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**Land Preservation for Socio-economic Rights: A Review of the  
Burial Culture in Lesotho**

By

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## Declaration

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

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Ntsikoe Eric Likiki (student)

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Most importantly, I dedicate this project to my Lord and Saviour Jesus Christ and our blessed Mother Mary. Additionally, to my guardian angels, the Saints and my blessed ancestors and to future generations from my bloodline.

## **Abbreviations and Acronyms**

ACHPR - African Charter on Human and Peoples' Rights

ACRWC - African Charter on the Rights and Welfare of the Child

CRC - Convention on the Rights of Children

ICESCR - International Covenant on Economic, Social and Cultural Rights

Maputo Protocol - Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

UDHR - Universal Declarations of Human Rights

UN - United Nations

UNSAID – The Joint United Nations Programme on HIV/AIDS

WFP – World Food Program

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## Chapter 1:

### 1.1 Introduction

Like in many African societies, Basotho funeral practices entail burial of the deceased bodies as opposed in other parts of the world whereby methods like cremation are a common practice.<sup>1</sup> Land use for cemeteries has been covered by the statutory legal framework which has existed unreformed for decades. The Land Act of 2010 states that with the approval from the Ministry of Health, any authority vested with powers to allocate burial sites together with principal chiefs, shall identify places to be used for burial and it will be deemed unlawful to bury the deceased in any other place except the ones identified as cemeteries by the aforementioned authorities.<sup>2</sup>

The above Land Act of 2010 draws its powers from The Public Health Order of 1970 which states that the minister of Public Health shall notify through a Gazette, places he or she has identified as cemeteries and it will be considered unlawful for any person to exhume a corpse or cremate it without the permission of the minister through official documentation.<sup>3</sup> In other words, the recent framework addressing land use for public purposes such as burial sites, which is the Land Act of 2010, only reiterates the conditions laid down by the 1970 Public Health Order. It is the aim of this paper to advocate for a reform in that law which has been enacted since 1970.

Even before its consolidation by the 2010 Land Act, the Public Health Order of 1970 had been well observed. This is seen in the court judgment delivered by Justice

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<sup>1</sup> <https://www.elektaitaly.com/en/list-of-countries-by-cremation-rate/> (accessed on February 25<sup>th</sup> 2024)

<sup>2</sup> Land Act of 2010 sec 80 (1) & (2)

<sup>3</sup> The Public Health Order of 1970 sec 72 (1) & (2)

Hlajoane in the case between *Hleoheng Community Council v Phokoanyane and Others*,<sup>4</sup> wherein the issue on who has power to designate burial sites between the Ministry of Health and a community council, was resolved with the decision that while the community council only identifies a place in a village or district, the ministry has the power to designate and finally authorize and issue a gazette for the usage of such a place as a burial site. In essence, it is the ministry that determines the suitability of a place nominated by a community council to be a cemetery and approval thereof.

Recent statistical data reveals that Eastern and Southern African is the region highest affected by the HIV/AIDS pandemic in the whole world. Roughly 37.9 million people are HIV positive in the world, and out of that number 20.6 million who denote a percentage of 54.4, are from eastern and southern parts of Africa.<sup>5</sup> Additionally, Lesotho is positioned as the second highest affected country with HIV/AIDS in the world with 23.6 percent of prevalence in the world.<sup>6</sup> As recent as 2019, AIDS-related deaths amounted to a total of 4800.<sup>7</sup> On the other hand, Covid-19 has also been a major factor contributing to death rates in Lesotho. At the time of the writing of this paper, a confirmed total number of positive cases since the year 2020 are 11,081 while deaths have reached 329.<sup>8</sup>

It is worth noting that while HIV/AIDS and Covid-19 have a fair share in the death statistics of Lesotho, there are other causes of deaths such as road accidents, cancer and so on. All in all, what remains common knowledge is the fact that there are

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<sup>4</sup> *Hleoheng Community Council v Phokoanyane & Others* (CIV/APN/453/2006) (CIV/APN/453/2006) [2007] LSHC 57

<sup>5</sup> G Adika 'HIV/AIDS and child malnutrition in eastern and southern Africa' (2021) 33 *African Development Review* 79-90

<sup>6</sup> B E Nichols et al 'Economic evaluation of differentiated service delivery models for HIV treatment in Lesotho: costs to providers and patients' (2021) 24 *Journal of the International Aids Society* 1

<sup>7</sup> 'UNAIDS' (2020) 64

<sup>8</sup> <https://www.worldometers.info/coronavirus/country/lesotho/> (accessed on 19 June 2021)

funerals every weekend in different places across Lesotho. This means that Basotho people are constantly creating spaces for new graves in every cemetery and also that there are new cemeteries created when others have reached full capacity.

Being a small country within the borders of South Africa, Lesotho's total area is 30 360 square kilometer, a north to south distance of around 230 kilometers and a total width of approximately 210 kilometers.<sup>9</sup> It can be observed that at some point sooner or later, Basotho will run out of land to create spaces for more cemeteries.

## **1.2 Statement of the Problem**

Lesotho has for a long time been known internationally as a country with a critically eroded landscape and soil erosion has been one of the contributing factors to the degradation.<sup>10</sup> In addition to the fact that Lesotho is the second highest HIV/AIDS hit country in the world as noted above, with Covid-19 death rates also having been relentless, Basotho's tenacious belief in the dignity of the dead and the grave is costing them a great portion of land. In other words, as a result of rampant deaths rates which lead to constant creation of burial sites and also the commonly known tenacious belief in the dignity of the dead and sanctity of the graves, a variety of human rights would be compromised if land was to be consumed by burial sites as time ticks on.

Land, as a natural resource that can be used for other life-sustaining activities such as agriculture, housing and so on, is compromised. A number of human rights are at risk as long as the practice of burials continues. As the United Nations Human Rights

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<sup>9</sup> <https://www.worlddata.info/africa/lesotho/index.php> (accessed on February 25th 2024)

<sup>10</sup> N Majara 'Land degradation in Lesotho: A Synoptic Perspective' Masters dissertation, Cape Town: University of Stellenbosch 2005 5

Office of the High Commissioner points out, land is more than just a commodity but also a fundamental instrument for the implementation of many other human rights.<sup>11</sup>

Thus, it is observable that land can also be used to serve other human rights. These include the right to adequate housing, the right to food in a form of agricultural activities to mention a few. This paper is more concerned with women and children's socio-economic rights since these are the most vulnerable groups in Lesotho. The socio-economic rights addressed are the right to health, the right to food for both women and children and the right to social activities for children.

### **1.3 Purpose of the Study**

In light of the above background, this study intends to advocate, from a human rights perspective, for land preservation against the burial practices entrenched in the Basotho funeral culture in the event that those practices lead to the ultimate consumption of land such that other human rights related uses of land would be impossible. The study proposes among other solutions, an adaptation to cremation methods of dead bodies' disposals to encourage land preservation. As poverty and food insecurity are some of the problems faced by the country, the study understands that land preservation would offer as a solution to curbing such problems and thus the basic human rights such as the right to food would be realized.<sup>12</sup>

### **1.4 Research Questions**

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<sup>11</sup> United Nations Human Rights Office of the High Commissioner 'Land and Human Rights, Standards and Applications' (2015) 1

<sup>12</sup> More on land preservation and alternatives to burials is discussed in Chapter 3 and Chapter 4.

The main research question of the study is: should the practice of burials culture continue even if it may be at the expense of land-related socio-economic rights? And the supporting research questions are as follows:

- What is the importance of the burial culture in Southern African societies, specifically in Lesotho?
- What rights could be implemented when more land is available?
- What should be done, as alternatives to burials, in order that land could be conserved for implementation of socio-economic rights at the expense of burials?

### **1.5 Research Objectives**

The main objective of the study is to determine whether the burial culture, which is highly practiced in Lesotho, should continue even if it may compromise usage of land for socio-economic rights. The supporting objectives are as follows:

- Examining the importance of the burial culture in Southern African societies, with focus much into Lesotho
- Establishing the socio-economic rights that could be implemented when land is available
- Justifying the implementation of socio-economic rights as opposed to continuation of the burial practices on land
- Provide possible recommendations on other methods of dead body disposals

### **1.6 Research Methodology**

The study will employ a qualitative method of research which entails finding meaning of non-numerical phenomenon such as human behaviors or cultures. In this study burial practices will be examined. Desktop research, which entails using secondary data such as texts, is the method used for data collection. The burial practice will be studied beyond its existence as a culture in Lesotho but also in other selected Southern African cultures in order to understand the phenomenon in a deeper sense. A critical and comparative analysis of the culture in contrast to other methods of disposal of dead bodies will be made in later chapters in order to inform an argument for alternative methods to burial practices.

### **1.7 Scope and limitations of the Study**

The study intends to focus on the burial culture as the main factor leading to the looming land problem for Lesotho. The arguments are solely Human Rights based and in this context human rights are understood more as moral precepts which eventually will inform legal frameworks. So the study will only consult Human Rights frameworks from the international instruments. The advocated rights are specifically within the context or area of Women's Rights and Children's Rights. For the sake of originality, the study attempts to narrow the land problem literature more to Lesotho.

### **1.8 Literature Review**

The issue of land scarcity as a challenge to human rights has not been addressed. Discussing the issues surrounding land governance in Africa, Afolabi places his concern more on the politically flawed administration systems of various African countries, emphatically addressing the 'land grabbing' paradox that often leads to

food insecurity and violation of other human rights.<sup>13</sup> Afolabi's discussion is also focused on the post-colonial eras of the selected African countries mentioned in the paper. However, in as much as Afolabi's paper deals with the issue of land administration in light of human rights, his paper does not address the issue of land scarcity that results from cultural practices by indigenous peoples such as burials. The paper solely addresses the weaknesses in African land management systems.

Another discussion underpinned by a Human Rights approach to land management by Reta, thoroughly critiques the Ethiopian government's conduct, which is legally supported by the country's constitution, in expropriation practices that often lead to violations of a variety of socioeconomic human rights associated with access to land.<sup>14</sup> While Reta's paper comes very close with the land administration practices of Ethiopia with socioeconomic rights related to land access, the utmost concern is similar to Afolabi's, which is expropriation.

A recent land administration study on Lesotho by Kokome, simply raises concerns on the effect of land tenure reforms which may favor foreign investors more than the indigenous people, more specifically who live in rural areas and use land for various activities other than agriculture.<sup>15</sup> Kokome's study also comes close for mentioning the fact that land use also goes beyond agricultural activities but also spiritual rituals which are part of cultural practices in Lesotho. Nevertheless, Kokome basically expresses concern for the fate of such practices in light of the reforms. On the contrary, this study is fundamentally against such practices and rather prioritizes

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<sup>13</sup> O Afolabi 'Land Governance in Africa' (2021)

<sup>14</sup> DS Reta 'A Human Rights Approach to Access to Land and Land Dispossession: An Examination of Ethiopian Laws and Practices' (2016) 9 *African Journal of Legal Studies* 100-123

<sup>15</sup> L Kokome 'Land tenure reforms as subtle and land grabbing: Lesotho's Land Act of 2010 and the poor rural communities' University of Pretoria, 2018

advocacy for any activities that are in alignment with the fulfilment of the socioeconomic rights and other rights that can be associated with land use.

Another landmark study in relation to land and human rights was carried out by Rosine. In the study, Rosine critically discusses the concept of environmental conservation, puts it in contrast with the right to natural resources for indigenous people in various African rural societies and exposes the socioeconomic effects created by conversationalist movements to the pastoral communities.<sup>16</sup>

Rosine's study, just like of Kokome above, expresses concern on the isolation of indigenous people in law making with regards to their environment. Rosine's study also uses the human rights framework to critically discuss conservation practices. In as much as Rosine employs a human rights framework, the purpose is to advocate for the inclusion of indigenous people and also protection of a variety of socioeconomic rights they should enjoy.

