter three is aimed at defining reservation made on the treaty by the member state and its implications. In addition, we ask to what extend is the reservation valid if it infringes on the treaty aimed at protecting and promoting human right. The chapter therefore investigates the implications of the reservation placed by the kingdom of Lesotho on Article 2 of CEDAW.

Chapter four

Comparative Analysis: This chapter focuses on the challenges of succession to chieftainship faced by women in Lesotho, looking at other perspectives from other systems in other African countries where traditional ruling remains a significant part of the nation and how these countries, where challenges of succession to chieftainship were experienced have managed to bring about equality between men and women. These shall be done by looking at the judicial responses to gender based discrimination. The study will examine cases from Namibia, Botswana and Zambia regarding the issues of women and the access to chieftainship.

Chapter five

Chapter five is based on the conclusions made from the previous chapters regarding inequality and discrimination against women resulting from customary law and the recommendations, such as utilizing the law as an engineer for social change as well as call for reforming the Constitution and Chieftainship Act to include all equally.

CHAPTER TWO

2 Theoretical framework

2.1 Introduction

Chapter two examines the theories that have informed the debate on discrimination of women in Africa and Lesotho in particular. The major issue at the heart of this discussion is the equal treatment of women in relation to chieftainship. This chapter will therefore examine the human rights perspective; women's law perspective; and the feminist theory/jurisprudence perspective on discrimination of women.

Lesotho like many southern African states has a high prevalence of gender inequality which manifests in many spheres of everyday life. According to Munalula⁷⁴ both discrimination and inequality against women are dealt with from the point of victims. Although under chapter II, the Constitution⁷⁵ makes provision for the principles of equality and non-discrimination. The questions therefore are what is discrimination? What is inequality? What does gender inequality or gender discrimination mean?

Most African states gained independence in the 1960's and inherited the legal systems of their colonial masters. Along with independence came principles of statehood, democracy and the rule of law to mention but a few. However, this posed a challenge for the existing customary or traditional systems. The solution for most African states was to adopt a mixed legal system that recognized both the common law and customary law. The result of this integrated system was that states like Lesotho retained institutions that were established under customary for instance chieftainship. Both customary law for instance the Chieftainship Act 22 of 1968 and common law recognize the institution of chieftainship and regard chiefs as legitimate leaders. However customary law does not make provision for women to be chiefs in their own right. Women can only be regents that is to say; they can only "act" as chiefs for a certain period until the "rightful"

⁷⁴ MM Munalula *Women, gender discrimination and the law: Cases and Materials* (2005) 7.

⁷⁵ Sec 4 of the 1993 Constitution of Lesotho.

male heir is appointed.⁷⁶ In addition, the inheritance Act of 1873 further states that women cannot inherit from their fathers. Women continue to be treated as minors dependent on men. That said; it is clear that women cannot inherit or succeed to the throne. Within the context of traditional leadership, women do not enjoy fully the right to rule in their own right. The institute of chieftainship remains patriarchal as the male child is considered to be the rightful heir. This has resulted in the inequality and discrimination against women.

It is often said that men and women are different, with different emotions, different abilities and capabilities. That men and women are physically, emotionally and naturally different. Although men and women are said to be different, they are usually found in the same institutions, for instance in the church, workplace, family and government to mention a few.⁷⁷ Kimmel further states that, it is the very same differences or distinctions drawn between men and women that have resulted in gender inequality.⁷⁸

2.2 General perspective

Human rights also known as natural human rights are a natural part of human beings. Human rights are innate, fundamental and held by every human being by the virtue of being human. This is to say, despite race, sex, colour, nationality, ethnicity, religion and language humans have equal entitlement to the rights and entitled to the enjoyment of the rights regardless of their sex, gender and religious beliefs to mention a few.⁷⁹ Equality and non-discrimination are therefore the fundamental principles of human rights.⁸⁰ However, it is important to note that cultural relativists contend with the 'universal' nature of human rights.

⁷⁶ The Chieftainship Act of Lesotho, Act 22 of 1968.

Also look at the Constitution of Lesotho section 45 on the succession to the throne, while the college is still deciding on who the rightful heir (male child) is, women who act as regents succeed the chieftaincy. It is important to note that common law of Lesotho is the Roman Dutch Law. It was introduced in Lesotho in May 1884. In this case we see common law protecting and promoting customary law, which also infringes on some provisions of the common law.

⁷⁷ SM Kimmel *The gendered society* (2004) 1.

⁷⁸ n 77 above 1.

⁷⁹ J Donnelly *International Human Rights* (1993) 19 Westview Press: Boulder

⁸⁰ Munalula (n 74 above) 8.

It has been argued that human rights are a western ideology⁸¹ imposed on African states. The underlying argument of cultural relativism is that an individual's perceptions of what is right or wrong, acceptable or not depends one's enculturation.⁸² Therefore this means that, things that an individual believes as acceptable or not are shaped by the society and the circumstances an individual is raised. For examples, a girl in certain parts of Africa is expected to kneel when she greets her elders. However another individual who is not brought up in that community would not understand let alone practice it. Other scholars also believe that the basis of human rights is the preservation of human dignity.⁸³ They further believe that human dignity has always been the measure of consideration in African traditions. For example an examination of African proverbs and quotes shows the overwhelming considerations for humanity and dignity. For instance Desmond Tutu states, "My humanity is bound up in yours, for we can only be human together".⁸⁴ Secondly, what has been termed as discrimination against women has been argued by many cultural relativists as an inaccurate depiction of African culture.

Critiques of cultural relativism argue that cultural relativism is based on enculturation which is an involuntary process but a result of an accident of birth. This therefore excludes the process of reason which is the fundamental basis of human rights.⁸⁵ In addition the African traditions and cultures continue to embody certain discriminatory and unacceptable practices. For example, unequal treatment of women and persons with disabilities draw a distinction between a fully functional person and one who is not. In addition, harmful practices like Female Genital Mutilation (FGM) continue to be a concern to the international community. It must be noted that although practices like FGM have been outlawed in national law, many jurisdictions as well as the United Nations (UN) it continues to be covertly practised in other countries for example

⁸¹ H Bielefeldt "Western" versus "Islamic" Human Rights Conceptions? A Critique of Cultural Essentialism in Discussion on Human Right." (2000) Political Theory 1 100 available at: <http://insct.syr.edu/wp-content/uploads/2013/03/Beilefelt.2000.Cultural-Relativism-Critique.pdf> (accessed 2 September 2014).

⁸² J Donnelly 'Cultural Relativism and Universal Human' (1984) 4 Rights Human Rights Quarterly 6 400 available at: http://hmb.utoronto.ca/Old%20Site/HMB303H/weekly_supp/week-02/Donnelly_cultural_relativism.pdf (accessed 2 September 2014).

⁸³ J Donnelly "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights." (1982) 2 The American Political Science review 76 306 available at: http://www.jstor.org/stable/1961111?seq=1#page_scan_tab_contents (accessed 2 September 2014).

⁸⁴ Desmond tutu Quotes available at: www.brainyquotes.co (accessed 5 September 2014).

⁸⁵ J kanarek "Critiquing cultural relativism" (2013) 2(2) the intellectual standard 1.

Tanzania.⁸⁶ Secondly, most major human rights treaties or conventions and covenants embrace and preserve cultures as long as the culture does not propagate harmful or discriminatory practices.

In conclusion, the minimum standard to be followed is the principle of non-discrimination under the Universal Declaration of Human Rights (UDHR), African Charter on Human and People's Rights (ACHPR) as well as other human rights treaties. These two articles emphasize the principles of non-discrimination and equal treatment.⁸⁷ Furthermore, the ACHPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise good cultural practices that are not harmful or discriminatory to a particular group of people or minorities. The rule against non-discrimination has also developed into one of the principles of customary international law which is binding upon all civilized nations.⁸⁸

However, Munalula argues that the problem with human rights perspective is that it is based on individuals as opposed to the collective.⁸⁹ The cultural ideologies towards women have influenced and shaped the law. For example in Lesotho culture has been made the law which is the chieftainship Act. Therefore, both discrimination and inequality result not from lack of recognising and respecting human rights but rather, socialisation. The best way to bring about change is through the changing of cultural perceptions which will help reform and change the law. Secondly, the law can be used as a tool to bring about social change through the enforcement of laws against harmful and discriminatory cultural practices. The human rights perspective in a nutshell is based on justice as a human right to be equally enjoyed by all; this

⁸⁶ C Yusuf and Y Fessha 'Africa Human Rights law Journal. Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania'. (2013) 2 356-382 available at: <http://www.ahrlj.up.ac.za/table-of-contents/40-issues/volume-13-no-2-2013/416-female-genital-mutilation-as-a-human-rights-issue-examining-the-effectiveness-of-the-law-against-female-genital-mutilation-in-tanzania> (accessed 4 March 2015).

⁸⁷ Article 2 and 3 (a) of the ACHPR states that everyone is entitled to enjoy the rights and freedoms recognized and guaranteed by the African Charter without distinction either based on religion, sex, gender or ethnicity. And that all people are equal before the law respectively. Article 1 and 2 of the Universal Declarations also put emphasis on the principles of non-discrimination and equality.

⁸⁸ According to Rule 88: Non-discrimination, "State practice establishes this rule as a norm of customary international law" available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88 (accessed 3 March 2015).

