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REALISING THE RIGHT TO PROPERTY FOR WOMEN IN RURAL LESOTHO

Mini-Thesis submitted in fulfilment of the requirements for the LLM Degree in
Constitutional Theory

BY

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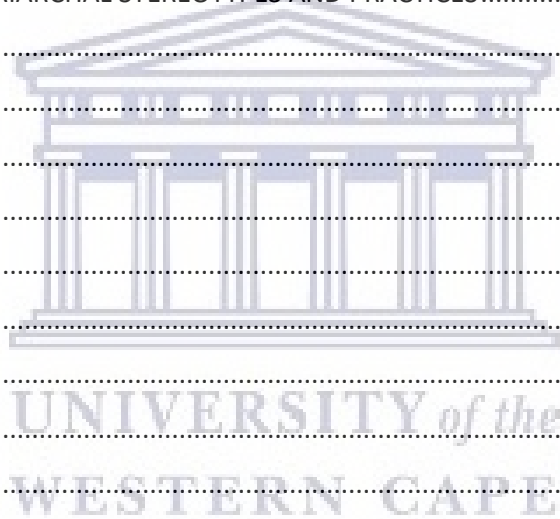
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PLAGIARISM DECLARATION

I, **Nokuthula Ndlovu**, declare that the thesis title: **Realising the right to property for women in rural Lesotho**, is my own work and that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed by Nokuthula Ndlovu

April 2021

Signed by Supervisor

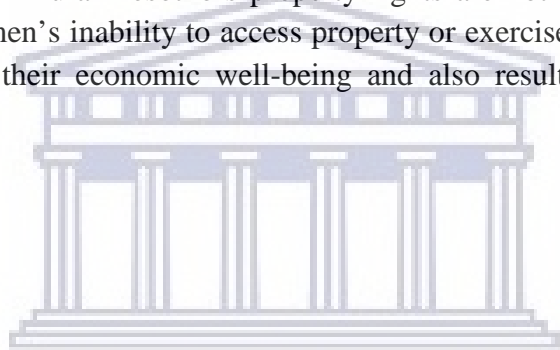


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ABSTRACT

The right to property is a human right guaranteed to all, including women, under various international legal instruments such as the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and Peoples' Rights as well as the Maputo Protocol. The right to property is further guaranteed under various Constitutions. However, despite the guarantee to the right to property, many women in Africa are deprived of their property rights.

Lesotho has a dual legal system comprising of customary law and common law (Roman-Dutch law) and therefore a Lesotho citizen is subject to two legal systems. Both customary law and common law regulate matters pertaining to property. This study proves that the co-existence of both common law and customary law does not provide for the realisation of women's property rights. Essentially, women in rural Lesotho's property rights are not being realised due to the conflict of these laws. Women's inability to access property or exercise their property rights has negative repercussions on their economic well-being and also results in the feminisation of poverty.



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KEYWORDS

Customary Law

Kingdom of Lesotho

Laws of Lerotholi

Maputo Protocol

Right to Property

Rural Lesotho

Women



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LIST OF ABBREVIATIONS

ADRDM – American Declaration on the Rights and Duties of a Man

ACHPR – African Charter on Human and Peoples’ Rights

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW COMMITTEE - Committee on the Elimination of Discrimination Against Women

HIV/AIDS - Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

LHLDC - The Lesotho Housing and Land Development Corporation

MAPUTO PROTOCOL - Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women

THE PROTOCOL-- The Protocol No. 1 to the European Convention on Human Right

UDHR – Universal Declaration of Human Rights

CHAPTER 1- INTRODUCTION

1.0 BACKGROUND

The right to property is a complex right as it extends to various disciplines of law and other human rights.¹ Such a discipline would be economic rights as property is often used in trade and exchange, and these are grounds on which economic activity is founded on.² Van Banning notes that the right to property is far reaching as it is also linked to the right to freedom as well as the rights to life and liberty.³ The right to property has been said to have political connotations and implications because to many, the accumulation of property is associated with power.⁴

The right to property has been recognised in various legal instruments, both international and regional Instruments. The 1948 Universal Declaration of Human Rights provides in Article 17 that everyone has the right to ownership of property on their own or joint ownership.⁵ The UDHR is said to be the only UN human rights instrument that explicitly recognises the right to property.⁶ This is so because drafters of other international legal instruments were unable to agree on the content of the right to property.⁷ The right to property is recognised in article 14 of the African Charter of Human and Peoples' Rights. Article 14 provides that everyone shall be guaranteed the right to property.⁸