This study does not necessarily address the indigenous people's cultures as detrimental for human rights. However, Rosine's study will assist in the later chapters wherein assessment of justifications for the inclusion of indigenous people in decision making will be made.

Golay and Biglino also present a relevant argument, where they critique the phenomenon of land grabbing as a vexing issue in the current discourses of human rights, showing it as a threat to the right to food.<sup>17</sup> The two scholars discuss land grabbing categorically in light of a socioeconomic right, which is a right to food. This right is among the socio-economic rights that this study aims to advocate for in

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<sup>16</sup> R Rosine 'Environmental Conservation and the Right to Natural Resources of indigenous people' University of Pretoria 2014

<sup>17</sup> C Golay and I Biglino 'Human Rights Responses to Land Grabbing: a right to food perspective' (2013) 34 *Third World Quarterly* 1630-1650

challenging the burial culture in Lesotho. The difference between Golay and Biglino's paper and this study is that the problems addressed are different. Their paper exclusively discusses land grabbing, while this study discusses the scarcity of land and burial cultures as sources for potential human rights violations. Nevertheless, the study will help in providing more insight into the importance of the right to food in the later chapters.

Now, coming into the burial culture itself, it is claimed that before the influence of Christianity, the burial system in Lesotho was different. Initially, the Basotho people often buried their deceased within the yards of their homes, specifically family elders and those who owned livestock would be buried in the kraals, with the belief that the latter cannot be separated from their livestock.<sup>18</sup> It should be noted that life after death is a belief underpinning this practice since one is believed to still be in contact with their livestock.

In Kenya, before the influence of Christianity, the disposal methods of dead bodies were different depending on the social status of the deceased. While other men and woman of significant social standing were granted burials, other ordinary people were left to be devoured by hyenas.<sup>19</sup>

In most African cultures nowadays, a grave continues to be a significant entity. Beyond the funeral, the ritual of unveiling a tombstone which usually occurs about a year later, often serves as a source of closure and solace for the bereaved family.<sup>20</sup> It is worth noting that the practice of tombstone unveiling is relatively common in Lesotho.

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<sup>18</sup> A K Opong 'The religious significance of ritual practices conducted at births, weddings and funerals in Lesotho' University of South Africa, 1997 41

<sup>19</sup> M Jindra and J Noret 'Funerals in Africa: An Introduction' (2011) 7

<sup>20</sup> T Leuta and C Green 'Exploring sustainable land practices in South Africa: Potential challenges and opportunities' (2011) 2

Furthermore, in cultures like Tsonga, the grave is simply regarded as the last resting place and the deceased are referred to as the sleeping.<sup>21</sup> This view is commonly used even in Lesotho apart from its presence which offers as a physical representation of the dead, it is also seen as the final home for the one who is buried. Thus, this view forms part of other views that make a grave a sacred entity or shrine.

These above views, which give a grave such a sacrosanct status, can be obstacles in terms of having to try new alternatives for the Basotho.

## **1.9 Theoretical Framework**

As it is multidisciplinary, the study intends to examine comprehensively the burial practices in Lesotho. Thus, Cultural Anthropology will be the best sub-discipline to inform the study with regards to the meaning of death and burial practices common in Southern African societies with a focus on Lesotho. Furthermore, the moral theory known as Deontology will be used to justify the need for a change of funeral practices in favor of the overall human rights-based argument of the paper. Practical theology is also incorporated in understanding Basotho's religious beliefs with regards to death and burial practices.

### **1.9.1 Sociocultural Anthropology**

This is a field of study which concerns itself purely with the practices and cultures of people, establishing generalized understandings of such through comparative descriptions of societies.<sup>22</sup> In other words, this is a field of study whose main

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<sup>21</sup> M E Baloyi 'Distance no impediment for funerals: Death as a uniting ritual for African people – A pastoral study' (2014) 3

<sup>22</sup> Z Doda 'Introduction to Sociocultural Anthropology' (2005) 21

concerns are the cultures and practices of a society. In this study, the sociocultural anthropology will be a more relevant discipline in attempting to understand the Basotho and a selected other African cultures and practices with regards to funerals.

### **1.9.2 Deontology**

Deontology is a duty-based moral theory that does not take into consideration consequences as basis for the rightness or wrongness of actions. Rather, in deontology, reason is the key dictator in establishing moral rules, rules which can be applicable universally.<sup>23</sup> In a nutshell, the important aspect of deontological ethics is usage of reasoning powers to make decisions. In this study, assessment of the Basotho burial practice will be made and judged on the reasonability of the culture.

### **1.9.3 Practical theology**

Practical theology is defined as a theological branch that deals with human interactions or actions in light of how they relate with God and the church in general since the life of a Christian is basically founded on one's relationship with God.<sup>24</sup> In other words, since Basotho are a highly Christian nation, the burial culture will also be assessed on the basis of their Christian beliefs and arguments for socio economic rights to be implemented in place of burials will accordingly be based on Biblical justifications.

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<sup>23</sup> I V Staveren 'Beyond Utilitarianism and Deontology: Ethics in Economics' (2007) 19 *Review of Political Economy* 21-35

<sup>24</sup> <https://uir.unisa.ac.za/bitstream/handle/10500/1789/02study.pdf?sequence=3> (accessed on 31<sup>st</sup> October 2022)

## **1.10 Assumptions**

It is the assumption of this research that due to Lesotho's small land size, there will be inadequate spaces for cemeteries in the future. Moreover, the consumption of the land by cemeteries is a result of Basotho's tenacity in their beliefs in ancestors and the dignity of the grave. It is on the basis of these assumptions that the study will take a look into the anthropological background of the burial practices among Basotho and other African ethnic groups wherein the practice is common. This will be done through investigation of available literature.

The study is aware of the right to culture which may serve as a counter argument in justification for the continuation of the burial practice. Thus, the argument will be established in the course of the paper to address the right to culture while advocating for the importance of other rights which may be compromised if the burial culture persists.

## **1.11 Structure or Chapter overview**

The research is dissected into five chapters. The first chapter, introduces the background within which the problem is captured, the statement of the problem, the scope, research questions and objectives, literature review and theoretical frameworks. The second chapter studies the anthropological basis of the burial culture and the attitudes of the Bantu people towards graves including the Zulus, Xhosas, Tswanas and Basotho ultimately.

The third chapter comprehensively discusses the socio-economic rights for which land should be preserved in order for them to be implemented. The fourth chapter provides alternatives for burials of the deceased, discusses burial local laws and also advances a justification for the limitation or abolition of burials through moral and theological arguments. The fifth chapter provides a conclusion and recommendations in alignment with the alternatives discussed in the previous chapters.

## **Chapter 2: The meaning of Death and the importance of burial cultures in the Bantu societies of Southern Africa, with specific focus in Lesotho**

### **2.1 Introduction**

This chapter explores death and burial cultures in Southern African societies. The focus is on Zulus, Xhosa, Tswana and Basotho peoples. The discussion explores what death means to the said ethnic groups and the processes involved leading up to the burial of the deceased. The scope of discussion revolves around preparations for the burial and more importantly on the importance of the graves. In essence, the aim of this chapter is to provide a broad understanding of the importance of burial culture in the said communities but with extended study on the Basotho people.

The rationale behind selecting the aforementioned ethnic groups stems from the fact that they are also situated in Lesotho. In districts like Quthing, there are clans such as the Baphuthi<sup>25</sup> and Abathembu, who identify themselves as different ethnic groups from Basotho and still maintain their languages and cultures. The Abathembu are a tribe in the Xhosa ethnic group.

The Zulus are also selected by virtue of the fact they too are a minority group in Lesotho who arrived in around the 17<sup>th</sup> century as part of other Nguni-speaking groups.<sup>26</sup> They are commonly referred to as Matebele in their clan identities and they occupy various parts of the country, unlike the Xhosas who are mainly found in Quthing.

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<sup>25</sup> R Shanafelt 'Talking peace, living conflict: the mental and the material on the borders of apartheid' published Phd study, University of Florida, 1989 249

<sup>26</sup> S Pitikoe 'Male herders in Lesotho: Life, history, identities and educational ambitions' Phd study, University of Kwazulu Natal, 2016 41

The Basotho and Batswana speak a slightly different dialect of Sotho from each other but have always shared similar cultures which distinguished them from other Bantu groups.<sup>27</sup> The Batswana also have a population in Lesotho in a form of the Batlokoa clan, who are found both in Lesotho and Botswana. Just like the Xhosa people who mainly occupy a certain district, the Batlokoa are also found mostly in Mokhotlong district.

The aforementioned groups, Zulus and Xhosas, are minority populations in Lesotho but what remains common knowledge is that they inter-marry with the rest of other Basotho and are also identified as Basotho in citizenship documents. Thus, a study cutting across the different groups shall provide more insight into understanding of the burial practices and more into the Basotho people, who are more a subject in focus. The aim is to understand the significance of the grave for the Basotho, their continuation of the burial culture despite the small land size of the country.

## **2.2 A general African conception of Death**

A common understanding of death is the simple end of life wherein the person's existence comes to a complete, permanent halt.<sup>28</sup> This view of death, which is universal but with a Euro-centric underpinning, is the one mainly adopted in mainstream psychology and does not acknowledge other perspectives such as the indigenous African view.<sup>29</sup> In a nutshell, death being a mere cessation of life is a

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<sup>27</sup> L Ngcongco 'The origins of Tswana' (1979) 21

<sup>28</sup> L Baloyi & M Makobe-Rabothata 'The African Conception of Death: A cultural implication' (2014) *Toward sustainable development through nurturing diversity: Proceedings from the 21st International Congress of the International Association for Cross-Cultural Psychology* 235

<sup>29</sup>Baloyi & Makobe-Rabothata (n 26 above) 232

belief that prevails around the world despite it being narrowed to a Euro-centric understanding.

Nevertheless, in Africa the view on death is in extreme contrast with the dominant Euro-centric one. For Africans, death is a journey the spirit of the deceased person takes to the land of ancestors.<sup>30</sup> Ramose perceives the disparity between life and death almost non-existent since death is a pathway to another world of the invisible and the personhood of the deceased persists beyond the death of the body.<sup>31</sup> In other words, for Africans there is no end of life. When the person dies in the physical world, they continue to exist but in a spiritual, invisible form to dwell in the world of ancestors.

With this being the case, there is no much difference between life and death since the deceased person continues to live but in a different phase of existence and in different form. It is therefore fitting at this juncture, to explore the meaning of death in the context of the aforementioned ethnic groups who are the focus of this chapter. Notably, the focus is not necessarily on the meaning of death alone but also on the importance of the burial culture as a whole.

### **2.3 Death and burial in the Zulus**

The Zulu people see death, like other Africans, as a continuation of life. Yet more precisely, for them death is a gateway back home where the person reunites with the deceased family members in spirit.<sup>32</sup> While this view of death is in conformation with the general view held by all other Africans,<sup>33</sup> the Zulus specifically understand

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<sup>30</sup> LM King 'In discourse-towards a Pan-African Psychology: Drum rolls for a psychology of emancipation' (2013) *Journal of Black Psychology* 39 223-231

<sup>31</sup> MB Ramose *African philosophy through Ubuntu* (2005) 60-61

<sup>32</sup> NA Ngcece 'The cultural significance of burial sites among Africans: A case study of Inanda' Masters dissertation, University of South Africa 2019 13

<sup>33</sup> Ramose (n 29 above)

death as a return to spiritual ancestral lands instead of just a transformation to this invisible world of ancestors. It is a home where they reconnect with their ancestors.