⁸⁹ Munalula (n 74 above) 8.

includes being protected by the law against discrimination and inequality based on sex and gender through accessible legal facilities.⁹⁰

2.3 The women's law perspective

According to the women's law perspective, because of the differences made by the society based on gender, men and women are treated differently not only in the society but also by the law. Women's experiences under the law are different to that of men.⁹¹ The women's law perspective's main objective is to identify women's relation to the law and uncover influences that inhibit women from attaining justice through equally based laws. Munalula argues that discriminatory laws are made legitimate by most legal documents for instance the Constitutions, Acts and Bills. Lesotho is no exception in this case. She further argues that the prevalent economic and social conditions further make such discriminatory laws disguise as rather impartial and therefore important to understand the effects of such laws.⁹² Although states have made laws that promote equality, such laws may not entirely result in equality; instead what we have seen are laws that put preference of the "other" in order to gain equality, for instance affirmative action. Such a method is not seen as prejudiced because the law in itself is said to be biased and designed in a way that benefits men as opposed to women.⁹³

The problem with the women's law perspective is the fact that it is aimed probing and questioning the sufficiency of women's rights instead of proposing for solutions to the problems at hand. Having laws such as affirmative action aimed at giving equal opportunity to those who were previously disadvantaged is not enough as it takes an individualistic approach instead of dealing women's issues collectively.⁹⁴ Equality should be for all not based on preference. It is evident that inequality does not only result from the lack of protection by the law but also from

⁹⁰ as above.

⁹¹ n 74 above, 9.

⁹² as above.

⁹³ as above; see also: M Maboreke 'Introducing Women's Law, in Women and Law in Southern Africa: The Legal Situation of Women in Southern Africa' Vol. II, Harare: University of Zimbabwe Publications, (1990) 2-3. According to Maboreke as also referenced by Munalula, argued that laws and rules made to be applicable to both men and women are normally patriarchal, made from the men's viewpoints. Therefore the law assumes that men and women have similar experiences, which is not the case.

⁹⁴ as above.

the political, economic and social circumstance where men remain dominant. The constitution is a minimum standard on which all other laws derive from. The Constitution of Lesotho states, under the Bill of Rights the promotion of the two human rights principles that of equality and the non-discrimination. But in terms of governance, the Constitution provides that only a man can be a chief or a king. Given the major challenge of the Women's law perspective, the question is therefore how do we resolve the problem of a constitution that contradicts itself? The simple answer would therefore be the reformation of the constitution. For example in the Citizenship Case against the Attorney General by Unity Dow,⁹⁵ Dow challenges the legality of the Citizenship Act. According to Dow, the Citizenship Act was inconsistent with the non-discrimination clause of the Constitution of Botswana. In its verdict, the court held that it did not have the power to include the word sex or gender but the power reserved for the legislature alone. Fortunately the parliament of Botswana yielded and inserted gender as one of the forms of discrimination under the constitution.

In such circumstances where the constitution is contradictory to itself, there is need for the parliament to harmonise the two provisions. However when the basis of the discriminatory provisions are deeply rooted in cultural practices then there is a need to carefully consider reformation of the law as well as changing the cultural beliefs, ideologies and perceptions.

2.4 Feminist theory/feminist jurisprudence perspective

Feminism is defined as "a set of beliefs and ideas that belong to broad social and political movement to achieve greater equality for women."⁹⁶ Feminism is not entirely based on the legal scholarship; however the law plays a crucial role in ensuring equality for women.⁹⁷ The feminist theory's main objective is to transform women's experiences.⁹⁸ Feminist jurisprudence can also be defined as a set different viewpoints aimed at analysing the relationship between the law and

⁹⁵ Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992) <http://www1.chr.up.ac.za/index.php/browse-by-country/botswana/1117-botswana-attorney-general-v-dow-2001-ahrlr-99-bwca-1992.html>.

⁹⁶ OM Fiss (1994) What is Feminism? Yale School Law School Legal Scholarship Repository available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2308&context=fss_papers (accessed 6 September 2014) 413.

⁹⁷ n 96 above 413.

⁹⁸ C Smart (1989) Preface Sociology of Law and Crime: Feminism and the Power of Law New York Routledge.

gender.⁹⁹ In addition feminist jurisprudence's main objective is to give an explanation, criticise and reform the law on behalf of the women, from the women's viewpoint and experiences.¹⁰⁰

Thornton argues that feminist jurisprudence is not based on a single school of thought but draws from several feminist approaches. She further argues that liberal feminism has influenced the feminist jurisprudence.¹⁰¹ According to Munalula,¹⁰² feminist jurisprudence perspective argues that the law is patriarchal.¹⁰³ In addition, it is argued that women's rights are overly simplified and therefore, the "neutrality" of law is questionable. Both feminism and feminist jurisprudence reject patriarchy and seek to liberate women from oppression (oppression women usually suffer because of the constructed gender identities that see men a superior) by criticising the law and through transformation of the law. However it is important to note that equality as provided by the law is not sufficient enough to end oppression, inequality and discrimination against women.¹⁰⁴

Smart¹⁰⁵ asserts that over time the law has changed from being viewed as 'sexist' but rather 'gendered' by the feminist jurisprudence perspective. Smart argues the law was said to be sexist based on the differences between men and women. This distinction had placed women in disadvantaged positions therefore preventing women from attaining equal privileges as men not only in the private sphere (family) but also in the public sphere (workplace).¹⁰⁶ According to Smart, law is seen as male because majority of the people taking part in decision making and

⁹⁹ K T. Barlett, 'Perspectives in Feminist Jurisprudence,' in: Betty Taylor et al (eds), *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda and Bibliography*, Littleton: Rothman & Co (1999) 3.

¹⁰⁰ C A. Littleton, 'Book Review; Feminist Jurisprudence: The Difference Method Makes,' 41 *Stanford Law Review* 751 (1989) 725.

¹⁰¹ M Thornton *The Development of Feminist Jurisprudence* available at: <http://www.ler.edu.au/Vol%209%20Thornton.pdf> (accessed 5 September 2014).

¹⁰² Munalula (n 74 above) 10.

¹⁰³ as above.

¹⁰⁴ as above.

¹⁰⁵ C Smart The women of legal discourse, in Naffine, N. (ed), *Gender and Justice* (2002) 31.

¹⁰⁶ n 105 above 31.

Smart gives examples of laws that disadvantaged women, for instance divorce laws that aimed at giving women less resources and prostitution and rape laws that turned a blind eye to the damage suffered by women and privileged men.

drafting of laws are men. Therefore laws and policies are made in a way that serves the interest and values of men.¹⁰⁷

Bartlett argues that, although the law was able to bring about change, the possibilities of complete change were constraint without scrutinizing the theoretical principles of which the law is founded. For instance the principle of equality is about comparing men and women which reflects the norms of the society, therefore “equality for women has come to mean equality with men.”¹⁰⁸ Another problem with the law is that though it is a means for achieving change, many people would rather not change with the aim of having stable societies. Consequently newly reformed laws are founded upon the existing laws and principles.

2.5 Analysis of the theoretical frameworks

It is evident from the different perspectives that women are indeed recipients and victims of inequality and discrimination because of the male dominated norms, values, interests and laws. However this is not to say states have not adopted policies and laws aimed at protecting and promoting women’s rights. Many states have enacted laws that protect women under their domestic laws. Furthermore states have also under international human rights law made an obligation to protect and promote human (women, children and minority) rights not only universally but also domestically.

Chapter II section 4 (1)¹⁰⁹ of the Constitution provides that every person in Lesotho is entitled to fundamental human rights and freedoms despite if one’s race, religious, cultural and political beliefs, sex, property, status, country of origin and status. According to the Constitution, “discriminatory” may be defined as treating people differently, thus affording other group of people more privileges over others based on either sex, race, religion, ailments/ infirmities or culture to mention a few.¹¹⁰ Therefore Section 18 (1)¹¹¹ on freedom from discrimination provides

¹⁰⁷ n 105 above 32.

¹⁰⁸ see above, an argument made by Bartlett K.T. in Munalula, M M. (2005). Women, Gender Discrimination and The Law: Cases and Materials.

¹⁰⁹ The 1993 Constitution of Lesotho.

¹¹⁰ The 1993 Constitution of Lesotho.

¹¹¹ Sec 18 (1) of the 1993 Constitution of Lesotho.

that “no law shall make any provision that is discriminatory either of itself or in its effect.” And this provision is said to be subject to Section 4 and 5, which provides for the entitlement of all humans to the fundamental human rights and the right to life respectively.¹¹² Equality as a fundamental right is also said to be provided for. Section 19¹¹³ Of the Constitution provides that it is the state’s responsibility to ensure that all humans are treated and protected equally under the law. For the purpose of this paper it is fundamental to look at Section 20 (1) (a)¹¹⁴ which provides that all citizens of the kingdom of Lesotho have a right to partake in the carrying out public affairs either being elected as a representative or directly.” However the institute of chieftainship has made all these principles unattainable based on customary law. Women in Lesotho continue to endure the harsh realities of inequality and discrimination as well as lack of participation in culturally defined spheres that only regard men as the rightful leaders. Chiefs in Lesotho are very important, influential and form part of local governance. It is evident that the Constitution of Lesotho supports discriminatory laws for instance the chieftainship Act of 1968, therefore infringing on the country’s domestic law and failing to promote equality in chieftaincy. It is therefore significant to look at the state’s international obligations and whether the state adheres to such the obligations.