Although the African Charter makes provisions for the property rights of everyone on an equal basis before the law, the African Charter does not fully address the circumstances surrounding property rights as regards women. The Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa (Maputo Protocol) was adopted in accordance to Article 66 of The African Charter on Human and Peoples' Rights (African Charter) which states that special agreements or protocols may be adopted to supplement the African Charter.⁹

The Maputo Protocol addresses women's rights to property under various articles. Article 2 of the Protocol mentions that the state is obligated to combat all forms of discrimination against women and that includes enacting legislative measures and other measures.¹⁰ Article 6 of the Protocol addresses the rights as regards marriage.¹¹ Article 6(j) grants a woman the right, during

¹ Van Banning TRG *The Human Right to Property* (2001) 3.

² Van Banning TRG (2001) 3.

³ Van Banning TRG (2001) 3.

⁴ Van Banning TRG (2001) 3.

⁵ The United Nations Universal Declaration of Human Rights 1948.

⁶ Van Banning TRG (2001)5.

⁷ Van Banning TRG (2001) 5.

⁸ African Charter on Human and Peoples' Rights,1981.

⁹ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹⁰ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹¹ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in

the course of her marriage, to acquire property of her own and administer it freely.¹² Article 7 of the Protocol addresses rights concerning divorce, separation and annulment of a marriage.¹³ Article 7(d) states that upon divorce, separation and the annulment of a marriage, the man and the woman shall both have the right to an equitable sharing of the property that they acquired during the marriage.¹⁴ Article 19 of the Protocol provides for the right to sustainable development, and according to Article 19(c), the right to access resources such as land and property.¹⁵ Article 21, the right to inheritance, states that a widow shall have the right to have an equitable share of her late husband's property as well as live in the matrimonial house.¹⁶ Article 21 also provides for the right to retain the property even after she remarries.¹⁷

Regardless of International Legislation as well as the worldwide recognition of the right to property, women around the world are unable to enjoy the protection of their property rights. Women around the globe are affected by various cultural practices and discriminatory legislation that prohibits them from acquiring property; the women in rural Lesotho are not an exception.

The Constitution of Lesotho, as regards property rights, assumes a gender neutral position.¹⁸ However, Mapetla notes that due to poverty and gender discriminatory practices, women in Lesotho have struggled to enjoy protection of their property rights.¹⁹ These rights are governed by a dual legal system which is based on Roman-Dutch Law (common law) and customary law (Laws of Leretholi).²⁰ According to Mapetla, these Legal systems apply parallel to one another, and like various legal systems in Africa, they are influenced by patriarchal practices.²¹ These patriarchal practices have created a construct in which men are regarded as the heads of the household and therefore, property is controlled by men.²² The consequence of this is that women can only acquire property through men.²³ The implications of these patriarchal laws and

Africa 2003.

¹² Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹³ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹⁴ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹⁵ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹⁶ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹⁷ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

¹⁸ Mapetla M 'Gendered Access to Housing in Lesotho' 1999 *Journal Storage* 71.

¹⁹ Mapetla M (1999) 71.

²⁰ Mapetla M (1999) 71.

²¹ Mapetla M (1999) 71.

²² Mapetla M (1999) 71.

²³ Mapetla M (1999) 71.

practices have greater implications for women in rural areas of Lesotho who are unmarried, married and divorced.²⁴

1.1 PROBLEM STATEMENT

The Kingdom of Lesotho is rich in customary law traced back to the Laws of Lerotholi and under these laws or customary practices; kings and chiefs play a significant role in governing communities.²⁵ Kings and chiefs have always been at the focal point of land matters such that the Constitution of Lesotho in sections 107 and 108, delegates the power to allocate and distribute land to the Kings and Chiefs.²⁶ According to the history of Lesotho, the land belonged to the community and the kings and chiefs held the land in trust for the community.²⁷ Married men in the community were entitled to three fields for agricultural purposes as well as a field for residential purposes.²⁸ Allocation of land was never made to women.²⁹

Customary law in Lesotho governs property rights in various aspects, one of them being a customary marriage. With respect to property acquired during the duration of a customary marriage, the general practice is that each party comes to the marriage with possessions and they are used for the joint benefit of the home.³⁰ In the event of a divorce, each party is entitled to only what he or she brought into the marriage.³¹ Since women seldom enter a marriage with immovable property, the women leave the marriage with no ownership or right to the immovable property which the husband entered the marriage with.³² The complexities of acquiring property in customary law also extend to inheritance.