In most African societies, Jali notes that the processes of burial take up lengthy periods of time due to a variety of rituals and rites involved.<sup>34</sup> In the past, burials normally occurred the day after the deceased had died and on the day the burial is held, family members and friends of the deceased from far and near would come together to pay their last respects.

However, it is common knowledge that nowadays the body of a deceased person is kept in a mortuary while the family engages in preparations for the burial. Furthermore, as it is common practice in most African communities that a religious leader is invited to counsel the mourning family,<sup>35</sup> even in the Zulu culture the congregants of a local church ensure that they visit the grieving family every day for scriptural counselling that involves prayers until the day of the burial.<sup>36</sup>

Jali also notes that during the burial, items such as a spear, bows, utensils were buried with the deceased person as it was believed that they would utilize the items on their way to the land of ancestors.<sup>37</sup> Moreover, one of the rituals in the burial involved the throwing of the soil before the coffin was sunk into the grave, while the blood of an animal slaughtered in the funeral was also sprinkled on the grave.<sup>38</sup>

### **2.3.1 The significance of graves for Zulu people**

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<sup>34</sup> NM Jali 'The African perception of death, with special reference to Zulus: A critical analysis' Masters dissertation, University of Stellenbosch 2000 21

<sup>35</sup> SD Edwards & M C Selepe 'Grief counselling in African indigenous churches: A case of the Zion Apostolic church in Venda' (2008) *Journal of Indigenous Knowledge Systems* 7 1

<sup>36</sup> JM Walligo 'Spiritual and cultural care' in J F O'Neill & P A Selwyn & H Schietinger (eds) *A clinical guide to supportive and palliative care for HIV/AIDS* (2006) 254

<sup>37</sup> Jali (n 32 above) 23-24

<sup>38</sup> Jali (n 32 above) 23-24

For the Zulu people, the grave plays a significant role in the lives of the ones left behind. Ngubane notes that for Africans, including Zulus, burying their family member in a grave is a symbol of planting them, such that it is even disrespectful for one to use one's finger when pointing at a grave.<sup>39</sup> Furthermore, when the grave of a loved one is marked and identifiable, friends and family members can easily go to communicate with the deceased. In addition, when the Zulus visit the grave, they are able to ponder on memories they have with the deceased and use that as a moment of acceptance to continue living without them.<sup>40</sup> In other words, for most Africans, the culture of burials assures them an opportunity to maintain their 'sense of contact with the dead.'<sup>41</sup> The latter observation is characterized by the Zulus as well.

Another significant role played by the graves for the Zulu people is that they serve as places where the bereaved family members go for consolation, deliberation and guidance when it is needed.<sup>42</sup> This practice can be associated with the observation that Africans use gravesites as places where they satiate their sense of connection with the deceased noted in the above paragraph.

All in all, for the Zulus, a grave is more than just an abode of their loved one but a medium of maintaining a connection. This connection entails communication in times of reflections and counsel when one needs direction. A grave is more or less the last physical representation of the deceased person and thus, it offers the bereaved a feeling of comfort and consolation.

## **2.4 Death and burial in the Xhosas**

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<sup>39</sup> S Ngubane 'Death and burial practices in contemporary Zulu culture, South Africa' in H Selin & R Rakoff (eds) *Death across cultures* (2019) 121

<sup>40</sup> Ngubane (n 37 above) 122

<sup>41</sup> DJ Davies & L H Mates *Encyclopedia of cremation* (2005) 5

<sup>42</sup> Ngubane (n 37 above) 127

For the Xhosa people, death is not viewed as extermination. The soul of the deceased continues to live and the family ties are unbroken since the departed maintain direct communication with the living.<sup>43</sup> Furthermore, the dead start a new life and acquire a new form of family belonging in which they can rightly be referred to as ancestors.<sup>44</sup> As observed earlier with the Zulus, the Xhosas also see death as simply the continuation of life. However, unlike the Zulus who see death as a gateway back home, the Xhosas interpret death as the beginning of a fresh chapter in the life of the deceased whereby they acquire an ancestral status.

In the Xhosa culture, mourning takes up to a year and in the first months, there are customs that the mourning family must conform to.<sup>45</sup> Some of these include, as Soga notes, the shaving of heads to portray their grief for the deceased by the affected family.<sup>46</sup> In some places, among the Xhosa people, as a sign of mourning people paint themselves all over their bodies with white or orange-like clay, while others break utensils and abandon their houses for good. It is further noted that the idea behind ritualizing death it is to ‘dance’ it away or in simpler words, to confront the pain it brings in order to start life afresh.<sup>47</sup>

The modern day funeral in the Xhosa communities is much like the Zulu. People are buried after a week or more and in this period, friends and neighbors keep checking up on the family up until the day of the burial. The religious leader is also present to

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<sup>43</sup> JH Soga *The Ama-Xhosa Life and customs (1931)* 20

<sup>44</sup> SN Yawa ‘A psycho-analysis of bereavement in Xhosa, Zulu and Tswana cultures’ Masters dissertation, University of South Africa 2010 23

<sup>45</sup> NZ Somhlaba & J W Walt ‘Psychological adjustment to conjugal bereavement: Do social networks aid coping following spousal death?’ (2008) *Journal of Death* 57 341 – 366

<sup>46</sup> Soga (n 41 above) 321

<sup>47</sup> ANN Solomon ‘Funeral rites of the Amakhosa as therapeutic procedures compared to crisis intervention’ Masters dissertation, Rhodes University 1987 25

deliver counselling. Solomon adds that at the gravesite, when the coffin is settled into the grave the primary mourners throw soil onto the coffin as a sign of farewell.<sup>48</sup>

When the burial is complete, everyone who has been at the gravesite washes their hands to get rid of the soil to ensure that death is left at the gravesite and not brought back home.

Just like with the Zulu people, animal sacrifice plays a role in Xhosa funerals. As part of the burial, a beast is slaughtered to ‘accompany’ the dead into the world of ancestors and after the period of mourning, which is 12 months, another animal is slaughtered with the aim of calling back home the spirit of the deceased person, now as the ancestor.<sup>49</sup> Just like with the Zulu people, the period of bereavement in Xhosa culture is communal.

#### **2.4.1 The significance of the grave for the Xhosas**

The Xhosa people in the past did not use graves in the funeral practices. Rather, the dead were transported to the wild or a desert and abandoned there.<sup>50</sup> However, in 1818, a prophet called Makana denounced this practice of abandoning the dead and called for burials and since then, the Xhosa people adopted to burying their dead.<sup>51</sup>

With the Xhosas, just like with other Africans in the South, graves have been regarded as spaces that assure continuation of family lineages.<sup>52</sup> In other words, gravesites in Xhosa tradition are physical representations of family ancestries for the ones that are still living. It could be understood that since the deceased are later

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<sup>48</sup> ANN Solomon (n 45 above) 32

<sup>49</sup> S N Yawa (n 42 above) 24

<sup>50</sup> A Elliot *The Magic world of Xhosa* (1970) 129

<sup>51</sup> N Ngongo ‘Cemeteries crisis, burial alternatives and African urban cities: a case study of Ethekwini city’ Masters dissertation, University of Kwazulu Natal 2005 29

<sup>52</sup> D Bunn ‘The sleep of the brave: graves as sites and signs in the colonial Eastern Cape’ in P S Landau & D Kaspin (eds) *Images and empires: Visuality in colonial and post-colonial Africa* (2002) 66

called back to their homes through a ritual as mentioned in the earlier paragraphs, there is no much need for the Xhosa people to practice visiting the graves of their loved ones since they live with them in their homes but as ancestors.

## **2.5 Death and burial in the Tswana culture**

For the Tswana people, as in other Africans beliefs including those of the Zulus and Xhosas, death is not the end of life for deceased. Rather, it is a voyage to the spiritual world of ancestors and since the dead are believed to give protection for their living relatives, it is fitting that they are given satisfactory burials.<sup>53</sup>

Thus, the Tswana people, approach death as a community like Zulus and Xhosas. In the period leading up to the burial day, the community shows support to the grieving family by regularly checking up on them and assisting with household errands.<sup>54</sup> The mourning period, unlike with the Zulus and Xhosas, takes less than a year and the bereaved family members signify their grief by wearing necklaces made of grass with their heads shaved. In the morning of the day of burial, an ox is slaughtered, and its chime is thrown into the grave by mourning relatives while uttering that the deceased should sleep for them.”<sup>55</sup>

Additionally, at the gravesite the soil is poured on the grave. This act is deemed as a prayer for the continuity of communal relationships and that the remaining family of the deceased may continue to live in harmonious relations with the rest of the community.<sup>56</sup> In a nutshell, when all the community members engage in the soil

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<sup>53</sup> M Bolaane and P T Mgadla *Batswana* (1997) 55

<sup>54</sup> M E Manyedi et al ‘Experiences of widowhood and beliefs about the mourning process of the Botswana people’ (2003) *Health SA Gesondheid* 8 84

<sup>55</sup> S N Yawa (n 42 above) 32

<sup>56</sup> G M Setiloane *The image of god among the Sotho-Tswana* (1976) 68

pouring act together with the family, there is an assurance of good relationships between the community and the offspring or family of the deceased.

### **2.5.1 The significance of the grave for the Tswana people**

For the Tswana people, graves are considered to be sacred structures that do not need to be tampered with.<sup>57</sup> Possibly, this explains why the graves of people who died unnatural and suspicious deaths relating to witchcraft, are protected with ritual herbs to avoid the dead from haunting the living in a dangerous manner.<sup>58</sup>

In addition, drawing from the soil-pouring act mentioned in the previous section, it can be understood that the grave offers assurance of good relationships for the community and the bereaved family. So unlike the Zulus and Xhosas, the Tswana people do not necessarily utilize the grave as places to visit for psychological fulfilment. They are simply seen as the sacred and undisturbed habitats of the deceased.

### **2.6 Death and burial in the Basotho culture**

Like with the other ethnic groups discussed in the chapter, death in the Basotho culture is not seen as total extinction. Rather, it is simply a switch from one world to a different one. For the Basotho, a person is never dead and for this reason, a deceased person is considered to have ‘migrated.’<sup>59</sup>

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<sup>57</sup> M Bolaane and P T Mgadla (n 51 above) 55

<sup>58</sup> J Denbow and P C Thebe *Culture and Customs of Botswana* (2006) 186

<sup>59</sup> FLC Rakotsoane ‘Religion of the ancient Basotho with special reference to “water snake”’ unpublished Masters study, University of Cape Town, 1996 54

Death in the Basotho community, just like in other ethnic groups, is approached collectively. Thus, when death has occurred in a family, according to Lesitsi, a group of men from outside the family are given a task to let the chief know of the situation.<sup>60</sup> In this period, people from the same area also visit the family to decipher the circumstances of death and offer consolation to the bereaved.

Just as it is with other groups discussed in the study, it is common observation that a beast is slaughtered, which is intended to accompany the dead person. Furthermore, Lesitsi adds that in the past, the grave of a man whose wife could no longer conceive, was dug deeply. But if the wife could still conceive, the grave would be shallow.<sup>61</sup> However, Rakotsoane accounts that the shallowness of the graves in the past was a result of shortage or complete lack of spades.<sup>62</sup> Nowadays nevertheless, most graves are dug at almost the same, standard depth of six feet.