States have an obligation to eradicate practices deemed harmful to the achievement of women’s rights through restriction of such practices.¹¹⁵ The law should be applied to ensure that justice is achieved and women are protected.¹¹⁶ Article 7 of the SADC Protocol provides that women should be treated in same manner as men both in the court of law and traditional courts. Furthermore under customary and civil law women should be afforded the same “legal” standard as men.¹¹⁷ All instruments on human rights are premised on the achievement of equality and non-discrimination against women in this case.

¹¹² Sec 4 and 5 of the 1993 Constitution of Lesotho.

¹¹³ Sec 19 of the 1993 Constitution of Lesotho.

¹¹⁴ Sec 20 (a) of the 1993 Constitution of Lesotho.

¹¹⁵ Art 5 African Charter.

¹¹⁶ Art 7 SADC Protocol.

¹¹⁷ as above, Article 7 (a) and (b).

Though the kingdom of Lesotho is a member state to all discussed human rights instruments, the system of governing through chieftainship is seen as posing a challenge. International law is said to be inconsistent with the customary law hence the reservation on Article 2 of CEDAW. It is therefore fundamental to argue that customary law evidently promotes inequality and discrimination against women and it is against and incoherent with international law, which is aimed at promoting and protecting human rights inherent to all humans without distinction. Therefore Lesotho under customary law and the Constitution infringes on the rights of women based on sex and gender. For this reason the kingdom of Lesotho disregards its obligation under international law to protect human rights especially women's rights. Clearly the kingdom of Lesotho defies its obligations under both international and domestic law.

2.6 Conclusion

In conclusion, discrimination and inequality against women are attributed to culture and the law that seeks to accommodate customary law. However, the conventions (UDHR, CEDAW and ACHPR) as well as the Constitution provide for equal treatment and non-discrimination as stated in the previous chapter. In addition, feminist jurisprudence suggests that we should use law as a tool for social change as well as challenge norms that have fuelled female subordination. However, the Constitution also embodies discriminatory clauses in providing for chieftainship.

Not only is the difference in sex but also in the social construction of what it means to be a man and a woman that has yielded what we call today discrimination and inequality. Regarding another sex or gender more important than the other has resulted in discrimination against those seen as less important therefore treating them unequally. Women fall victim the unfortunate distinction made based on sex and gender. Culture has become one of determinants of inequality and discrimination against women within societies. In addition culture defines the gender roles and identities therefore attributing superiority to the masculine and supposedly strong genders. Culture views men as stronger as opposed to women. Therefore, men are treated as important not only by the society but also by the law; for instance the Chieftainship Act of 1968 under customary in Lesotho.

Although different approaches were taken into account to address the issues of discrimination and inequality by questioning the neutrality of the law, it is evident that such issues cannot only be dealt with through the law. Feminists argue that the law is not sufficient enough to address problems of inequality and equality. It is argued that the law is male in nature as result promotes male dominance. To abolish discrimination and inequality it is important to address and challenge principles of patriarchy. Although the Kingdom of Lesotho has adopted laws both domestically and internationally aimed at eradicating discrimination and ensuring equality for all, customary law remains a barrier to the achievement of a state free of discrimination and inequality. Having examined the different theories that inform the debate on the discrimination of women it is important to examine Lesotho's position on international law regarding the rights of women. Under international law the most important convention regarding the rights of women is CEDAW. This Convention prohibits discrimination against women and advocates for equality. However, Lesotho placed a reservation on Article 2 of CEDAW which prohibits discriminatory treatment of women in relation to succession to chieftainship. The next chapter will therefore examine the validity of Lesotho's reservation on Article 2 of CEDAW.

CHAPTER THREE

3 Lesotho's reservation on CEDAW

3.1 Introduction

Chapter 3 focuses on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the reservation placed on Article 2 of the convention by the kingdom of Lesotho with regards to succession to chieftainship. This Chapter investigates the validity and implications of the reservation. The Chapter also takes into account comments and recommendations made by the committee on CEDAW as well as the Maputo Convention and the SDAC protocol on gender and Development (both instruments on regional level draw and are influenced by CEDAW). The chapter will consequently explore the following questions: What constitutes a valid reservation? Under what circumstance the reservation may be held invalid? Furthermore we look at Lesotho's inconsistency of both domestic and customary law to that of international law.

The Kingdom of Lesotho signed the Convention on the 17th of July 1980 and ratified the treaty on the 22nd of August 1995.¹¹⁸ Although Lesotho has signed, ratified, and accepted the amendment to the convention, that is the optional protocol on CEDAW. It is important to note that the kingdom of Lesotho had placed a reservation on three aspects of the Convention, firstly on the general convention, secondly on Article 29 (1) and lastly Article 2 paragraph (e).¹¹⁹ Viljoen notes that in August 2004, two of the aspects were withdrawn.¹²⁰ However reservation on Article 2 was retained by the government of Lesotho stating that, "The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of

¹¹⁸ Status of ratification of the principal international human treaties (2006) available at: www.ohrh.org (accessed 10 August 2014).

¹¹⁹ F Viljoen International Human Rights Law in Africa (2012) Oxford University Press 121.

¹²⁰ n 119 (see above) 121.

Lesotho and law relating to succession to chieftainship”.¹²¹ It is therefore imperative to briefly discuss CEDAW particularly Article 2.

3.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

For years, issues on both women’s rights and equality for women have been a subject of debate. Consequently, with the primary objective of ensuring women’s rights, equality under the law and the full enjoyment of rights and freedoms for all women, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly in 1979.¹²² The Convention also known as the ‘international bill of rights for women’¹²³ entered into force in September 1981¹²⁴ with 187 out of 194 states as member states.¹²⁵ The prime object (being what the convention seeks to achieve) and purpose (being the intension of the convention) of CEDAW is to abolish discrimination and inequality women continue to endure in the present day. This is clearly articulated in Article 2 of the Convention. The Convention aims at ensuring that all women enjoy fully, equally and also have equal access to human rights.¹²⁶ Akstiniene states that CEDAW strives to address issues of inequality and discrimination against women which result from the social, cultural and economic conditions.¹²⁷ The “object and purpose” of CEDAW also known as the Women’s Convention is crystal clear. The Convention not only identifies clearly in which fields and against whom discrimination should be abolished, it further gives specific measures to be taken in order to achieve the goals of the Convention.¹²⁸

¹²¹ Reservation by the kingdom of Lesotho to the Convention on the Elimination of All forms of Discrimination against Women report available at: www.unhrc.org (accessed 12 August 2014), see also F Viljoen International Human Rights Law in Africa (2012) Oxford University Press 121.

¹²² UN WOMEN: United Nations Entity for Gender Equality and the Empowerment of Women: The Convention on the Elimination of All Forms of Discrimination against Women: Short History of CEDAW available at: <http://www.un.org/womenwatch/daw/cedaw/history.htm> (accessed 13 August 2014).

¹²³ A Akstiniene *Reservation to Human Rights Treatise: Problematic Aspect Related to Gender Issues*. 2013, 20 2, p. 451-468 available at: <https://www3.mruni.eu/ojs/jurisprudence/article/viewFile/965/921> (accessed 13 April 2014) 454.

¹²⁴ The Office of the United Nations High Commissioner for Human Rights: The Core Human Rights Treaties available at: www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf (accessed 10 August 2014).

¹²⁵ n 123 (see above) 454.

¹²⁶ MM Munalula (n 74 above). *Women, Gender Discrimination and the Law: Cases and Materials*.

¹²⁷ n 123 see above 454.

¹²⁸ RJ Cook Reservation to the Convention on the Elimination of All forms of Discrimination against Women (1990) available at: HeinOnline <http://heinonline.org> (accessed 24 April 2014) 647.

The Convention is progressive in nature and strives to eradicate completely discrimination against women in all forms.¹²⁹ Consequently CEDAW as provided in Article 17¹³⁰ established a committee to monitor member states' progress on implementation of the Convention.

Based on Article 2, CEDAW is without a doubt aimed at protecting women against discrimination and inequality as well as ensuring that women's rights are guaranteed not only under international law but also domestic law. Although the majority of states are party to the convention, CEDAW has seen the greatest number of state reservations.¹³¹ As a result these weaken the objectives and purposes of the treaty. It is therefore imperative to define what a reservation is, reasons for the reservations and the implications on women.

3.3 The Validity of Lesotho's reservation on Article 2 of CEDAW

States may put a reservation and a declaration on a particular article(s) of the treaty. This is usually done when international law is said to be in conflict with the domestic law.¹³² Most states place reservations on treaties because they argue that the specific Article(s) are inconsistent with the state's religious beliefs and also in conflict with provisions made by the constitutions regarding succession to chieftainship.¹³³ Such states include Islamic states and states where the institute of chieftainship is very much still embraced. This however has led to several concerns as the main 'objectives and purposes' of the treaties are being compromised.

A reservation may be defined as¹³⁴

...a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. A reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to.

¹²⁹ n 128 (see above) 647.

¹³⁰ Art 17 of CEDAW. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Office of the United Nations High Commissioner for Human Rights: The core human rights treaties. June 2006 available at: www.ohchr.org (accessed 10 August 2014).

¹³¹ Akstiniene (n 123 see above) 454.