Regarding inheritance of property upon a husband's death, the distinction is based on whether the marriage is matrilineal or patrilineal.³³ In a matrilineal marriage, the line of inheritance is female.³⁴ In a patrilineal marriage, the rules of primogeniture apply and the line of inheritance is male.³⁵ According to the rules of primogeniture, the property will be inherited by the next male in line such as a son, a nephew or a brother etc.³⁶ In the case of male primogeniture, a woman is least likely to inherit, especially a widow.³⁷ This makes a woman very vulnerable as she is likely

²⁴ Mapetla M (1999) 71.

²⁵ Lesotho Laws of Lerotholi.

²⁶ Constitution of Lesotho, 2001.

²⁷ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 29.

²⁸ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 29.

²⁹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 18.

³⁰ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

³¹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

³² UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

³³ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

³⁴ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

³⁵ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

³⁶ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

³⁷ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

to be subjected to expulsion from the home which she shared with her husband.³⁸ Where a woman can inherit her late husband's property, she is subjected to rituals to make her eligible for inheritance.³⁹

The construct concerning the inheritance of property is well illustrated in the case of *Motsamai v Motsamai*. In this case, the deceased, father to the Applicant and husband to the 1st Respondent, died intestate leaving property including various houses.⁴⁰ The 1st Respondent was married to the deceased based on civil rights.⁴¹ The Applicant, the first son of the deceased from a previous marriage, brought forth the application to court for an interdict on the registration of a house in the name of the 1st Respondent.⁴² The basis of his application to the court was that, even though the deceased and the 1st Respondent were married under civil rights, Basotho customary law applied.⁴³ He claimed that because Basotho customary law was applicable, the 1st Respondent would not be able to inherit from the deceased for various reasons.⁴⁴ The two notable reasons were that the woman, although married to the deceased, did not form part of the family and could not inherit, and secondly, the principle of male primogeniture.⁴⁵ In this case, the court decided that because the Applicant was not the first male son of the 1st Respondent, he could not claim the status of heir to the estate of the deceased.⁴⁶ If the Applicant was the first male son, he would be entitled to inheritance and thus the 1st Respondent would disinherit or experience forfeiture of some kind.⁴⁷

According to common law and national legislation, a man and a woman have the same rights and control over property and there are no limitations.⁴⁸ Section 18 of The Constitution of Lesotho provides for freedom from discrimination.⁴⁹ It states that no laws, subject to provisions (4) and (5) of the section, shall make any provision that is discriminatory in itself or in its effect.⁵⁰ The Constitution also provides for the right to property in Section 34 (economic opportunities).⁵¹ It states that "Lesotho shall adopt policies which encourage its citizens to

³⁸ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

³⁹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 20.

⁴⁰ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴¹ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴² *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴³ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴⁴ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴⁵ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴⁶ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴⁷ *Motsamai v Motsamai and Others* (CIV/APN/166/2008) [2011] LSHC 104 (30 September 2011).

⁴⁸ Larsson A 'Housing conflicts and women's strategies in Lesotho', in A Schlyter (ed) *A Place to Live, Gender Research on Housing in Africa* (1996) 66.

⁴⁹ Constitution of Lesotho 2001.

⁵⁰ Constitution of Lesotho 2001.

⁵¹ Constitution of Lesotho, 2001.

acquire property including land, houses, tools and equipment; and shall take such other measures economic measures as the State shall consider affordable”⁵².

As the Kingdom of Lesotho moved towards national legislation governing land, two policy review commissions worked to bring forth the National Land Policy in 2001.⁵³ From the National Land Policy, the Land Bill was adopted, and the work of these two reforms was considered a failed attempt at governing matters pertaining to Land Law.⁵⁴ However, legislation was later implemented to address the issues pertaining to Land, more specifically as regards women.⁵⁵ In March 2003, the Lesotho Gender policy was adopted.⁵⁶ The Lesotho Gender Policy makes reference to women and land as one of its objectives. A noted objective of the Gender Policy is that it calls for women’s equal access to land as well as the control over land.⁵⁷ Molapo’s study notes that the status with respect to Land is an ambiguous case.⁵⁸ The Land Act of 1992, which amended the Land Act of 1979, gives women the capacity to acquire land, both for agricultural purposes and for dwelling purposes.⁵⁹ However, legislation still exists that limits women’s property rights such as the Deeds Registry Act of 1967 which stipulates that a woman married in community of property cannot have immovable property registered in her name.⁶⁰ The husband’s consent is very important to acquire immovable property, and if such consent is absent; the woman is unable to acquire property.⁶¹