After the burial, all those coming from the gravesite come back using the same route they used when they went to the burial and at the entrance of the deceased's home, they wash their hands with water mixed with herbs.<sup>63</sup> After eating the meal cooked for the community, they disperse back to their homes. In most cases, all rituals that follow after the burial are not attended in large numbers as the burial.

Notably, the Basotho do not necessarily shave their heads like Xhosas as a sign of bereavement. Rather, the ritual of cutting of hair follows after the burial and this is when a mourning veil, known in Sesotho as 'thapo,' is worn by the family members after the cutting of hair.<sup>64</sup> This hair cutting ritual is still practiced even today and it is often done a day after the funeral.

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<sup>60</sup> AM Lesitsi *Seemahale* (1990) 145

<sup>61</sup> Lesitsi (n 58 above) 146

<sup>62</sup> Rakotsoane (n 57 above) 54

<sup>63</sup> AK Opong 'Some religious aspects of Basotho funerals' (2004) 17 *Journal for the study of Religion* 31

<sup>64</sup> Opong (n 61 above) 31

In the past, on the day before the burial, an ox would be slaughtered and be eaten before dawn. At dawn when the deceased was buried, as it was common practice back then, all the people from the village came together, holding a tiny chime from the ox's stomach and when the sun cast its first rays, they would throw the chymes simultaneously saying, "*u re roballe*," which means that the deceased should peacefully sleep for them.<sup>65</sup> This practice is no more common today. The ox that is slaughtered is eaten throughout the day of the burial and the deceased are no more buried before sunrise. Funerals take long hours through the day but with the covid-19 enforced lockdowns, most burials were done in the early hours of the morning. Again, in the past, the deceased was traditionally buried with seeds in order to cultivate crops in the world he or she was travelling to. For Rakotsoane, this signifies that the life after death is still influenced by material needs and the only difference is God is the only governor in this world.<sup>66</sup> This practice is relatively popular in the modern society.

Again, in the past, the position of the body in the grave was covered in the skin of the ox that had been slaughtered and faced the Northeast, known as '*Ntsoana-tsatsi*' which translates to land of the rising sun.<sup>67</sup> Notably, despite that people are now buried in coffins, the positioning of the body is still highly maintained, that the body should lay down in such a way that when they wake up, they will face eastwards. This is supported by the Christian belief in the resurrection of the dead.

### 2.6.1 The significance of the grave for the Basotho

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<sup>65</sup> F Laydevant *The Basuto* (1952) 73

<sup>66</sup> Rakotsoane (n 57 above) 59

<sup>67</sup> JS Gill *A short history of Lesotho* (1993) 53

The gravesite or a cemetery, for the Basotho, is a highly respected place. It is not a land meant for any type of allocation or trade activities, no agricultural or crazing activities are allowed.<sup>68</sup> No one is allowed to walk around this place in the afternoon. Rather, only early morning or visits at around sunset are allowed.

Lesitsi adds that anyone who visits this place at the aforementioned timeframes, should also wash themselves with water mixed with aloe to purge the graveyard or death filth. Additionally, the soil of the grave is considered sacred and therefore should not be tampered for anyone who does this would have committed a serious transgression.<sup>69</sup>

Lesitsi also makes caution that in the case whereby one renovates a grave. He or she would have to make a ceremony wherein an ox is slaughtered. If one renovates a number of graves, one must also slaughter the amount of oxen equal to the graves. Failure to slaughter the same number of oxen to the graves, would be an indirect invitation of death in the family since the ancestors, who are the owners of those 'houses' would be angry.<sup>70</sup>

In a nutshell, for the Basotho, a grave is given the same status as a house of a living person. Hence graveyards are not places to be utilized for any purposes. Even visiting is not done arbitrarily. They are sacred structures. Hence, even though a renovation activity would be done at goodwill, it cannot be done unpaid for. And if the payment does not satisfy ancestors, then death is a price to pay for the living.

## 2.7 Conclusion

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<sup>68</sup> AM Lesitsi *Monamoli: Moetlo le bochaba ba Basotho* (2002) 79

<sup>69</sup> Lesitsi (n 66 above) 80

<sup>70</sup> Lesitsi (n 66 above) 80

The fundamental concern of this chapter was the ways in which Southern African societies perceive death and treat the grave. The focus was on the Zulu, Xhosa, Tswana and Sotho ethnic groups which are subdivisions of the Bantu ethnic group and are commonly found in Southern Africa and more importantly, are located in Lesotho and have cultural similarities.

The chapter used a funnel approach method of study. This is a method whereby a research question is answered from a broad to narrow style. Thus, the study on death and burial culture starts with other ethnic groups closely related with the Basotho, and finally addresses the Basotho who are the main focus of the chapter.

For each ethnic group, the study of their culture is divided into two sections: the meaning of death and burial, and the significance of the grave. As the research is centered on advocacy for elimination or reduction of graves, the sections on death and funeral processes were not broadly discussed as some of the funeral processes or rituals do not add much relevance on how the groups perceive and treat graves. The key focus was on how important the graves are for the aforementioned groups in order to make an informed argument throughout the next chapters of the research. As observed in the study, the groups have a common understanding on death but with different views. All the groups understand that death is not the end of life. However, some view death as a transition to a different phase of life, others see it as a journey to another world and others a journey back home. While others see it as a journey to another world not so different from the one in which the living occupy. With regards to treatment of the graves, the groups all have a common approach which is respect. Graves, for most of the groups, are sacred places. For the Zulus, they provide psychological relief, while for the other groups they are highly respected and need not be disturbed or tampered with. For the Basotho, graves are not meant to be visited randomly as they are highly sacred places.

All in all, what is learned in this chapter is that graves, across the four ethnic groups, are important components of their funeral ceremonies and grieving processes and thus, land continues to be used to make space for graves. In other words, land serves as an instrument to maintain the culture of burials for these ethnic groups. Without land it would also be impossible for them to maintain their traditional views on death such as the belief that the Basotho originate from *Ntsoana Tsatsi*. The pouring of soil into the grave by the family and the rest of other members of the community as a symbol of unity in mourning of the dead is one of the crucial practices burials provide in maintaining peaceful relations in communities.<sup>71</sup> In a nutshell, graves are sacred entities in communities for the various roles they play in maintaining beliefs and reinforcement of good relations amongst community members.

The sacrosanct status attributed to the graves will be challenged in the coming chapters of this research. In essence, the later chapters aim to show the importance of land preservation for fulfilment of socio-economic rights despite the deeply esteemed status of graves in the Basotho society.

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<sup>71</sup> Setiloane (n 52 above)

## **Chapter 3: Socio-economic rights which could be fulfilled on land in place of burial practices**

### **3.1 Introduction**

Following the examination of the meaning of death, burial practices and significance of graves for the Basotho, this chapter focuses on the promotion of socio-economic rights which could be implemented through the use of land in contrast to the continuation of the burial practice. In other words, the chapter establishes how land could be used to implement some socio-economic rights at the expense of burial practices. In specific terms, the rights in focus are predominantly socio-economic rights and relevant aspects of children and women's rights are added. The socio-economic rights discussed in this chapter include the right to health, the right to housing, and the right to food. Additionally, the chapter advances an argument for the fulfillment of these rights through the use of land.

### **3.2 The Right to Health in International, African and local frameworks**

The right to health is a widely recognized right across various international and regional frameworks of human rights. In this chapter, the discussion of the right is centered on the regional and local frameworks in which it is addressed. The argument is made for the implementation of this right to accommodate the vulnerable groups in society including women, children, the sexual minorities and the people living with disabilities.

The right to health was first enshrined in article 25 of the Universal Declaration of Human Rights (UDHR) in 1948. It is stipulated that in addition to food, clothing and shelter, everyone is entitled to a standard of life that suffices for the health and well-being of themselves and their families.<sup>72</sup> Worth noting is the fact that the right to health does not only entail access to health care and building of health care facilities. Rather, the right is further defined to include safe food, water and sufficient sanitation, satisfactory nutrition and shelter, healthy working conditions and surroundings, health education and gender equality.<sup>73</sup>

On a regional level, the right to health is also enshrined in the African Charter. Expressed through article 16, it is maintained that everyone shall be allowed to enjoy the best realizable state of physical and mental well-being.<sup>74</sup> In other words, African countries should ensure that their citizens enjoy this right, specifically countries who are party to the African charter, with Lesotho included.

In the context of Lesotho, however, the right to health is not explicitly addressed in the bill of rights. Rather, under the principles which inform the state's policy in the constitution, one in relation to health stipulates that policies will be designated which aim at ascertaining that every Mosotho enjoys the best possible level of mental and physical health.<sup>75</sup> In essence, Lesotho does follow the African Charter's mandate on the right to health despite the fact that the right is not explicitly enshrined in the Constitution.

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<sup>72</sup> Universal Declaration of Human Rights

<sup>73</sup> International Covenant on Economic, Social and Cultural Rights. General Comment 14. 2000

<sup>74</sup> African (Banjul) Charter on Human and People's Rights. Article 16. 1981

<sup>75</sup> The Constitution of Lesotho, 1993. Section 27 (1)

### **3.2.1 The state of Lesotho's health sector services**

It goes without saying that human life depends on land in a myriad of ways. Specifically, land is not only a source of food land but is also used for shelter. The shelter built on land may serve different purposes as well. In the context of the latter point, this chapter argues that it is important that instead of creating more burial spaces, the same land should be used to build healthcare facilities in Lesotho.

This is due to the fact that Lesotho's healthcare system is one of the sectors that remain underdeveloped. The out-of-date and insufficient service delivery infrastructure including lack of adequate number of facilities, difficult accessibility and sub-standard technical management has left the country's healthcare system compromised.<sup>76</sup> The difficulty of healthcare accessibility is a brunt borne mostly by the rural populations of Lesotho.

The above fact is reflected in statistics which indicate that more than 30 percent of births, which make women vulnerable to maternal and neonatal deaths, occur outside of healthcare facilities in the rural areas as compared to urban areas where such incidences occur at the rate of 16 percent.<sup>77</sup>

It is reported that despite improved patient satisfaction with health services from 2011 to as recent as 2018, barriers to wide-reaching healthcare such as less access to facilities due to long distances across excruciating landscapes, transport costs, and regular denial of service when patients arrive late at facilities have not been

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<sup>76</sup> Lesotho Ministry of Health and Social Welfare 'Lesotho health systems assessment' (2010) xviii

<sup>77</sup> World Bank Group 'Public Health Sector Expenditure Review' (2017) 16

mitigated.<sup>78</sup> In this respect, pregnant women continue to deliver babies at home. This is a common occurrence in Lesotho's rural areas.

Furthermore, the Covid-19 pandemic exposed the country's weaknesses in the healthcare system as there were inadequate services for patients even in times of emergency and additionally, lack of accredited laboratories to conduct coronavirus tests added to the unpreparedness of the country to mitigate the risks brought about by the virus on the public.<sup>79</sup>

### **3.2.2 Lack of access to facilities as a women's rights concern**

Lack of access to facilities has implications of women's rights.<sup>80</sup> Accordingly, Stadig notes that the situation of women in rural areas who are already living in poverty, becomes worse when there is a challenge in accessing healthcare facilities, such that even children are affected, especially the new born babies as their fundamental right to life is tested.<sup>81</sup> Essentially, the plight of inadequate access to health facilities is a double-edged sword as it impacts negatively on both women and children's rights.

While children's right to life is affected, for women it is their right to health. This right is not expressly articulated in Lesotho's constitution at the time of this writing, but on the regional level, it is articulated through the Maputo Protocol. Article 14 of the Maputo Protocol outlines ways in which states are obliged to protect the health

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<sup>78</sup> Evaluation Brief 'Strengthening health services in Lesotho' (2019) 2

<sup>79</sup> Beterlsmann Stiftung 'BTI 2022 Country Report' (2022) 38

<sup>80</sup> Like it is the case with other countries in Africa, women and children constitute the most vulnerable groups in Lesotho.