¹³² see above 453.

¹³³ as above.

¹³⁴ Glossary of the terms relating to Treaty actions available at: [https://treaties.un.org/pages /Overview.aspx?path=overview/glossary/page1_en.xml](https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml) (accessed 10 August 2014).

Reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made...

According to Freeman¹³⁵ reservations made to the international human rights instruments have a very lengthy and complicated history. Because of these complexities, the Vienna Convention on the Law of Treaties was adopted in 1969. The Convention was adopted with the aim of codifying the practice of placing reservations, providing the legal meaning of the reservation and lastly providing the method of entering the reservation for all member states.¹³⁶ Although the Convention provides that a reservation may not be placed when inconsistent with the “object and purpose” of the treaty, it fails to give a definition of what is the “object and purpose” as well as who determines the validity of the reservation.¹³⁷ Although the Convention allows for members states to make an objection on a reservation within a year, the objections still fail to resolve questions around the validity of a reservation.¹³⁸ As a result states continue to make reservation despite the conditions placed by the treaty.¹³⁹ For instance though Finland, Netherlands and Norway made objections on Lesotho’s reservation to Article 2 of CEDAW, claiming that the reservation is invalid but nothing materialised since the question of validity is a difficult one to crack. However it should be noted that given the concerns of the CEDAW Committee regarding reservation placed by Lesotho, the Committee recommended that the Kingdom of Lesotho withdraws the reservation.

Given that Article 2 of CEDAW is impermissible, the reservation entered by the kingdom of Lesotho is null and void because it is inconsistent with the object and purpose of the treaty which to aims to eliminate all forms of discrimination against women. Member states have an obligation to ensure that the goals are attained. Consequently the reservation should be seen as invalid and should be annulled given that both customary law and common law fail to give a justification as to why women cannot succeed their fathers. Though it continues to be a challenge determining

¹³⁵ MA Freeman Reservation To CEDAW: An Analysis For Unicef (2009) available at: [http://www.unicef.org/gender/files/Reservations to CEDAW-an Analysis for UNICEF.pdf](http://www.unicef.org/gender/files/Reservations%20to%20CEDAW-an%20Analysis%20for%20UNICEF.pdf) (accessed 14 August 2014) 1.

¹³⁶ n 135 (see above) 1.

¹³⁷ as above.

¹³⁸ as above.

¹³⁹ Art 20 (2) art 111 of CEDAW.

the validity of the reservation it is important to examine the CEDAW Committee on this issue, but before that we shall look at the reasons as to why states make reservations.

3.4 Reasons and implications for making a reservation

Based on cultural practices and religion to mention a few, several states have placed reservations on specific articles of the treaties.¹⁴⁰ CEDAW is no stranger to this. It has been argued that reservations to international treaties by the member states result from the states seeing rules agreed upon not applicable to them.¹⁴¹ By placing a reservation on the international treaty, simply means the state parties do not find themselves bound legally by the provisions of the treaty and as a result find it unnecessary to domesticate the provisions of the treaty.¹⁴² In addition state parties make reservations to retain their sovereignty, power within the state and national interests.¹⁴³

This is usually done when the states recognise that they cannot revoke their obligation especially when in contravention of the treaty.¹⁴⁴ It is important to note that placing reservations to treaties result in hindering the efficiency and the application of the treaty.¹⁴⁵ As a result, the practise of placing reservations does not only make it difficult to implement the treaty but fuels practices said to be detrimental to all humans or a specific “groups of people”.¹⁴⁶ Akistiniene argues that CEDAW’s Article 2 and 16 have the greatest number of reservations, although both articles are said to be the “core” articles. Reservations on both articles are unacceptable.¹⁴⁷ Both articles define the object and purpose of the treaty. Therefore, the reservation made by the kingdom of Lesotho on Article 2 of CEDAW continues to lead to the infringement of women's rights; Women cannot succeed to chieftainship as a birth right based on the sex and gender. This as a result poses as discriminatory practice and aimed at bringing about inequality on the basis of sex and gender. It further encourages the continuity of negative cultural or traditional practices. It is

¹⁴⁰ Freeman (n 135 see above) 6.

¹⁴¹ n 123 see above 452.

¹⁴² see above 452.

¹⁴³ as above.

¹⁴⁴ Cook (n 128 see above) 650.

¹⁴⁵ Akstiniene (n 123 see above) 462.

¹⁴⁶ see above 453.

¹⁴⁷ see above 455.

therefore essential to look at the CEDAW Committee, a body that continues to monitor the progress of the treaty and the Committee's thoughts on reservations especially on particular articles of the treaty for instance Article 2 in this case.

3.5 CEDAW Committee on the Reservation

The CEDAW Committee comprising of 23 experts was constituted with the aim to monitoring the progress and ensuring the implementation of the Convention. The Committee was created under the authority of provided Article 17 of the Convention.¹⁴⁸ The Committee's main roles include reporting to the United Nations General Assembly on its undertakings yearly through the Economic and Social Council; it may also give both suggestions and general comments after examining the member state's reports on legislative, administrative and judicial measures states adopted in order to ensure that the Convention's provisions are carried out.¹⁴⁹ This was however until the mandate of the Committee was expanded in 2008 when the Committee's meeting moved from New York where they were examined by the Division for Advanced Women to Geneva where the Office of the High Commissioner for Human Rights took over. With the adoption of the Optional Protocol to the Convention entering into force in December 2000, two newfangled methods were introduced. One, women could in their personal capacity present claims of violated women's rights protected by the Convention. Two, the Committee itself could now take upon itself to investigate the claims of violations submitted to them.¹⁵⁰

While Article 28 provides for the regulation of placing reservations, it is evident as Pauw rightfully argues that the method adopted by the Committee regarding reservations viewed as incompatible with the Convention is rather indecisive. These he argues resulted from the United Nations Office of Legal Affairs comment, stating that it is not the Committee's task to determine whether the reservation is incompatible or not.¹⁵¹ Although that being the case, the Committee

¹⁴⁸ DM Pauw Women's rights: from bad to worse? Assessing the evolution of incompatible reservations to the CEDAW convention. (2013) 29, 77 51-65 available at: <file:///E:/Chapter%20four/05.pdf> (accessed 15August 2014) 57.

¹⁴⁹ n 148 see above 57.

¹⁵⁰ as above.

¹⁵¹ as above.

has however requested for the limitation and urged states to withdraw the reservations.¹⁵² A number of General Recommendations were thus adopted by the Committee.¹⁵³ Pauw further states that Article 19 of the Vienna Convention on the Law of Treaties (VCLT) was included by the CEDAW Committee in the article that makes a provision for reservations.¹⁵⁴ Article 19 of the VCLT provides that “the reservation is incompatible with the object and purpose of the treaty is prohibited by the treaty”.¹⁵⁵ This led to the CEDAW Committee making a clarification as to what is the object and purpose of the treaty, which according to the Committee is “to eliminate all forms of discrimination against women with the view of achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms”.¹⁵⁶ However the Committee fails to give legal implications and consequences for reservation said to be incompatible with the treaty. Thus the Committee’s indecisiveness in approaching matters of invalid reservations.¹⁵⁷

CEDAW’s Committee report presented during the Fourth World Conference on women in 1995 clearly stated that it is aware of the considerable reservation placed particularly on Article 2 also known as the core provision of the Convention. The Committee’s report cautiously states that, indeed some reservations are incongruous with the object and purpose of the treaty.¹⁵⁸ It was further argued that the manner in which reservations escalate should serve as expression of the Convention’s importance. The Convention is aimed at pioneering change. Therefore it would be important for states to evaluate themselves culturally and nationally in order to meet the standards the treaty aims to achieve.¹⁵⁹ The Committee therefore approved General Comment No.24 by the Human Rights Committee, regarding the Committee assessing the compatibility of

¹⁵² see above 58.

¹⁵³ as above.

¹⁵⁴ as above.

¹⁵⁵ Art 19 of the Vienna Convention on The Law Of Treaties Signed at Vienna 23 May 1969, available at: <http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm> (accessed 17 August 2014).

¹⁵⁶ Committee on the Elimination of Discrimination against Women, ‘General Recommendation 25’ (2004) UN Doc A/59/38(SUPP) Annex I, paragraph 4 (accessed 17 August 2014). For the purpose of understanding the concepts of de jure and de facto, De jure can be explained as the acquisition of a position as a right backed by the law while de facto would mean the actual/physical/effective holding of such a position.

¹⁵⁷ Pauw (n 148 see above) 58.

¹⁵⁸ as above.