Lesotho’s legal system, as mentioned above, is comprised of customary law as well as common law. Women, under customary law, face the challenge of acquiring property due to patriarchal practices. However under common law, there exists ambiguous legislation which either promotes women’s access to property or limits women’s access to property. Lesotho ratified the Maputo Protocol in 2004. The consequence is that Lesotho is under obligation to ensure the realisation of the rights enshrined in the Maputo Protocol. The Maputo Protocol requires states to promote women’s equal access to property. However, in Lesotho, women face discrimination regarding property rights because of existing customary practices that prohibit women from acquiring property. Article 2 of the Maputo Protocol requires that states eliminate all forms of discrimination; however, there remain discriminatory practices in Lesotho regarding women’s access to property.⁶² Article 6 of the Maputo Protocol promotes the rights of women to acquire

⁵² Constitution of Lesotho, 2001.

⁵³ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 29.

⁵⁴ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 29.

⁵⁵ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 29.

⁵⁶ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 29.

⁵⁷ Ministry of Gender and Youth *The Lesotho Gender and Policy* (2009).

⁵⁸ Molapo ELM *Women and Patriarch in Lesotho: A Deconstructive Study* (PHD Thesis, University of Free State, 2005) 21.

⁵⁹ Molapo ELM (2005) 21.

⁶⁰ Lesotho Deeds Registry Act of 1969.

⁶¹ Lesotho Deeds Registry Act of 1969.

⁶² Article 2, Protocol to the African Charter on Human and Peoples’ rights on the Rights of Women in Africa 2003.

property in their own capacity during marriage; however, where a woman is married in community of property, the Deeds Registry Act requires that she obtains consent from her husband in order for her to acquire immovable property.⁶³

The aim of this research is to conduct an analysis with respect to women's property rights under both customary law and common law with the aim to establish whether or not women in rural Lesotho's property rights are being realised.

1.2 PRILEMINARY LITERATURE REVIEW

Under the Constitution of Lesotho there is no distinction between men and women concerning the right to acquire property, however that is just on paper.⁶⁴ It does not yet have an impact on the practices that arise from customary law and common law.⁶⁵ The Kingdom of Lesotho has a customary code which is known as the Laws of Lerotholi.⁶⁶ These laws were put into effect in 1903 and still remain the main source of customary law in Lesotho.⁶⁷ Juma notes that unlike various legal systems whose customary laws were overthrown by liberal constituencies, the Kingdom of Lesotho's legal situation is different as their customary law continues to remain in effect forty years post-independence.⁶⁸ Despite the various perspectives with respect to the relevance of customary law in the present times, and the various rulings of the judiciary with respect to customary law, and activism, customary law in Lesotho continues to persist in a Constitutional era.⁶⁹

Under customary law, only married Basotho men were entitled to land distributed by the chiefs or herdsmen in their respective communities.⁷⁰ A Basotho man was entitled to three pieces of land for the sustenance of himself and his household.⁷¹ This limitation in respect to married men being granted land stemmed from the belief that men were the heads of households.⁷² The effects of the customary practice were that women could not acquire land of their own; instead they acquired land indirectly from their husbands.⁷³ If it happened that there was a divorce or separation, the woman would lose the right to her husband's land.⁷⁴ This woman was expected to

⁶³ Article 6, Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa 2003.

⁶⁴ Mapetla M (1999) 71.

⁶⁵ Mapetla M (1999) 71.

⁶⁶ Juma L 'The Laws of Lerotholi: Role and Status of Codified Rules of The Custom in The Kingdom of Lesotho' (2001) 23 *Pace International Law Review* 95.

⁶⁷ Juma L (2001) 95.

⁶⁸ Juma L (2001) 95.

⁶⁹ Juma L (2001) 95.

⁷⁰ Larsson A (1996) 66.

⁷¹ Larsson A (1996) 66.