<sup>81</sup> M Stadig 'The increasing neonatal mortality rate in Lesotho: an explorative study' Bachelor's essay, Sodertorn University 2021 32

of women and these entail provision of adequate, affordable and accessible healthcare services even for women in the rural parts of a state.<sup>82</sup>

### **3.2.3 How land could be used to fulfil the right to health in Lesotho**

It is commonly known that in Lesotho, every village has a cemetery. In some cases, some cemeteries link up two villages considering the size of such villages. Thus, in alignment with this background, it is imperative that land that is used for burials, should rather be used to improve the health sector by building more facilities. These could include clinics in rural areas where accessibility is difficult. For instance, a sizeable portion of land which connects two or three villages could be allocated for building of a health facility such as a clinic.

In some places, accessibility is made difficult by rivers between villages and healthcare facilities such that when rivers are full, patients who need to travel may not be able to or some would risk their lives trying to cross the river. In worst case scenarios for pregnant women, delivery could happen on their way to the facility, as it was the case in 2018 at Qacha's nek district where a woman delivered in a rowboat on the side of the river on her way to *Tebellong* Hospital.<sup>83</sup> In between the hospital and the villages such as *Ha Sekake*, is South Africa's biggest river known as *Senqu*. It is also referred to as the Orange river.

On the transport costs, it is reported that patients are ferried with boats for a price of 10 Maloti but it increases to 50 *Maluti* when the river is in flood because of the

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<sup>82</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Article 14 (2) (2003)

<sup>83</sup> 'Tebellong Hospital Suffers Neglect Scare' MNN Center for Investigative Journalism 25<sup>th</sup> March 2018 <https://lescij.org/2018/03/25/tebellong-hospital-suffers-neglect-scare/> (accessed on 25<sup>th</sup> June 2022)

amount of risk involved during the transportation.<sup>84</sup> The prices may have changed due to nationwide increase in transport prices in recent years.

If a healthcare facility was built in the nearby villages, for which *Tebellong* hospital would serve as a referral facility, then the transport expenses would be alleviated. Additionally, when healthcare facilities are near, infant mortality rates and neonatal deaths would significantly decrease since women would be able to deliver in safe environments with the help of healthcare personnel.

In contrast, one would argue that if a bridge was built, aiding people to be easily transported to the hospital, then the above-mentioned challenges would be dispelled. However, that would not necessarily be the case. Even if a bridge was built, it wouldn't eliminate the possibilities of having pregnant women deliver on their way to the hospital due to the varying lengths of distances they walk from their villages to the bridge. On the transport expenses aspect, as a result of high poverty rates in Lesotho especially in the rural areas, there are people who may still not afford the transportation costs regardless of the prices. Hence, building facilities nearby the villages would be a better option.

It should be noted that, the Qacha's nek incidence is just cited here as an example of the challenges posed by limited healthcare facilities in rural Lesotho, amongst many others that may not have been reported. As indicated in earlier paragraphs, accessibility is sometimes caused by the insurmountable terrains in the highlands of the country,<sup>85</sup> and not only the rivers separating villages. Furtherly, the limited

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<sup>84</sup> 'Poverty, distance, block access to healthcare' *Public Eye* <http://publiceyenews.com/poverty-distance-block-access-to-health-care/> (accessed on 25<sup>th</sup> June 2022)

<sup>85</sup> Evaluation Brief (n 76 above) 2

access to healthcare facilities is not necessarily a challenge facing women and children but everyone including the elderly and people living with disabilities. These challenges are not necessarily in the rural areas alone but even in the urban areas. The only difference is that these challenges are rife in the highlands of the country.

Again, conversely, one would ask whether burials are the only activities which consume land. This is not the case. Additionally, there is plenty of land that is utilized for various purposes such as housing, construction of business premises, rangelands for livestock to feed on to mention a few. However, burial practices do not, unlike the aforementioned activities, contribute to the socio-economic development and welfare of the Basotho people. Thus, land that could be used for burials, should rather be used for other purposes which socioeconomically develop the Basotho people. The following sections will discuss other socioeconomically beneficial purposes, advocated in the context of rights, for which land could be used in place of burials.

### **3.3. The Right to food in international, African and local frameworks**

The United Nations defines the right to food as not necessarily entailing a right to mere calories, proteins or any other nutrients but also, a right to accessing adequate nutritional elements which every human being needs in order to live in good health and progressively.<sup>86</sup>

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<sup>86</sup> United Nations Human Rights Fact sheet no 34 (2010) 2

As an internationally recognized right, Mechlem notes that the right to food draws its foundation from a variety of instruments in the international law.<sup>87</sup> It is articulated, though indirectly, in article 25 of the Universal Declaration of Human Rights within the context of health and well-being, clothing and shelter.<sup>88</sup> Along the same lines, article 11 paragraph 2 (a) of the ICESCR advocates for the improvement of production mechanisms, storage and distribution of food through the use of the best scientific knowledge and with the goal of achieving the best ways in which natural resources could be exploited for nutritional purposes.<sup>89</sup>

On the regional level, in Africa, the right to food has been established but through a variety of frameworks. The Maputo protocol makes a provision, through article 15, that states should ensure that women enjoy a right to sufficient and healthy food.<sup>90</sup> Nutrition and health are also emphasized in the children's rights framework regarding the responsibilities of parents in African states.<sup>91</sup>

As recent as 2017, the right to food to food has been addressed through the African Commission's 374 Resolution which provides that all states should ascertain that they establish policies and other necessary mechanisms to combat hunger and mitigate it even in times of unfortunate events like natural disasters or any humanitarian crisis.<sup>92</sup>

In Lesotho, the right to food is not addressed nor articulated in the constitution. Nevertheless, the office of the prime minister, through the Food and Nutrition

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<sup>87</sup> K Mechlem 'Food security and the right to food in the discourse of the United Nations' (2004) 10 *European Law Journal* 631-648

<sup>88</sup> UDHR (n 70 above)

<sup>89</sup> International Covenant on Economic, Social and Cultural Rights. 1966

<sup>90</sup> Maputo Protocol (n 80 above) Article XV

<sup>91</sup> African Charter on the Rights and Welfare of the Child. Article 20 (2a) (1990)

<sup>92</sup> 374 Resolution on the Right to Food and Food Insecurity in Africa – ACHPR/Res.374 (LX) 2017 <https://www.achpr.org/sessions/resolutions?id=416> (accessed on 1<sup>st</sup> July 2022)

Coordinating Office does have a policy which specifically addresses the food security and nutritional issues affecting the Basotho people.<sup>93</sup> The policy will be referred to in the subsequent sections of the chapter.

### **3.3.1 The state of food security in Lesotho**

Food insecurity in Lesotho is reported to be rifer in the rural parts of the country. In as recent as 2019 to 2020, the food security situation was worsened by the less activity in agriculture and low on-farm and off-farm job opportunities.<sup>94</sup> In addition, the covid-19-enforced lockdowns significantly contributed to the levels of food insecurity not only in the rural but also in the urban areas, especially in the capital district Maseru, which is the center of the country’s economic activity and where majority of the population depend on salaries and wages to buy food.<sup>95</sup>

Climate change has also impacted the food security in Lesotho. As land degradation goes hand in hand with food insecurity, cultivated fields are negatively affected by water and soil erosion, low fertility of the soil, decreased water tables to mention a few.<sup>96</sup> Agriculture, which is commonly the source of food not only in Lesotho but across the whole world, is significantly affected by the climate change ordeal facing the country.

### **3.3.2 Food insecurity as a women and children’s rights concern**

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<sup>93</sup> The Lesotho Food And Nutrition Policy (LFNP) was developed in 2016 and its action plan is from 2016 to 2025.

<sup>94</sup> Lesotho Vulnerability Assessment Committee ‘2019 Vulnerability Assessment and Analysis Report’ (2020) 57

<sup>95</sup> World Food Program ‘Lesotho Annual Report 2020’ (2021) 8

<sup>96</sup> World Food Program ‘Lesotho Annual Report 2021’ (2022) 26

Just as it is the case with lack of access to health facilities, food insecurity has a ripple effect on vulnerable groups in society, women and children in particular. As indicated earlier, women in rural areas are mostly the ones who bear the brunt of abject poverty.<sup>97</sup> Across the four districts namely Mafeteng, Mohale's Hoek, Quthing and Qacha, in which the World Food Program (WFP) made efforts to assist the women-headed families who make up 52 percent of the population, it is reported that these efforts weren't enough due to Covid-19 enforced increase of members in families.<sup>98</sup> This is to say that as a result of lockdown restrictions, people who initially had jobs away from home and lived independently, found themselves having to go back to their homes and adding to the number of the poverty stricken household members. The more numbers, the harder it was for food to sustain everyone in those families. This situation was common in other districts as well since women in the rural areas are the ones who suffer high degrees of poverty.<sup>99</sup>

As rural women are the ones who face the impacts of poverty and food insecurity, it can be understood that their rights are tempered with. With food insecurity being a reality in Lesotho, women's right to nutritional and ample food is directly affected.<sup>100</sup>

### **3.3.3 How land could be used to curb food insecurity**

In Lesotho and in many other countries around the world, farming is a common way of livelihood and food production. The majority of Basotho, who make up 85 percent of the population, rely on agriculture even though the mountainous landscape of

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<sup>97</sup> M Stadig (n 79 above)

<sup>98</sup> World Food Program (n 93 above) 14

<sup>99</sup> Lesotho Council of Non-Governmental Organizations 'The status of women in Lesotho' (2015) 39

<sup>100</sup> Maputo Protocol (n 80 above) XV

Lesotho compel only 10 percent of land to be cultivated.<sup>101</sup> Normally, fields are located on the outskirts of villages. Nevertheless, due to competition for farming fields in the country, many people often resort to homestead gardening which entails using space in one's yard far from the house, to grow vegetables or any food crops that could possibly grow.<sup>102</sup> Competition for land is often within families where inheritance or heirship is a fiercely contested issue. An example of this is the case of *Shale Vs Shale*, where Mokhali Shale, an appellant, argues for the high court to recognize him as the sole and lawful heir to three fields which belonged to his parents, and declare Mamphele Shale, who is a second respondent, as the unrecognized heir.<sup>103</sup>

In alignment with this above background, it is the argument of this chapter that instead of allocating land for burials, such land should be used for agricultural purposes. As it is seen that some of the cultivated fields are contested for, it may even be difficult for people who live in poverty to use such fields, not to mention buying them.

Just like it is the case with homestead gardening whereby crops are grown slightly far from the house but within the yard, spaces normally situated outside villages or within but far from households, which would be allocated for burials, should be freely used by community members who cannot afford to buy land for themselves. The immediate authority to regulate the utilization of such land should be the village chief.

As reflected in the earlier paragraphs, there is only 10 percent of land used for farming in Lesotho due to the mountainous terrain of the country. Thus, when land

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<sup>101</sup> <https://www.helplesotho.org/wp-content/uploads/2015/03/9.-agriculture.pdf> (2015) (last accessed on 29<sup>th</sup> July 2022)

<sup>102</sup> Catholic Relief Services *Homestead gardening* (2008) 8

<sup>103</sup> *Shale v Shale* (C of A (CIV) 35/19) [2019] LSCA 45 (01 November 2019)

which would be normally used for burials is rather used for agricultural purposes, the above-mentioned percentage would increase and that means food insecurity would be significantly curtailed. Women constitute the majority of the impoverished population in the rural areas. Worse still, despite women being the ones who are responsible for food in their households especially in rural areas, they are not afforded any rights to land due to their gender, while customary practice does not recognize them as rightful heirs to land but only males who can be awarded heirship.<sup>104</sup>

The new agricultural land for community use, would enable women who have been denied opportunities by their male relatives of using family-owned land, to produce food for their families without any legal restraints from customary authorities. Thus, the high rate of impoverished women-headed households in rural areas would be alleviated. This is not to insinuate that men are not obliged to participate in agricultural activities as well.