¹⁵⁹ as above.

the reservation based on the object and purpose of the Convention.¹⁶⁰ The report further states that determining the consistency of the reservation may be up to the Committee itself.¹⁶¹ Pauw¹⁶² states that in 1998 at the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR), CEDAW's Committee made a reiteration on the significance of withdrawing reservations especially on both Articles 2 and 16, insisting that the former is a core provision, providing the Convention's object and purpose. Reservations placed on both articles are said to be "impermissible" therefore should be reformed or retracted. The reservation entered by the kingdom of Lesotho on Article 2 should therefore be considered null and void because it is inconsistent with the object and purpose of the treaty aimed at eliminating all forms of discrimination against women. In 2011, CEDAW Committee raised concerns regarding the reservation while examining the report presented by Lesotho on CEDAW.¹⁶³ The Committee argued that the Lesotho has not integrated the Convention into national law, therefore the provisions made by CEDAW regarding inequality and non-discrimination has not been implemented (relating particularly to customary practices).¹⁶⁴ Similarly, while probing Lesotho's report on ICCPR, the Human Rights Committee presented the same concern.¹⁶⁵ It was therefore recommended that Lesotho withdraws the reservation given that it was inconsistent with the Convention, but Lesotho refused to withdraw stating that Lesotho's culture and tradition is embedded in society therefore cannot be changed and that Section 18 (4) (c) of the Constitution allows for discriminatory laws as provisions or applications of customary law despite the fact that Section 18 aims at promoting non-discrimination.¹⁶⁶ Furthermore it has been argued in

¹⁶⁰ as above, see also General Comment No.24 (2) and (16) by the Human Rights Committee which states that reservations should be compatible with the object and purpose of the treaty and committee should be able to legally determine whether particular reservations are compatible or incompatible with the object and purpose of the treaty available at: <http://www1.umn.edu/humanrts/gencomm/hrcom24.htm> (accessed 17 August 2014).

¹⁶¹ as above.

¹⁶² as above.

¹⁶³ The Convention on the Elimination of All Forms of Discrimination against Women: Concluding observations of the Committee the Elimination of Discrimination against women, 2011. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-LSO-CO-1-4.pdf> (accessed 25 August 2015).

¹⁶⁴ n 163 above.

¹⁶⁵ Human Rights Committee Concludes Consideration of Lesotho Report on Compliance with Civil and Political Rights 1999. Available at: <http://www.un.org/press/en/1999/19990401.hrct534.html> (accessed 25 August 2015).

¹⁶⁶ Human Rights Council: Universal Periodic Review Mechanism, 2015. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/209/72/PDF/G1420972.pdf?OpenElement> (accessed 25 August 2015). See also the judgment on the Case of Senate Masupha.

judgement on the case of Senate Masupha that Lesotho cannot rely on its obligation to international law because international law cannot be effective where it is not implemented.¹⁶⁷ Though this might be the case, the act of ratifying the treaty binds states to oblige to the treaty. Therefore this argument cannot be seen as a valid reason for failing to withdraw the reservation. This is a clear indication that Basotho customary law is inconsistent with international human rights law.

3.6 Regional Human Rights Instruments: the Maputo Convention and SADC Protocol on Gender and Development.

The Maputo Protocol and SADC Protocol on Gender and Development form their basis from CEDAW. Both regional instruments inspired by CEDAW adopted the mandate of the Convention recognising the importance of Women's rights on the regional level. Like Article 2 of CEDAW, the two instruments encourage and obligate member states to promote and protect the rights of women in Africa. In addition, states must ensure that the principles of non-discrimination and equality are upheld¹⁶⁸ and that cultural and traditional practices that are harmful to the wellbeing of women should be abolished.¹⁶⁹ Both instruments provide that international law should be in harmony with both regional and domestic legislation.¹⁷⁰ It is important to note that Lesotho ratified the Maputo Protocol before entering the reservation on CEDAW; therefore the argument based on the importance of culture cannot serve as justification for denying women the right to participate in cultural practices.¹⁷¹ It is evident based on the above information and the concerns presented by the CEDAW committee, Human Rights Committee on ICCPR as well as Human Rights Council Universal Periodic Review, that indeed the reservation placed by the Kingdom of Lesotho on Article 2 of CEDAW proves to be not only inconsistent with international law but also regional

¹⁶⁷ n 153 above.

¹⁶⁸ Art 2 (2) of the Maputo Protocol calls for the elimination of all forms of discrimination against women, see also 3 (b) of the SADC Protocol which calls for equality between men and women.

¹⁶⁹ Art 21 (1) of the SADC Convention, Also see Article 2 (2) of the Maputo Protocol on the elimination of harmful practices in customs and traditions. Calls for the reforming of such practices immediately.

¹⁷⁰ Art 3 (b) of the SADC Protocol and Article 18 of the African Charter which provides that women's rights be protected as stated in the international conventions, for instance CEDAW (Art. 2)

¹⁷¹ Maputo Protocol calls for the elimination of all forms of discrimination against women, came into effect in 2005 and by 2009 at least 45 states and 28 states had both signed and ratified it including the kingdom of Lesotho. Available at: <http://www.maputoprotocol.com/the-countries-that-have-ratified-it> (accessed 25 August 2015).

law. It is therefore argued that the reservation on CEDAW is not only in contradictory with the purpose and object of CEDAW but also that of the two regional protocols.

It is also noteworthy to state that any State Party which has made a reservation in accordance to article 2 of CEDAW may at any time under Article 28 paragraph 3 withdraw that reservation by notifying the General Secretary of the United Nations.¹⁷² The Kingdom of Lesotho is no stranger to this process. In August 2004, Lesotho withdrew reservations placed on CEDAW on Article 29 (1) and the general Convention¹⁷³ and hopefully will withdraw one on Article 2.

3.7 Conclusion

In conclusion it is evident that CEDAW Committee's main objective is to ensure that all reservations deemed incompatible with the convention's object and purpose should either be withdrawn or reconsidered. The Committee has further expressed its dissatisfaction concerning the entering of reservations particularly on the core articles of the Convention which sets out the object and purpose of the Convention, which is Articles 2 and 16. Concerns about states failing to withdraw or modify the reservations are one of the Committee's dissatisfaction. However the Committee has failed to address the question of penalties on invalid reservations.

It is also evident that the continued relations between states based on either political, economic gains or any other sort of interests have led to many states objecting against reservations and not entirely keeping the fight, rather they make objections without any measures taken against a state's reservation said to be inconsistent with the Convention. Some states are not entirely affected by the reservation as they have no interest in a state that has entered a reservation, as a result this hinders the object and the purpose the convention aims to achieve. In this case it is empirical for the Committee to adopt and enforce laws that will limit the entering of reservations as stated in the previous chapter. The law should be used as a tool for social change.

¹⁷² Article 28 (3) of CEDAW "Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received".

¹⁷³ Viljoen (n 119 see above) 121.

States such as Lesotho hinder the attainment of women's rights especially the right to equality and non-discrimination, therefore should be punished either through sanctions as they hinder the progression of human rights (particularly women's rights based on culture and customary law). The reservation entered by the kingdom of Lesotho on Article 2 on the succession to chieftainship is invalid and calls for immediate withdrawal and reevaluation. Therefore the Chieftainship Act has to be revised in order to accommodate women and to be in line with the states' obligation to promote and protect the rights of women. CEDAW Committee needs to be clear on the consequences states may have to face by entering invalid reservations. General comments and recommendation made by CEDAW Committee to member states are not sufficient enough to hold states accountable. Proposing the withdrawal of reservations without any measures to ensure that the states with reservations actually withdraw those conditions shows lack of efficiency by the Committee. Therefore it is the Committee's task to ensure that a serious action is taken against states that refuse to either modify or withdraw their reservation particularly on the core articles of the Convention, articles said to be impermissible. It would be advisable for Lesotho to withdraw the reservation. Having discussed the position of Lesotho in relation to Article 2 of CEDAW, it is important to look at other countries in which traditional leadership is embraced and practiced. Also looking at how the CEDAW has been incorporated into both domestic and customary law to bring about equality and non-discrimination within the institution of chieftainship.

CHAPTER FOUR

4 Comparative analysis

4.1 Introduction

The previous chapters of this dissertation have analyzed the rights of women in Lesotho in relation to chieftainship as well as the country's position on CEDAW. This chapter distinctively compares Lesotho's position on women's rights and succession to chieftainship to three Southern African countries including Zambia, Botswana and Namibia.

According to Quinlan and Wallis¹⁷⁴ chieftainship in Lesotho means *Borena*. However, *Borena* is not a term that is explicitly defined. Instead if one is said to be of royalty then he is called "*oa boreneng*." A chief also known as *Morena* in Lesotho means 'the one that leads the society.' *Morena* is usually from the royal family. According to Quinlan and Wallis,¹⁷⁵ Lesotho has about 1558 chiefs comprising of the paramount chief (the King), the principal chiefs, ward chiefs, sub ward chiefs and village headmen in order of superiority. Under customary law, the paramount and principal chiefs are the most important offices and succession to this position is inherited. According to Makoa,¹⁷⁶ the college of chiefs nominates the Principal Chiefs and their successors and only first born male children can succeed the throne.¹⁷⁷ Women under Chieftainship Act cannot succeed in their own right; however they are allowed to "act" as chief or regent in instances where the "rightful heir" is a minor, unstable or when the council of chiefs is still deciding on the rightful successor.¹⁷⁸ While such a woman holds power as regent, she enjoys the rights and privileges of office until the rightful heir succeeds the throne. It must be noted that

¹⁷⁴ Quinlan & Wallis (n4 above), 147.

¹⁷⁵ n 4 above 147.

¹⁷⁶ F Makoa Parliaments of the South *Strengthening parliamentary democracy in SADC countries Lesotho country report* available at: <http://dspace.africaportal.org/jspui/bitstream/123456789/31690/1STRENGTHNING%20PARLIAMENTARY%20DEMOCRACY%20IN%20SADC%20COUNTRIES%20LESOTHO%20COUNTRY%20REPORT.pdf?1> (accessed 12 September 2014) 15.

¹⁷⁷ Chieftainship Act of Lesotho, Act 22 of 1968.