⁷² Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁷³ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁷⁴ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

reincorporate herself into the home and land of her parents.⁷⁵ Her father or brother could lend her land for small scale farming, but that would be until the woman remarried.⁷⁶ The category of widows was granted rights to the late husband's fields provided that she would continue living in that village and did not remarry.⁷⁷ According to custom, one of the late husband's fields was reallocated, upon his death, to someone related to the deceased who had not acquired land of his own. Upon the widow's death, the land she had rights over would return to the chief or herdsmen in order to be redistributed.⁷⁸

Customary law has been said to be used to deny women the right to have ownership over land.⁷⁹ This diminishes their capacity to participate in the economic development of the regions to which they belong.⁸⁰ Research has observed patriarchy as being a feature of customary law, and it is because of this feature that ownership of property and land is vested in men and thus subjecting women to the status of perpetual minors and stripping them of all their capacity to acquire ownership of land.⁸¹ Contrary to the observation above, research argues that the notion that women are unable to acquire ownership over capital assets is not well founded because assets are said to belong to the family as a whole rather than to an individual despite the position they hold within the family.⁸² In light of this argument, male domination as regards the ownership of property is an incorrect interpretation of customary law.⁸³

Laws were enacted in Lesotho with the aim of improving the legal status of women concerning land rights.⁸⁴ According to Fogelman, the laws enacted were supported and sponsored by the U.S government.⁸⁵ The Laws enacted are as follows: The *Local Government Act 1997*, which came into force in 2005; *Capacity of Married Persons Act 2006*; and *Land Act 2010*. The Local Government Act in its clauses moved the powers to allocate land from chiefs to members of an elected committee.⁸⁶ Part II, section 3 of The Capacity of Married Persons Act placed full property ownership rights on women as opposed to subjecting them to the status of a minor and thus vesting these rights in the hands of their husbands or fathers.⁸⁷ The Land Act 2010 was

⁷⁵ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁷⁶ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁷⁷ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁷⁸ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁷⁹ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

⁸⁰ Juma L ' "Repugnancy" to "Bills of Rights" African Customary Law and Human Rights in Lesotho and South Africa' (2007) 94.

⁸¹ Juma L (2007) 94.

⁸² Juma L (2007) 94.

⁸³ Juma L (2007) 94.

⁸⁴ Fogelman C 'Measuring Gender, Development, and Land: Data-Driven Analysis and Land Reform in Lesotho' (2016) 1 *World Development Perspectives* 37.

⁸⁵ Fogelman C (2016) 37.

⁸⁶ Fogelman C (2016) 37.

⁸⁷ Fogelman C (2016) 37.

considered a major shift in the rights of women as regards land rights.⁸⁸ This Act moved women's rights with respect to land from customary authorities to an open market.⁸⁹

Research further suggests that the Constitutional right to property and land awarded to men and women on an equal basis is contradicted by another section of the Constitution.⁹⁰ Matashane-Marite suggests that its major flaw is in Section 18 (4) (c) of the Constitution.⁹¹ Section 18 (1) of the Constitution states that subject to provision (4) and (5) no laws may be enacted that are discriminatory.⁹² However, provision (4) (c) qualifies discrimination that is founded on customary law or customary practices.⁹³ Matashane-Marite suggests that these laws that disqualify the non-discriminatory clause promote inequality between women and men.⁹⁴ The consequence of this inequality contributes to the slow development of the economy.⁹⁵ This is because women are unable to contribute, on an equal basis, to economic development.⁹⁶ Research further suggests that because the greater majority of Basotho women are subject to customary law, the discrimination of women in Lesotho is justified by the Constitution with

88 Fogelman C (2016) 37.

89 Fogelman C (2016) 37.

90 Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

91 Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

92 The Constitution of Lesotho, 1993.

93 Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

94 Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

95 Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

96 Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

respect to their property rights.⁹⁷This research suggests that the prohibition of women's property and land rights plays a role in the lack of growth in the economy.⁹⁸ Contrary to the perspective above, Moguerane suggests that women's acquisition of property such as a house is not a currency for a woman to independently participate in the public life.⁹⁹Women's ability to gain independence and contribute to the public life, as well as the economic growth and political development, is inseparable from her gendered relationships.¹⁰⁰This creates the notion that despite a woman's right to access property of her own, her involvement and contribution to society will always be dependent on a relationship with a man.¹⁰¹ The basis of this argument is that men, and not women, are the ones who have the power to transfer homes to others as property.¹⁰²