### **3.4 Children's right to recreational activities**

As indicated in the beginning of the chapter, children's rights are part of the discussions alongside socio-economic and women's rights. In the first section, children's rights are not expressly discussed but rather form part of the women's rights discussions. In particular, children's right to life is discussed as it appears intertwined with women's right to health and reproductive health overall. In this section, for the purposes of the argument advanced in this chapter, the children's

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<sup>104</sup> The Federation of Women Lawyers 'Implications of the coronavirus disease (covid-19) on gender based violence and domestic violence in Southern Africa' (2021) 3

right to recreational activities is the one discussed as it is connected with the use of land.

### **3.4.1 Children’s right to recreational activities in international, regional (African) and local frameworks**

The United Nations Conventions on the rights of the Child (CRC) is the first international framework to recognize children’s rights. In this framework, Article 31 in paragraph 1, encourages states to recognize children’s rights to participate in playing and recreational activities that are in alignment with the child’s age.<sup>105</sup>

Paragraph 2 further stipulates that “States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”<sup>106</sup> In other words, states are not only encouraged to recognize but also promote the right of the child to engage in recreational, artistic and cultural activities.

In the African context, Article 12 of the African Charter on the Rights and Welfare of the Child (ACRWC) advises states on the same line of thought as the CRC. States are encouraged to acknowledge the right of the child to participate in recreational, leisure and gaming activities that are also suitable for their age and additionally, states should respect and promote those rights.<sup>107</sup>

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<sup>105</sup> Convention on the Rights of the Child. (1989) 9

<sup>106</sup> CRC (n 103 above) 9

<sup>107</sup> ACRWC (n 105 above) Article 12 (1 and 2)

In Lesotho, the right to recreational activities for children is not recognized in the constitution, not to mention the rest of other children's rights. Nevertheless, the Ministry of Social Development has made a strong effort in addressing children's rights. In the Children's Protection Welfare Act, the recognized right close to a recreational right, is the right to social activity.<sup>108</sup> It is deducible then, that social activity may refer to participation in the social life and that includes recreational activities.

### **3.4.2 Recreational activities in Lesotho**

At the time of this writing, there is no existing scholarly literature comprehensively discussing recreational or sporting activities in Lesotho. However, just like in many other countries, Lesotho does have a variety of sporting activities. There are also policies in place for the activities by the Ministry of Gender and Youth, Sport and Recreation.<sup>109</sup>

The National Policy on Sport and Recreation was formed due to a variety of factors. It is reported that more than 27 percent of the country's population lives below the poverty line, which is roughly R30.00, adding to political upheavals, climate and food insecurity and thus, sport and recreation could be used as motivators for social development.<sup>110</sup>

In the context of children, sports may also be used as a catalyst to curb juvenile delinquency, which is a social challenge as well. Juvenile delinquency as an existing phenomenon in Lesotho, is a social ill of which poverty or lack of access to

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<sup>108</sup> Children's Protection Act of 2011 sec 12

<sup>109</sup> Lesotho National Youth Policy 2017-2030 and National Policy on Sport and Recreation for Lesotho 2021-2031

<sup>110</sup> The Commonwealth Secretariat 'National Policy on Sport and Recreation for Lesotho 2021-2031' (2022) 7

opportunities is the root among lower class children.<sup>111</sup> In essence, fulfilling the right to recreational or social activity, may help in combating the above-mentioned social problems.

### **3.4.3 How land could be used to fulfill the right to social activity**

It has been demonstrated in this chapter, how land could be used as a resource for a variety of activities linked with socio-economic rights. These include construction of health care facilities and farming to fulfil the right to health and the right to food effectively. In terms of fulfilling the right to social activity for children, it is argued in this section that land should be utilized for construction of sporting facilities whereby such land would be used for cemeteries.

As indicated in the earlier sections, Lesotho's mountainous terrain makes it only 10 percent of land to be used for agricultural purposes.<sup>112</sup> While food insecurity is a vexing issue in Lesotho, other social ills such as crime and unemployment persistently continue despite the democratic progress of the country since 1993.<sup>113</sup> Hence, the National Policy aims to ensure that promotion of sports is used as a crime prevention strategy.<sup>114</sup>

Thus, in the 10 percent portion of the land that may not be suitable for agriculture, such land should be used for construction of sporting facilities. The popular sports in Lesotho include soccer, judo, boxing, long-distance running and horse racing.<sup>115</sup> While soccer is the most popular and most played in the country, Setsoto Stadium is the only standard stadium in the country and it is located in the capital town, Maseru.

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<sup>111</sup> E E Obioha and M A Nthabi 'Social background patterns and juvenile delinquency nexus in Lesotho: A case study of juvenile delinquents in Juvenile Training Center (JTC), Maseru' (2011) 165-177

<sup>112</sup> Help Lesotho (n 99 above) (last accessed on 5<sup>th</sup> August 2022)

<sup>113</sup> BTI (n 77 above) 17

<sup>114</sup> Commonwealth Secretariat (n 108 above) 90

<sup>115</sup> <https://www.britannica.com/place/Lesotho/Cultural-life> (last accessed on 7<sup>th</sup> August 2022)

Facilities for sports like Judo and boxing are provided in the army and police premises.

The construction of sporting facilities itself is a process that would bring job opportunities for the majority of unemployed youth. The right to social activity will also be fulfilled when there are sports facilities for everyone, including children, to entertain themselves. Additionally, with sports facilities being available across the country's districts, juvenile delinquency, which is also caused by lack of access to opportunities, will be reduced. Sports, in this regard, provide children with opportunities to develop or harness their talents and in this way, they would be occupied by sporting activities more than being tempted into criminal activities.

### **3.5 Conclusion**

Following an examination of the importance of burials and the graves for the Basotho, this chapter simply aimed to explicate the socio-economic rights which could be fulfilled through the use of land, and how they could be fulfilled instead of continuing to create more space for graves. These socioeconomic rights include the right to health, the right to food and the right to social activity, all of which answer the problems facing Lesotho in terms of healthcare, food insecurity and crime or juvenile delinquency for children.

One would ask if these rights could be fulfilled simultaneously and in order of importance. Again, one would ask what should happen with the already existing cemeteries or lands allocated for cemeteries already. Firstly, the fulfilment of the rights may depend on the availability of land that is not yet used. It is the argument

of this chapter that even if they may not be fulfilled simultaneously, but depending on the availability of resources such as funding, priority should be given to the need that is more critical per place. In other words, where healthcare is most scarce, then construction of healthcare centers should be prioritized. Secondly, it is the argument of this chapter that in places where cemeteries are already allocated, they should be used. But when there is remaining land that is still unused, it should be used to fulfill any of those socio-economic rights and no more for burials.

Subsequently, one would ask whether these socio-economic supersede the rights of the indigenous people or put differently, the right of the Basotho people to continue their culture. Additionally, a question would also be on reasons why the discussed socio-economic rights should supersede Basotho's right to their culture. Thus, it is the aim of the following chapter to address these questions and provide justifications for the fulfilment of the discussed socio-economic rights over Basotho's right to their burial culture.

## **Chapter 4: Alternatives to burials and their justification in contrast to Basotho's right to the burial practice and existing burial laws**

### **4.1 Introduction**

The previous chapter has comprehensively discussed the socio-economic rights advocated for in the overall research project and how they could be implemented at the expense of the Basotho's burial custom. In this chapter, the focus will be the provision of and discussion on alternative means of disposal for the deceased people's bodies. Additionally, the justification for implementing the aforementioned socio-economic rights will be advanced in contrast to Basotho's right to their burial practices and existing laws pertaining to burials. The justification rests on the moral framework of Deontology which will be explicated in the later sections of the chapter. The suitability of these disposal methods will be evaluated based on how they could be compatible with the rest of Basotho's beliefs of death and the dead.

### **4.2 Second interment as an alternative disposal method of the deceased**

Second interment simply refers to the method of burial wherein the lifespan of a grave is extended through the re-usage of the grave preferably by family members.<sup>116</sup> The process of second interment requires that the first burial should be at sufficient depth. For instance, in a situation whereby there would be two bodies to be buried, the grave is dug to the depth of seven feet, the first coffin is placed and the grave backfilled and when the second burial takes place, the grave is opened again and dug to the level of six feet, just above the initial interment, thus not tampering with the

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<sup>116</sup> Leuta and Green (n 18 above) 3

first coffin.<sup>117</sup> In other words, this method of burial requires a family to plan ahead as significant depth of the first interment would be key in determining the size and capacity of the grave.

#### **4.2.1 Compatibility of second interment with Basotho's belief in the grave**

In as much as this method sounds viable in terms of saving land space and perhaps cheaper since it does not require much logistics as in when digging new graves when family members die, it may be problematic to accept and implement for the Basotho people. As Rugg and Holland point out, the ethical dilemma of the practice stems from the idea of wanting the deceased to be left in their peaceful rest and the inevitable reluctance to disturb them while trying to accommodate new burials.<sup>118</sup>

The avoidance to disturb the dead coincides with Basotho's belief that graves are houses of the dead and are to be respected and treated with dignity, as even the soil of a grave itself is sacred.<sup>119</sup> This means that since a grave is considered a dead person's house according to Basotho's beliefs on the sanctity of the grave, it would be impossible to shift this long-held belief to considering a 'one-house-for all' system, in addition to the fear of tampering with the sacred soil of the grave.

#### **4.3 Cremation as an alternative method for disposal of the deceased**

Cremation can simply be understood to be the annihilation of a dead body through the use of extreme heat until it is reduced to ashes.<sup>120</sup> However, it can also be

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<sup>117</sup> J Rugg and S Holland 'Respecting corpses: ethics of grave re-use' (2016) 4

<sup>118</sup> Rugg and Holland (n 115 above) 4

<sup>119</sup> Lesitsi (n 66 above)

<sup>120</sup> A E Brumbaugh 'An investigation into the phenomenon of cremation in today's society' Honours study, Ball State University 1980 4

understood in a more generic sense to entail the mechanical, thermal or any manner of dissolution of a corpse to bone elements to the sizes of one-eighth inch, with alkaline hydrolysis and fire-based cremations being the normally used methods of cremation.<sup>121</sup>

Cremations are normally performed in a room called a crematorium. In explaining the cremation process, Jantz relates that the body of a deceased is normally concealed in a casket when it enters the cremation chamber, taking up to two or three hours under the furnace temperature ranging from 1600 to 1800 degrees Fahrenheit.<sup>122</sup>

Alkaline hydrolysis on the other hand, is a water-based form of cremation. In this type of cremation process, alkaline chemicals with heat, agitation and pressure are used in order to speed up the natural decomposition of the body which is similar to the one that would slowly occur when the deceased is buried in a grave.<sup>123</sup> In both types of cremation, the aim is for the body to be reduced to bone fragments or ashes that would later be placed in a container for the family of the deceased to retain.