¹⁷⁸ see above, also see Sec 45 of the 1993 Constitution of Lesotho.

the female regent who acts as chief can never assume full office regardless of the length of time she holds in power. Although chieftainship is male dominated, women can be appointed as village chiefs because this position does not require one to be of royalty. Most of the village headmen are not from the royal family and are elected because of their good work within the community.

According to the Chieftainship Act (1968),¹⁷⁹ chiefs have the responsibility to assist, give support to and maintain the King's government. Chiefs must serve the people, ensure that public is safe and maintain order within the state. Chiefs therefore act as custodians and have the responsibility to ensure that Basotho's customs and traditions are preserved.¹⁸⁰ It is the chief's duty to ensure that widows and orphans, the disabled, sick and underprivileged are taken care of by allocating land and cultivating it with the help of the village. In the case of registering the marriages, deaths and births of the people, the chief serves as an attester.

The comparison will therefore focus on the structure of chieftainship; the rights of women in relation to succession to chieftainship; whether these countries have adopted CEDAW; and how they have reconciled CEDAW and traditional leadership. This comparison will play a very important role in drawing lessons and good practices if any, that Lesotho can adopt to improve the status of women. The next subsection will examine the position of Namibia on the rights of women in traditional leadership.

4.2 Chieftainship and traditional leadership in Namibia

The people of Namibia can be classified into at least eleven different ethnic groups each having its own culture and heritage. These different cultures have influenced the traditional leadership within the respective tribes. Pre-colonial Namibian societies were ruled by kings for example among the Owambo¹⁸¹ who were nominated from the family or clan. Kingship was hereditary

¹⁷⁹ The Chieftainship Act of Lesotho, Act 22 of 1968 see also P Leretholi & G Moran *et al* (eds) *Chieftainship and Local Government in Lesotho: Local Governance and Non-State Actors Support Programme (LGNSP) Report 5* (2009) 9 available at: www.bookshop.europa.eu/.../chieftainship...loc... (accessed 13 September 2014).

¹⁸⁰ The Chieftainship Act of Lesotho, Act 22 of 1968 (see also the LGNSP Report of 2005).

¹⁸¹ C Keulder 'State, society and democracy': A reader in Namibian politics (2000) Macmillan Education Namibia (pty)Ltd Windhoek 155.

and was associated with control over all aspects of life.¹⁸² People's lives, property and social welfare were all under the control of the king and all institutions were answerable to him.¹⁸³

Under colonial rule, the institute of kinship was replaced by chieftainship. The new chiefs were elected into power under the supervision of colonial masters.¹⁸⁴ Kavango had five sub areas with each area under the administration of a chief. Succession to chieftainship in the south followed a matrilineal lineage, however successors had to be elected.¹⁸⁵ Therefore all chiefs had to be from the royal family. Chiefs were helped by the village headmen to carry out their duties; headmen were elected by the society and not appointed by the chief.¹⁸⁶ Within the Kavango tribe succession is matrilineal and women can be elected to serve as chiefs.

Namibia's Traditional legal system comprises of traditional leaders, namely chiefs and headmen.¹⁸⁷ Although Constitution of Namibia does not provide for the institution of chieftainship and customary courts, the Traditional Authorities Act 17 of 1995 and the Traditional Authorities Act 25 of 2000 does.¹⁸⁸ Both Acts make provision for the establishment of traditional authorities, and furthermore recognize the traditional leaders.¹⁸⁹

According to the Traditional Authorities Act of 2000, traditional authorities consisting of chiefs and headmen within a particular society are elected according to the provisions of Section 4 (1) (a) or (b) and Section 6 of the Act.¹⁹⁰ Traditional authorities have a duty and responsibility to ensure that peace and social welfare of the members of society within their jurisdiction is

¹⁸² n 181 see above.

¹⁸³ as above.

¹⁸⁴ see above.

¹⁸⁵ see above 157.

¹⁸⁶ as above.

¹⁸⁷ Traditional Authorities Act, Act 25 of 2000, Signed by the president, the act was consented to in December 2000 and entered into force in May 2001.

¹⁸⁸ H Becker '*New things after independence*': gender and traditional authorities in postcolonial Namibia *Journal of Southern African Studies* 32, 1, March 2006 32. Available at: http://www.jstor.org/stable/25065065?seq=1#page_scan_tab_contents (accessed 13 April 2015).

¹⁸⁹ Traditional Authorities Act, Act 17 of 1995 and Traditional Authorities Act, Act 25 of 2000.

¹⁹⁰ Traditional Authorities Act, Act 17 of 1995 and Traditional Authorities Act, Act 25 of 2000.

promoted.¹⁹¹ In addition upon consulting the community, the chief or headmen may establish customary law pertinent to the society and help in codifying it.¹⁹²

Traditional leaders have to ensure that language, traditional customs and values, cultural artefacts, heritage sites and historical literature is preserved, promoted and protected. Furthermore, as provided in the Namibian Constitution under Article 102 (5), traditional leaders shall give advice to the Council of traditional leaders in its duties.¹⁹³ In accordance to Article 23 of the Constitution, traditional chiefs have to make sure that affirmative action is promoted in order to encourage gender equality in leadership positions.¹⁹⁴ The Act further states that shall chiefs help the Namibian security forces in preventing and investigating any crimes and taking into custody offenders. Moreover help the government, regional and local councils in carrying out and implementing policies, keeping the community well-versed of projects aimed at developing their community.¹⁹⁵

Section 4 of the Traditional Authorities Act, Act 25 of 2000 of Namibia provides that in accordance to and authorised by customary law as well as section 5 and 6 of the Act, members of the society may elect one member of the royal family within the community who will be inaugurated as chief or head of the village.¹⁹⁶ The Act further provides for the functions and duties; election into power; recognition and appointment of traditional leaders. It is important to note that the Act adopts a gender neutral language which supposes that traditional leadership is accommodative of both men and women. The operative clauses of the Act make use of the words “authorities”, “individual and person(s) in reference to traditional leaders. By implication, this means that

¹⁹¹ Sec 3 of the Sec 2 Traditional Authorities Act, Act 25 of 2000 of Namibia under the powers, duties and functions of traditional and members.

¹⁹² n 189 see above.

¹⁹³ see above, see also Art 5 provides that “There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice”. See also the Constitution of Namibia.

¹⁹⁴ see above and see also article 23 of the Constitution of the Republic of Namibia which provides that “ racial discrimination, discriminatory practices and laws shall be prohibited and that women who suffered under discrimination may be treated equally and equally partake in political, social, economic and cultural life’.

¹⁹⁵ Traditional Authorities Act, Act 25 of 2000 of Namibia.

¹⁹⁶ Sec 4 of the Traditional Authorities Act, Act 25 of 2000 of Namibia.

women in Namibia maybe appointed as traditional leaders which is giant progression in the realm of traditional leadership, culture and tradition in Africa.

On the 22 November 1992, Namibia acceded to CEDAW.¹⁹⁷ Namibia's position on women's rights to succession of traditional leadership reflects a progressive society that is accommodative of contemporary principles which includes equality, human rights and democracy. This constitutes an example where by the law has been used to reform cultural practices in endeavor to elevate the status of women in traditional leadership. Namibia therefore constitutes an example which Lesotho should emulate in order to show equality in all spheres of life.

4.3 Chieftainship in Botswana

During the colonial era, chiefs (*dikgosi*; *kgosi* - *singular*) also called traditional leaders were recognized by colonial rulers as important leaders of the society.¹⁹⁸ In 1966, the Republic of Botswana became independent and adopted the Westminster system of democracy.¹⁹⁹ Although the government has taken measures to reduce the powers of chiefs, the suppleness and adaptable nature of customary law, Chieftainship (*bogosi*) remains at the center of politics, government and the society of Botswana.²⁰⁰ That said, the institution of chieftainship continues to be strong and valued and validated by customary law.²⁰¹ However, Dusing argues that the institution continues to be emasculated and manipulated by the new democratic nature of government through new legislation.²⁰²

The Constitution established and recognizes the Houses of Chiefs under Section 77.²⁰³ However, it is important to note that not all members of the House of Chiefs are chiefs. Dusing, asserts that the Constitution of Botswana recognizes eight major indigenous groups, namely Bakwena,

¹⁹⁷ Namrights Press Releases: Namibia Fails In Its Obligations Under Human Rights Treaties (May, 28 2002) available at: <http://www.nshr.org.na/index.php?module=News&func=display&sid=149> (accessed 17 April 2015).

¹⁹⁸ S Dusing Traditional leadership and democratisation in Southern Africa: *A comparative study of Botswana, Namibia and South Africa* (2002) Munster Hamburg London 101.

¹⁹⁹ WG Morapedi *Customary law and chieftainship in the twenty-first century Botswana* in T Higgins, P Galizzi & J Fenrich *The Future of African Customary Law* (2011) 147 Cambridge University Press 248.

²⁰⁰ as above.

²⁰¹ see above 255.

²⁰² n 198 see above 101.

²⁰³ The Constitution of the Republic of Botswana.

Bakgatla, Balete, Barolong, Batawana, Bangwaketse, Batlokwa and Bangwato (8 principle tribes).²⁰⁴ These groups are represented in the House of Chiefs by their paramount chiefs and inherently regarded as principal.²⁰⁵

In the past, chieftainship followed a male pedigree. Women were not allowed to be chiefs, only first born sons could succeed their fathers.²⁰⁶ After independence the institution of chieftainship still retained its prevalence and was recognized by other Acts of Parliament including the Chieftainship Act/Bogosi Act 41:01, Tribal Territories Act and Customary Courts Act.²⁰⁷ The Chieftainship Act/Bogosi Act 41:01²⁰⁸ outlines the powers and duties of chiefs as well as process of appointing and removing the chief, regents and headmen.²⁰⁹

Where the position of chieftainship was vacant either because of retirement or death, the tribe elders may convene a meeting to appoint the 'rightful successor'²¹⁰ in accordance with customary law of the tribe. The minister shall be notified of such designation and recognise the designated person.²¹¹ Morapedi however argues that, succession is not entirely in accordance with the customary law but whether the appointed successor is good enough for the government.²¹² In instances where the chief dies or fails to perform his functions, the Act provides that the minister shall be notified and the regent may be appointed.²¹³

Botswana adopted the CEDAW in August 1996 and since then evolution in the institute chieftainship has been evident. Women have been acknowledged as chiefs in Botswana. Moumakwa²¹⁴ rightfully asserts that there has been great progress in the institution of

²⁰⁴ n 198 see above 109.

²⁰⁵ as above.

²⁰⁶ Morapedi (n 199 see above) 251.

²⁰⁷ KC Sharma 'Role of traditional structures in local governance for local development the case of Botswana' available at: <http://info.worldbank.org/etools/docs/library/153055/botswana.pdf> (accessed 18 April 2015) 5.

²⁰⁸ n 207 above, also see the Chieftainship Act/ Bogosi Act 41:01 of Botswana.

²⁰⁹ as above 5.

²¹⁰ Sec 6 of the Chieftainship/ Bogosi Act 41:01 of Botswana.

²¹¹ as above.

²¹² Morapedi (n 199 see above) 257.

²¹³ Sec 7 of the Chieftainship/Bogosi Act, Chapter 41:01 of Botswana.

²¹⁴ PC Moumakwa *The Botswana Kgotla System: A mechanism for Traditional Conflict Resolution in modern Botswana. Case study of the Kanye Kgotla* (2010) 76. Available at: <http://munin.uit.no/bitstream/handle/10037/3211/thesis.pdf> (accessed 18 April 2015).

chieftainship; women have taken up the role of chiefs. The installation of Chief Mosadi Seboko and Chief Rebecca Baneka was said to a step forward for women, thus claiming their rightful positions.²¹⁵ This serves evidence that the republic has indeed made progress in curbing gender inequality within the traditional system of governance and under customary law. A number of laws and policies have been reformed to abolish clauses deemed discriminatory.²¹⁶ This further show that the Republic of Botswana has not only obliged by the Constitution but also international law aimed at promoting and protecting the rights of all humans. The principles of non-discrimination and equality have been adhered to. The position of Botswana indicates a progression from the radical traditional position of many African states that still deny women the right to participate in traditional leadership. Such development is a step in the right direction which the Kingdom of Lesotho can emulate.

4.4 Chieftainship in Zambia

Chieftainship in Zambia is an integral part of the political governance of the country. Chiefs form the core of local governance especially in rural areas.²¹⁷ The institution of chieftainship has undergone significant transformation since the colonial period.²¹⁸ The common law of Zambia has codified chieftainship under the Chief's Act 13 of 1994 and Part XIII of the Constitution of Republic of Zambia.²¹⁹

The Constitution of Zambia under Part XIII creates the House of Chiefs as a social, political and cultural institution that participates in governance.²²⁰ The Chief's Act provides for the appointment and dismissal of chiefs as well as their roles and duties.²²¹ The most notable aspect of the Chief's Act of Zambia is that it is written in gender neutral language. Under the structure of chieftainship, the paramount chiefs are the highest ranking in hierarchy of traditional

²¹⁵ n 214 see above 76.

²¹⁶ Botswana MDGR report 'Goal 3: Gender equality and empowerment' (2004) available at: [http://www.sarpn.org/documents/d0001974/Botswana MDG Report2004_11.pdf](http://www.sarpn.org/documents/d0001974/Botswana_MDG_Report2004_11.pdf) (accessed 18 April 2015).

²¹⁷ WV Binsbergen '*chiefs and the state in independent Zambia*' Journal of legal pluralism (1987) 139.

²¹⁸ Binsbergen (n 217) see above.

²¹⁹ Part XIII of the Constitution of the Republic of Zambia.

²²⁰ Part XIII of the Constitution of the Republic of Zambia.

²²¹ The Chief's Act Chapter 287, Act 13 of 1994.

leadership.²²² Zambia has eight principal tribes each having a paramount chief who controls a vast territory. Under the principal chiefs are 56 chiefs/ chieftaness who control smaller areas within the principal tribe's territory.²²³ The chief or chieftaness is assisted by sub chiefs who ensure that the roles and duties of chieftainship are performed.

While there is no female principal chief currently, women are serving as chieftaness in Zambia for example Chieftaness Malukwa of Kapata peninsula.²²⁴ It must be noted that although no woman is serving as a principal chief, the language of the Chief's Act is permissive of a woman assuming that position. In addition, women like Chieftaness Malukwa of Kapata peninsula are successfully serving in the position of traditional leadership. It is important to note that majority of the ethnic groups in Zambia follow a matrilineal lineage. In addition, the Republic of Zambia adopted the CEDAW Convention on the 21st of June 1985.²²⁵ In Zambia's report to the CEDAW Committee,²²⁶ it was rightfully stated that Zambia had made progression in the implementation of Article 2 of the CEDAW (equality and non-discrimination against women). The incorporation of women in traditional leadership in Zambia signifies a milestone in achieving equality and non-discrimination. This position is an enviable departure from the radical African cultures and norms which place primacy on male domination without a rational explanation. The chieftaness in Zambia has displayed the capability to discharge with due diligence the functions of office of chief. This is strong lesson which the kingdom of Lesotho can follow in the advancement of equality and the rights of women to chieftainship.

4.5 Conclusion

²²² Palaces: Traditional hierarchy available at: <file:///G:/materials/palace.html> (accessed on 2 June 2015).

²²³ as above.

²²⁴ as above.

²²⁵ VII Zambia's International Legal Obligations available at:

[file:///G:/materials/Hidden%20in%20the%20Mealie%20Meal %20Gender-Based%20Abuses%20and%20Women%E2%80%99s%20HIV%20Treatment%20in%20Zambia %20VII.%20Zambia%E2%80%99s%20International%20Legal%20Obligations.html](file:///G:/materials/Hidden%20in%20the%20Mealie%20Meal%20Gender-Based%20Abuses%20and%20Women%E2%80%99s%20HIV%20Treatment%20in%20Zambia%20VII.%20Zambia%E2%80%99s%20International%20Legal%20Obligations.html) (accessed on 2 June 2015).

²²⁶ Zambia's third and fourth State Report to the CEDAW Committee 1999 available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw27/zam3-4.pdf> (accessed on 2 June 2015).

It is undeniable that the institution of Chieftainship or traditional leadership has evolved over time. However traditional leadership or the institution of chieftainship continues to be male dominated in most African states. It is also undeniable that countries like Namibia, Botswana and Zambia have been able to adapt to changes and accept cultural changes within the traditional leadership structures to include women in traditional positions. This has been done through the passing of new pieces of legislation and reformation of discriminatory laws as well as conforming to international law instruments aimed at promoting and protecting the rights of women and preserving positive culture. Therefore the Kingdom of Lesotho as stated in the previous cannot justify denying women the right to succeed to chieftainship on the basis of culture, the reservation placed therefore should be deemed invalid given the lack of consistence to CEDAW. It is evident that Lesotho's legislation is still characterised by claw back clauses as a result discriminatory laws continue to be justified. The study calls for the reformation and revision of the Constitution and the Chieftainship Act to be more inclusive of women in traditional leadership and the incorporation of CEDAW in national law as it is done in the discussed countries. Lesotho can also adopt positive practices from the above discussed countries, for instance the community should be involved in the appointment of the successor, adopt affirmative action policies and ensure that customary law recognises women, promotes gender equality and conforms to the international law principles of equality and non-discrimination.

CHAPTER FIVE

5 Conclusion and Recommendations

5.1 Summary and Conclusion

Chapter five will focus on the conclusions drawn from the findings set out in the previous chapters regarding inequality and discrimination against women under customary law; particularly, succession to chieftainship and continue to give recommendations thereof.

The study was undertaken to address the plight of women (first born daughters) regarding succession to chieftainship. The study's prime objective is to address gender inequality and discrimination against women within the institution of chieftainship or traditional leadership. The study therefore examined different theoretical perspectives which informed the discussion on discrimination and inequality within the African continent, particularly Lesotho. In Addition the study attempted to define chieftainship or chief. Furthermore, the study examined the nature and relevance of chieftainship in the current era that is characterized by democracy and human rights. Moreover the study questioned the conformity of Lesotho's domestic and customary law to that of international law. The study further questioned the validity of the reservation the Kingdom of Lesotho placed on Article 2 of CEDAW. A comparative analysis was also made between Lesotho and other countries; in which chieftainship continue to be regarded as important to this day.