#### **4.3.1 Compatibility of cremation with Basotho's belief in the grave**

Cremation leads to the total annihilation of the deceased's body. However, in as far as the burial custom is concerned, the deceased's body forms part of their beliefs in the grave. As studied in the earlier chapters, the burial practice entails placing the body in a way facing north-eastward at Ntsoana-tsatsi, a belief that also coincides

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<sup>121</sup> E L Wilcox 'Cremation best practices' (2022) 2

<sup>122</sup> R Jantz 'Cremation weights in East Tennessee' (2004) 1

<sup>123</sup> Wilcox (n 119 above) 5

with Basotho's Christian doctrine of the resurrection of the dead.<sup>124</sup> In other words, Basotho's belief in the resurrection is deeply intertwined with their burial practice and for that, the cremation would clash with Basotho's hope for resurrection of their loved ones and also compromise the practice of having their dead facing Ntsoana-tsatsi.

Ntsoana-tsatsi's religious significance stems from the tradition that it is the place where Basotho were originally birthed from the Earth.<sup>125</sup> Thus, the practice of placing the deceased in a position facing Ntsoana-tsatsi, plays a meaningful part of the burial custom but in cremation, the practice would be compromised and thus eliminating the hope of resurrection and create the feeling, amongst the bereaved, that their deceased is isolated from others when he or she does not face towards the place of his or her origin.

Furthermore, according to Basotho's burial custom, the deceased is buried with seeds in his or her hands as it is believed that he or she would cultivate crops in their destined ancestral world.<sup>126</sup> Hence, the cremation, which means the total demolition of the body, would hinder the practice of handing seeds to the deceased for him or her to cultivate.

One would argue that the deceased would still be handed the seeds and enter the cremation chamber with them, in the same way he or she would enter the grave and eventually decompose with them. However, even if the seeds may be given to the deceased as they enter the cremation chamber, the purpose of him or her cultivating

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<sup>124</sup> Gill (n 65 above)

<sup>125</sup> D P Kunene 'Ntsoanatsatsi/Eden: superimposed images in Thomas Mofolo's *Moeti oa Bochabela*' (1986) 18

<sup>126</sup> Rakotsoane (n 64 above)

them would be defeated since the seeds themselves would be destroyed in the cremation process.

#### **4.4 Memorial diamonds as an alternative method for the disposal of the deceased**

Closely related to the cremation method of disposal is what is known as memorial diamonds or cremation diamonds. Simply put, memorial diamonds are made from the carbon found in hair or the cremation remains. The process of creating the diamond entails extraction of carbon from the hair or ashes in a laboratory, then through processes such as purification and crystallization, a cremation diamond is formed from the remains of the deceased.<sup>127</sup> These diamonds share similar features with natural diamonds in terms of visibility, the chemical and physical aspects as well.

While cremation is an ancient culture that evolved with technologies across different societies, the practice of lab-made diamonds started in around the 1950s and then became popular around the early 2000s, only to become an established industry of memorial diamonds around the 2010s in parallel with the rise of cremation as an alternative to burials.<sup>128</sup>

Switzerland is the country to which the origins of cremation diamonds are attributed to, while over the years the cremation culture has gained popularity in European

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<sup>127</sup> [https://www.lonite.com/en/LONIT%C3%89\\_Catalog-Cremation\\_Diamonds\\_from\\_Ashes.pdf](https://www.lonite.com/en/LONIT%C3%89_Catalog-Cremation_Diamonds_from_Ashes.pdf) (accessed on 25<sup>th</sup> October 2022)

<sup>128</sup> C K Cann 'Palatable and portable: do memorial diamonds aid in the grieving process' (2022) 50

countries such as Sweden, Denmark and Switzerland and all three accounting for 70, 76 and 90 percent rates respectively.<sup>129</sup>

#### **4.4.1 Compatibility of Memorial Diamonds with Basotho's belief in the grave**

All processes leading up to the creation of memorial diamonds are similar to the processes involved in the cremation of the deceased person's body as observed in the previous section. However, the only difference between common cremation practices and memorial diamonds is that in cremation, ashes or the remains, are retained by family members sealed in a special container, while for memorial diamonds to exist, the ashes will be used in a laboratory. Therefore, for the Basotho, the arguments put in the previous section in determining the compatibility of the cremation practice with Basotho's belief would still apply for cremation diamonds.

To be precise, the Basotho believe that the dead should be let to rest in their graves undisturbed.<sup>130</sup> Also, it is believed that they have departed to another world.<sup>131</sup> In both cases, the Basotho demonstrate through those two beliefs, that they are inclined to moving on when their loved ones have died. Thus, adopting to the practice of memorial diamonds would clash with the two aforementioned beliefs both of which demonstrate reluctance to disturb the dead and inclination to move on with life.

The cremation diamonds would sensibly be viable for the Xhosa people, who, in contrast to the Basotho's beliefs, view death as a continuation of life and maintenance of communication with the dead plays a crucial role their daily lives,<sup>132</sup> in addition to performing rituals that call back the spirits of the dead to live with

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<sup>129</sup> Cann (n 126 above) 48

<sup>130</sup> Lesitsi (n 66 above)

<sup>131</sup> Rakotsoane (n 57 above)

<sup>132</sup> Soga (n 41 above)

them in their homes. Cremated remains and or memorial diamonds in the Xhosa would offer a physical representation of the dead.

#### **4.5 A case for cremation in contrast to Basotho's beliefs: theological and philosophical justifications**

As noted in the previous section, Basotho are inclined to moving on from their grief of their loved ones. This is observed in their belief that the dead have migrated to another world and in the belief that they are rested peacefully as demonstrated in their understanding of graves as the deceased's houses which bear a great degree of dignity and sanctity.

However, at the heart of Basotho's understanding of death in general, which informs their respect for the grave, is what can be spotted as a fallacy of inconsistency. The notion that the dead have 'migrated' as Rakotsoane relates,<sup>133</sup> is glaringly contradictory to the idea that that the graves are houses of the dead, who should not be disturbed as Lesitsi notes.<sup>134</sup> Furthermore, the belief in the deceased's resurrection facing Ntsoana-tsatsi,<sup>135</sup> presupposes that the one who resurrects had been at rest.

These two contrasting beliefs beg the following questions: If one has migrated to a world where they would cultivate crops, why should the living understand them to also be at rest? Migration, cultivation of crops and rest are utterly three different phases as they denote activity and passivity. It is thus impossible for one to have departed and busy with some agricultural activity but at the same time be at rest. Additionally, if the dead have moved on to cultivate crops in a different world, why

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<sup>133</sup> Rakotsoane (n 57 above)

<sup>134</sup> Lesitsi (n 67 above)

<sup>135</sup> Gill (n 65 above)

should their ‘house’ be so feared and untampered with, since they obviously do not occupy the house for any meaningful purpose?

This lack of logical coherence in Basotho’s general notion of death leaves the burial culture as a whole susceptible to a variety of foreign influences. One of the foreign influences in Basotho’s notion of death is Christianity, as observed in the previous sections through the doctrine of resurrection. It is common observation that Christianity is the most followed religion in Lesotho. The International Religious Freedom Report accounts that as recent as 2019, 90 percent of Lesotho’s population, which consists of 2 million people, are Christian.<sup>136</sup>

It is this very influence of Christianity that may be used to advocate for cremation amongst the Basotho people. It may be argued, nevertheless, that in most African societies cremation is rejected due to the emotional reaction that comes with the picture of watching one’s loved one being burned and more so, the belief in the body’s sanctity as it is God’s creation.<sup>137</sup> The latter belief, may also match with the Christian scripture that maintains the view that the body is the ‘temple’ of God.<sup>138</sup>

However, the same scripture later shows that in resurrection, the dead are raised as spiritual bodies despite being buried as physical bodies.<sup>139</sup> In other words, the physical body will not be the one with which the deceased will be recognized when they resurrect, but the immaterial body. Thus, the scripture gives latitude for any method of disposition of the dead people’s bodies since the most important bodies

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<sup>136</sup> Lesotho 2019 International Religious Freedom Report <https://www.state.gov/wp-content/uploads/2020/06/LESOTHO-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> (accessed on 28th October 2022)

<sup>137</sup> M J S Masango ‘Cremation a problem to African people’ (2005) 1286

<sup>138</sup> 1 Corinthians 6: 19 [https://biblehub.com/1\\_corinthians/6-19.htm](https://biblehub.com/1_corinthians/6-19.htm) (accessed on 28th October 2022)

<sup>139</sup> 1 Corinthians 15: 35-55, *Good News Bible*

beyond death are the spiritual ones. This means that in a largely Christian society like Lesotho, cremation of the dead should not be a problem.

#### **4.5.1 Right to culture as a possible counter argument**

A countering argument may be expected towards the advocacy for cremation. The argument may simply be based on the view that Basotho, like the all other Africans across the continent, do have a right to exercise their culture and it is the responsibility of states to ensure the respect, protection and fulfilment of such a right. This argument may be drawn from both the local and international legal frameworks.

Lesotho's constitution does not exclusively address the right to culture. Nevertheless, freedom to associate with others based on, but not limited to ideological, political, cultural purposes is protected.<sup>140</sup> Moreover, the State aims to make sure that citizens have a chance to take part in the cultural life of their various communities.<sup>141</sup>

On a broader scope, the right to culture is also acknowledged in the African Charter when it states that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."<sup>142</sup> Thus, in as far as the local and international frameworks are concerned, an argument would be advanced that the Basotho people have a right to practice their culture.

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<sup>140</sup> Constitution (n 73 above) Section 16 (1)

<sup>141</sup> Constitution (n 73 above) Section 35 (1)

<sup>142</sup> African Charter (n 72 above) Article 22 (1)

#### 4.5.2 Laws pertaining to burials as a possible counter argument

Following the right to culture as a potential counter argument would be the laws that deal exclusively with the burial custom. Like other countries with colonial histories, Lesotho operates on a mixed domestic legal system entailing customary and general laws. The customary law, also known as the Laws of Lerotholi, is a framework that maintains Basotho's cultural practices whereas the general law includes Roman Dutch Law which was borrowed from the Cape, and the Lesotho statutes.<sup>143</sup> In this section, the burial culture will be reviewed from both the legal frameworks under the domestic system.

The Laws of Lerotholi are a framework containing Basotho's cultural codes of conduct or practices traditionally acknowledged as rules, which was promulgated in 1903 under the advice of Basutoland National Council.<sup>144</sup> The law is named after the then paramount chief, Lerotholi. The laws of Lerotholi are intended to reinforce Basotho's traditional legal guidelines but even though they are accepted as authoritative, they are not the sole source of customary laws since the courts can refer to academic writings and anthropological records for issues that the laws of Lerotholi do not address.<sup>145</sup>

In terms of the burial guidelines, section 30 of the Laws of Lerotholi provides as follows:

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<sup>143</sup> B A Dube 'The law and legal research in Lesotho' (2008) <https://www.nyulawglobal.org/globalex/Lesotho.html> (accessed on 26th February 2023)

<sup>144</sup> Q Letsika 'The place of Sesotho customary law marriage within the modern Lesotho legal system' (2005) 74

<sup>145</sup> Letsika (n 142 above) 75

“Every adult male person residing in a village in which any death may occur or, if there are no adult male persons in such village, such adult male person as may be ordered by the chief, subchief or headman, shall assist in digging the grave for and the burial of the deceased person. Any adult male person failing or refusing to assist when ordered to do so shall be liable on conviction to a fine not exceeding £3.”<sup>146</sup>

It should be noted that this is the only provision in the framework that addresses the burial custom. The practice of adult males digging a grave when there is a death in a village is still upheld up to the time of this writing. With regard to conviction of any adult male who refuses the chief’s orders when there is a death in a village to join the grave-digging, there is no recorded case.