It is therefore essential to conclude that, even though it has been more than forty years after independence, the kingdom of Lesotho continues to recognize the institution of chieftainship under customary and common law. Chieftainship remains an integral part of Lesotho hence the dual system of governance. However the greatest challenging aspects between the customary and common law of Lesotho has been the issue of equal treatment of women regarding the assumption of traditional leadership positions. Under customary law particularly Section 10 of the Chieftainship Act 22 of 1968, women cannot in their own right succeed to chieftaincy but can only act as regents. One could argue that the institution of chieftainship is patriarchal in nature

and put emphasis on male dominance. As a result, women continue to be discriminated against based on gender. Although Chapter II of the Constitution of Lesotho provides for the principles of non-discrimination and equality, women remain excluded from traditional leadership on the basis of sex and gender. It is evident that the Constitution has failed not only to uphold the principles of equality and non-discrimination but that of international law and to protect the rights of women in Lesotho.

While examining the different perspectives on inequality and gender discrimination, it became clear that culture plays a pivotal role in determining gender differences and roles. Culturally people are socialized to believe that men are more important than women. We can therefore conclude that culture is gender biased and results in gender inequality and discrimination against women in the attempt to accommodate customary law. That said it is not surprising that chieftainship in Lesotho remains discriminatory. Although some feminist jurisprudence scholars propose that issues regarding inequality and discrimination be dealt with by the law, many scholars on the other hand including Munalula, have questioned the neutrality of the law itself, stating that the law is not adequate enough to deal with issues of inequality and discrimination.²²⁷ Furthermore, it has been argued that the law is naturally male.²²⁸ It is evident therefore that customary law plays tremendous role in Lesotho and in an effort to retain power and male dominance. Culture and customary law remains the reason why women cannot succeed to chieftaincy.

Although it is evident that nature of chieftainship is male dominated and discriminatory, it remains relevant and perceived by many as a good institution. However it is important to note that not all members of the society appreciate the institution, some people find the institution less relevant in this day and age as it has lost its significance especially in the urban areas.²²⁹

²²⁷ Munalula (n 74 above) 7.

²²⁸ Smart (n 98 above).

²²⁹ P Lertholi & G Moran *et al* (eds) *Chieftainship and Local Government in Lesotho: Local Governance and Non-State Actors Support Programme (LGNSP) Report 5* (2009) 9 available at: www.bookshop.europa.eu/.../chieftainship...loc... (accessed 13 September 2014).

The institute of chieftainship is governed by customs and not based on freewill. This has therefore resulted in gender discrimination. Although there are laws such as affirmative action that legitimately discriminate, the Chieftainship Act of Lesotho cannot be categorized as such. Instead women under the Act are treated unequally and discriminated based on sex and gender. The Chieftainship Act as well as the Constitution has failed to give justification of this act of discrimination. I argue that cultural practices are not sufficient enough to justify discrimination suffered by women under customary law, the Chieftainship Act and the Constitution. Although Section 18 (4) (c)²³⁰ provides that laws inconsistent with customary law may not be regarded as binding to them, ratifying the Convention means that the state is bound to domesticate international law. Therefore the argument by the Appeal Court on Senate Masupha's Case regarding the reservation on Article 2 of CEDAW is inconsistent with Section 18 (4) (c) of the Constitution does not seem to be reasonable. Therefore I argue that the reservation placed is invalid and incompatible with the object and purpose of CEDAW that is principles of equality and non-discrimination. Although concerns were raised and recommendations made to the Lesotho regarding the case of succession to chieftainship, the kingdom of Lesotho rejected them on the grounds of the traditions and cultures deeply embedded in the society. Thus denying her obligation to the human rights instruments and impeding the attainment of women's rights particularly with regards to equality and non-discrimination. The question therefore remains as to when should customary or common law precede over international law or in which cases would international law precede over domestic law. It is evident that the Constitution is in itself contradictory.

The study further took a comparative angle, comparing chieftainship in light of the democracy and international law between Lesotho and other countries where chieftainship continues to be resilient. Three countries which I argue have progressed in matters relating to the institution of chieftainship include Namibia, Botswana and Zambia. In the discussion of the three countries, it became evident that, although the institution of chieftainship continues to be significant, relevant and male dominated, they acknowledged that the institution has evolved over the years

²³⁰ The Constitution of Lesotho

and therefore adopted legislation that is gender neutral. This allowed women to be chiefs and take up traditional leadership roles in traditional councils. Most of the powers held by the chiefs are restricted and traditional leaders play a more advisory role to the government in power. All the three countries have progressed in attaining positive cultural practices and incorporating CEDAW in their domestic laws. It is worth noting that the functions and duties of chiefs under the Chieftainship Act of Lesotho are administrative in nature and can therefore be executed by women, even better than male. Chieftaness 'Masenate Masupha acted as a chief for a period of 12 years, cant this period qualify her to be the rightful chief? This goes further to demonstrate that chieftainship is based on power relations as opposed to culture. As a result it is important for the kingdom of Lesotho to emulate the positive cultural practices from the discussed countries.

5.2 Recommendations

Therefore based on the summary and conclusion thereof, it is important that I make recommendations to the kingdom of Lesotho in the light of the issues raised in the paper.

- I argue that the law should be used as an engineer for social change and a tool to dismantle patriarchy within our societies both in the public and private sphere. The law in many aspects has been enacted to bring about equality especially where inequality is evident.²³¹ With the changes taking place not only the societies but the whole world, it is inevitable that the law will respond to this. The law responds to the changes through process of judicial revisions of the domestic laws, constitutions or policies to mention a few.²³² This helps bring about change in social, political and cultural institutions through the development of policies accommodative of such institutions. As a result the law appears inclusive and aimed at protecting every member of the society.²³³ The revision of the Constitution and Chieftainship Act in light of cultural and social changes in Lesotho

²³¹ K Makkar Law as Tool for Social Engineering in India. Available at: <http://manupatra.com/roundup/331/Articles/law%20as%20tool.pdf> (accessed 26 August 2015).

²³² Auknotes Chapter 7: Law and Social Change. Available at: <https://sites.google.com/a/g.rit.edu/auknotes/law-and-society/chapter-7-law-and-social-change> (accessed 26 August 2015).

²³³ As above.

will help eradicate discrimination against women and gender inequality. However it is important to note that sometimes the law is formed in way that accommodates latest demands. For instance in the quest to attain gender equality and non-discrimination, both international and national laws are shaped to ensure that the above mentioned are obtained. Furthermore measures and instruments should be used to achieve these goals and ensure that they are established. This should therefore be the case in Lesotho while dealing with the plight of discrimination based on sex in relation to customary practices.

- Although Lesotho has undertaken some measures upon ratifying CEDAW to promote gender equality, it has been evident that domestic law has failed to obtain this mandate where customary law is concerned.²³⁴ Therefore the kingdom of Lesotho needs to adopt gender neutral policies aimed at promoting and protecting the rights of women. For instance adopting policies like affirmative action and ensuring that customary law recognizes women as important role players in traditional leadership positions, promotes gender equality and conform to the international law principles of equality and non-discrimination.
- The kingdom of Lesotho should abolish all laws deemed discriminatory. In addition it is evident that Lesotho's legislation is characterised by claw back clauses making it easy for her justify discrimination, therefore such clauses should be abolished.
- International laws particularly CEDAW in this case should be wholly and completely integrated into national law as it is legally binding. It is important to urge parliament to ensure that measures are taken to ensure that CEDAW is implemented in domestic law. I recommend therefore that parliamentary action in this case to harmonize domestic law and international law in order to achieve equality for all and non-discrimination.

²³⁴ The Convention on the Elimination of All Forms of Discrimination against Women: Concluding observations of the Committee the Elimination of Discrimination against women, 2011. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-LSO-CO-1-4.pdf> (accessed 25 August 2015).

For example the kingdom of Lesotho has managed to add to its legislation the Sexual Offence Act (2003), Legal Capacity of Married Persons Act (2006) and Anti-Trafficking in Persons Act (2011) to mention but a few of which was some of the mandates of CEDAW in an effort to protect women's rights.

- The Sections believed to be discriminatory in the Constitution of Lesotho, this case being Section 18 (4) (c) should be re-examined and reformed. Measures should be taken and established in the Constitution that proscribes all forms of discrimination against women.²³⁵
- Platforms for discussions regarding women's rights should be created within the society as well as the establishment of the National Human Rights Commission which will deal with issues relating to gender inequality, discrimination on the basis of sex and human rights issues as a whole as suggested by the CEDAW Committee in 2011.
- Furthermore it is important to adopt the processes of institutionalization and internalization. Both processes will ensure that from a young age all children regardless of their gender are regarded as equal. In addition, it is the state's duty to ensure that our cultural norms are consistent and in cooperation with the law aimed at promoting and protecting human rights.
- It would therefore be advisable for Lesotho to withdraw the reservation given that despite their arguments based on customary law, the reservation under international law is invalid. Customary law has to be more inclusive of women, eradicate all practices deemed discriminatory and adopt positive cultural practices that ensure equality and non-discrimination between men and women. It is also important for the council of chiefs and parliament to take into account and think through the length of periods regents or women hold in chieftainship office.
- The kingdom of Lesotho needs to accept that culture is not static but evolves. And within the process of evolution some of the cultural practices need to be altered to accommodate new occurrences, therefore the Constitution should be reviewed.

²³⁵ CEDAW Committee (n 234 above).

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