Apart from the above mentioned customary legal architecture protecting and maintaining Basotho’s burial culture, the other laws include the Public Health Order of 1970 and the Land Act of 2010, which fall under the general law. The 2010 land Act, as elaborated in the first chapter, simply emphasizes on the issue of land allocation for burial places by the Ministry of Health.<sup>147</sup>

It’s predecessor, the 1970 Public Health Order, makes a similar provision that it is the ministry of Health who will identify the suitable places that should be used for burials of deceased persons.<sup>148</sup> In as far as protection and maintenance of the burial

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<sup>146</sup> The Laws of Lerotholi in Basotuland (1952) 158

<sup>147</sup> Land Act of 2010 (n 1 above)

<sup>148</sup> Public Health Order of 1970 (n 2 above)

practice in Lesotho is concerned in the legal domain, the aforementioned are the only available regulation until the time of this writing.

With the exception of the court judgement delivered by Justice Hlajoane in the case between *Hleoheng Community Council v Phokoanyane and Others*<sup>149</sup> which reiterated the 1970 Public Health Order and 2010 Land Act regulations, the rest of other court rulings are mostly on issues of heirship wherein families internally fight over authority to bury their deceased.

An example is the case of *Mateboho Mabathoana v Makalo Mabathoana and Other*<sup>150</sup> wherein the court, presided by Justice E.F.M Makara, ruled in favor of Makalo Mabathoana as the head of the family to decide where his son, the husband to Mateboho Mabathoana, would be buried, despite the court recognizing and appreciating Mateboho's heirship and right to bury her husband. This court judgment and others of the similar nature, are however not within the context of this research project's topic and arguments since they deal more with heirship issues rather than the burial practice itself as a bone of contention.

The right to cultural practices, though not expressly addressed in the constitution as noted in the previous section and in the African Charter, in conjunction with these aforementioned legal literature regulating the burial practices, may serve as a strong basis for rejection of any other methods of dead persons 'bodies' disposal. Nevertheless, since the law finds justification through morality, the next section

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<sup>149</sup> Hleoheng Community Council v Phokoanyane and Others (n 3 above)

<sup>150</sup> Mateboho Mabathoana v Makalo Mabathoana and Other (CIV/APN/76/2013) (2013) LSHC 22 (26 February 2013)

provides a moral argument for the employment of other methods, specifically cremation, with the aim to modify the above-mentioned laws on burials in Lesotho.

### **4.5.3 A moral examination of the burial culture and justification for cremation: a deontological approach**

The general argument advanced in this research is that land should be preserved with the aim to use it only for implementation of socio-economic rights and thus, one of the land-consuming practices, the burial culture, should be abolished or at least reduced. The suggestion that cremation should be adopted in favor of land preservation is not a new pursuit. In Northern European countries, burial costs and land scarcity have been cited by some scholars as some of the practical factors leading to cremation in addition to flexibility in religious beliefs.<sup>151</sup> In Africa cremation remains unpopular as observed in the previous sections.<sup>152</sup>

However, despite its unpopularity by virtue of how Africans may feel about it, for countries that may be faced with land shortage like Lesotho, cremation may be the only option and this requires more use of reason than emotion to accept. It is thus fitting to use a Kantian deontology to justify the abandonment of burials in favor of cremation.

According to the Kantian deontology, it is understood that a moral action is done out of duty more than feelings and this duty being purely grounded on reason, is designated as a ‘categorical imperative.’<sup>153</sup> One of the rules of the categorical imperative states, “Act only according to that maxim by which you can at the same time will that it should become a universal law.”<sup>154</sup>

In other words, with reason being central to moral thinking and action, the categorical imperative encourages that all moral actions should be molded on

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<sup>151</sup> Cann (n 126 above) 48

<sup>152</sup> Masango (n 135 above)

<sup>153</sup> S J Koali ‘Organ transplant trade: a moral examination’ (2015) 265

<sup>154</sup> I Kant *Groundwork of the metaphysics of morals* (1997) 19

commands or principles that may be universalized.<sup>155</sup> In short, the moral permissibility of an action lies in its ability to be applied universally. It should also be highlighted that for Kant, humans by virtue of being rational beings, are capable of guiding their good conduct through use of reason and if people ceased to exist, so would morality itself in the world.<sup>156</sup>

Now, putting aside that burials are already abandoned due to shortage of land and cremation adopted in European countries, it is strikingly obvious that continuing the burial culture at the expense of land, which is a resource, would ultimately have detrimental consequences in a country that is already small in land size like Lesotho.

In alignment with the Kantian mode of thought, one would ask if it would be morally acceptable to continue land-consuming practices such as burials and care less about preserving land for implementation of socio-economic rights. Or to be more precise, would it be morally permissible for Basotho to exercise their constitutionally protected right to cultural activities to the detriment of implementing other life-sustaining rights?

Certainly, it would not be permissible because if life-sustaining rights are not implemented on land, then people will not live long enough to enjoy the very same right to cultural practices. This is similar to what Kant purports when he argues that extinction of humanity is also the extinction of moral standards fundamentally.<sup>157</sup> Thus, continuation of the burial culture, so long as it has long-term life-threatening consequences, renders the same right to cultural practices useless since there would not be enough Basotho to enjoy such a right.

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<sup>155</sup> D Palmer *Looking at philosophy: the unbearable heaviness of philosophy made lighter* (2006) 219

<sup>156</sup> J Rachels and S Rachels *The elements of moral philosophy* (2015) 138

<sup>157</sup> Rachels and Rachels (n 154 above) 138

## 4.6 Conclusion

The main focus of this chapter was to provide justifications for the adaptation of cremation in order to preserve land. The justifications included the theological and philosophical or moral justifications. The reason for using a Christian argument is because Christianity, as revealed in the chapter, is the largest followed religion in the country. Thus, the word theological can be understood to refer to Christianity in the context of Basotho and in this chapter. In Philosophy, Moral Philosophy or Ethics is the only branch known to regulate right action and wrong action. Thus, in the context of this chapter a philosophical argument refers to a moral one.

One would ask whether the chapter generally argues against Basotho's constitutionally protected freedom to exercise or participate in their cultural life in order to advance socio-economic rights. Undoubtedly, the argument put forward to preserve land does not necessarily argue against the right to participation in cultural life.

However, the burial practice is the only targeted culture. Arguing for the abolishment or at least limitation of the burial culture does not necessarily invalidate the rest of other cultures. In point of fact, the Basotho people may still continue with all the necessary rituals leading up to the burial. But the disposal of the body is where the issue is. Since burial of the dead is the final step in the funeral processes, it is argued that burial should be the only eliminated or limited aspect of the Basotho funeral culture.

## **Chapter 5: Concluding Chapter**

### **5.1 Introduction**

This chapter aims to provide an overview of this research project in a form of summaries of chapters, the overall argument and supporting arguments of the researcher and in addition, the recommendations in accordance with the arguments raised in the past chapters.

### **5.2 Chapter summaries**

In the first chapter, the study gave an overview of what the research is about and how it would be approached. As captured in the topic, the main purpose of this research is to advocate for the preservation of land that would be used for cemeteries, in favour of implementation of socio-economic rights, specifically those covered in Women and Children's rights frameworks. The research would thus incorporate a desktop method of data collection.

The main aim of this research project was to establish and advance an argument for the restraint or eradication of the burial practices in the Basotho society. The hypothesis is that continuation of creation of cemeteries will lead to land shortage especially for an already small country in terms of land size like Lesotho. This shortage of land will then make it impossible for the fulfilment of socio-economic rights which need land in order to be implemented.

The second chapter attempted to answer the question on the significance of graves in the Basotho culture. In other words, the chapter studied the meaning of death for the Basotho people and the importance of maintaining the burial practice and significance of the graves thenceforth. The Basotho, in the context of the research entail the Bantu ethnic groups who are found in Lesotho including the Xhosas, Zulus and Sothos. The Batswana are also included by virtue of being part of the Sotho ethnic groups in the Southern Africa.

In the third chapter, the socio-economic rights being advocated for are extensively discussed and it is demonstrated how land would be used to fulfill such rights. These are the right to health, the right to food and the right to social activities and are discussed in alignment with women and children's rights. These rights are deliberated in conjunction with how they could be implemented on land.

The fourth chapter suggests other methods of dead bodies' disposal which do not consume land the way burials do. Additionally, not only is the burial culture criticized but also justifications for land-preserving methods are provided on a philosophical and theological basis.

It should be noted that one of the key tasks in this project was to demonstrate multidisciplinary. Thus, in advocating for the implementation of land-oriented socio-economic rights, the researcher did not only use legal frameworks. Rather, a socio-anthropological approach was made as seen in the study of the burial culture in Chapter 2. In chapter 3, not only are the land-oriented socio-economic rights are discussed, but additionally they are supported through both local and international frameworks. Chapter 4 simply uses theological and philosophical frameworks to

critique the burial culture and justify cremation as the preferred alternate means of disposal of dead bodies. In other words, both chapter 3 and 4 provide justifications for the said socio-economic rights from three disciplines including Law, Theology and Philosophy to achieve multidisciplinary.

### **5.3 Recommendations**

As noted above, the main argument of this research is that the burial practice should be abolished or at least restricted, in favour of cremation in order to reserve land for other life-sustaining activities such as agriculture. As things stand, the burial culture continues due to being supported not only from the cultural and religious areas of life but also by the law.

Thus, the first recommendation would be that the Land Act of 2010, which maintains the Public Health Order of 1970 in terms of identifying cemeteries, should be reviewed. In this respect, while the total abolishment of the burial practice may not be practical, the ministry should rather allow people to bury their loved ones within their home yards instead of identifying places for cemeteries. The same amendment should be made for the customary law. Even though it only focuses on the obligation of male figures in the community to participate in grave-digging, it should rather shift the obligation from grave-digging to helping the bereaved families in preparation of the funeral ceremony. In other words, punishment should rather be shifted to not participating in helping the bereaved families in preparations of the burial such as slaughtering of a beast, collecting firewood and so on.

For those who may not have homes in which they could be buried, their bodies should be cremated. This however does not mean cremation should be a second option to burials. Rather, it should be a more encouraged practice to avoid having graves that consume space even within home yards. In other words, the Ministry of Health should encourage cremation more than burials.

Secondly, as suggested in the third chapter on how land could be used to fulfil socio-economic rights, the government through the Ministry of Health, should prioritize building of healthcare facilities over creating space for cemeteries especially in the rural areas of the country. Construction of healthcare facilities fulfills the right to health for not only women but everyone in the communities.

The sporting industry in Lesotho is crippled by lack of facilities for the various sports or recreational activities that Basotho may be interested in. Thus, the government, through the Ministry of Gender and Youth, Sports and Creation should in liaison with the Ministry of Local Government and Chieftainship, identify places both in the urban and rural areas which could be used for construction of sporting and recreational activities. These places should be appointed even in place of those that would be used as cemeteries.

In fulfilling the right to food, as noted in the third chapter, the government should prioritize utilization of free land for agricultural purposes instead of such land being used for cemeteries. To this end, in its policy the Ministry of Agriculture and Food Security together with the Ministry of Local Government and Chieftainship should identify spaces that could be used for agricultural activities and categorically discourage creation of cemeteries.

It should be noted that the issue of burial culture as a potential cause for land shortage has not been discussed before in Lesotho's academic forums, at least not from a human rights perspective. Thus, the outstanding argument which may still need to be explored further is on Basotho's right to culture versus the fulfilment of socio-economic rights.

To be specific, since the right to culture is not exclusively addressed in Basotho's Constitution, there would still be a need for further explication of the available provision which states that citizens will participate in the cultural life of their communities.

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