Research as regards women's rights to property and land has been explored from different perspectives. Fogelman C has explored the rules governing the acquisition of property and land with respect to women.¹⁰³ Gay J's research has observed the rules applicable as regard the acquisition of property in a customary marriage as well as inheritance.¹⁰⁴ Matashane-Marite has explored how women's denial of property and land under customary law affects women's ability to contribute into the public life as well as the economy, and thus causing difficulties in the economic growth of Lesotho.¹⁰⁵

Legislation suggests that there has been progress in the realisation of women's property rights, because of the Acts and Policies that have been put into place. However, Matashane-Marite, in her research, sheds light on how these Acts and Policies are ineffective due to clauses that promote inequality embedded in customary law, such as Section 18 of the Constitution.¹⁰⁶

Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

⁹⁸ Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

⁹⁹ Moguerane K 'A Home of One's Own: Women and Home Ownership in the Borderlands of Post-Apartheid South Africa and Lesotho' (2018) 52 *Canadian Journal of African Studies* 140.

¹⁰⁰ Moguerane K (2018) 140.

¹⁰¹ Moguerane K (2018) 140.

¹⁰² Moguerane K (2018) 140.

¹⁰³ Fogelman C (2016) 37.

¹⁰⁴ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

¹⁰⁵ Keiso Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

¹⁰⁶ Keiso Matashane-Marite 'Women's Rights and Participation - Including Women's Access to Land and Inheritance, and the Role of Lobbying and Grassroots Organizations in Lesotho' available at <https://www.un.org/womenwatch/daw/eqm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.3%20K.pdf> [accessed on 30 March 2020].

Moguerane K's research points out how, despite women's ability to acquire property, their participation in the public life and economic life cannot be separated from men because men are then ones with the power to transfer property.¹⁰⁷

From the literature explored above, it can be deduced that there is scanty research which explores the effects of the dual legal system on the property rights of women in rural Lesotho. The research explored largely focuses on how property is acquired under customary law and under common law. Research has explored how men play a role in the relationship between women and their property rights. However, as mentioned above, research in respect to the realisation of property rights of women in rural areas of Lesotho is limited. There is limited research focusing on the complexities of acquiring property in a dual legal system, where customary law and common law are both regarded as important sources of law. It is from this point that this research will depart with the aim to extend the research by analysing women in rural Lesotho's property rights under both customary law and statutory law. The approach this research will take on is establishing whether women in rural Lesotho are able to realise their property rights.

1.3 RESEARCH QUESTION

The main question of this research is:

Does the legal framework of Lesotho allow women in rural Lesotho the ability to exercise their right to acquire property?

The following sub-questions will be answered:

- What are the Norms and Standards imposed by the Maputo Protocol, CEDAW and other international human rights instruments as regards women's rights to acquire property?
- Does the legal framework of Lesotho allow for the realisation of the right of women in rural Lesotho to acquire property?
- Is the co-existence of both customary law and common law consistent with Lesotho's obligations under international law to realise the right of women to acquire property without discrimination?
- How can Lesotho ensure the realisation of the property rights of women in rural areas in accordance with its obligations under international law?

¹⁰⁷ Moguerane K (2018) 140.

1.4 RESEARCH OBJECTIVES

The research objectives are as follows:

- To explore the protection of women's property rights under common law of Lesotho
- To explore the effects of the Laws of Lerotholi (customary law) in respect to the realisation of property rights for women in rural Lesotho
- To explore the extent to which the dual legal system in Lesotho realises the right of women to acquire property in rural Lesotho

1.5 LIMITATION OF STUDY

With the aid of international legal instruments, regional legal instruments, national laws of Lesotho, as well as textbooks, articles, and case law, this study will be limited to the right to acquire property for women in rural Lesotho. This research will be limited to the right to acquire immovable property focussing on land, marital property and inheritance of property.

1.6 FRAMEWORK OF THESIS

This research will require an approach that observes other disciplines besides that of Law because simply applying the discipline of law will not be enough to fully explore the research at hand. Apart from law being the major discipline of this research, this research will refer to the discipline of sociology.

The research will engage with various legal instruments. It will engage with international legal instruments that make reference to the right to property, particularly the property rights of women. It is important to note that in respect to international law, this research will also engage with General Comments of the Committees of the United Nations, the CEDAW Committee and the African Commission in order to seek clarity on legal concepts that are not well defined in the legal instruments. The engagement will be narrowed down to regional legal instruments in Africa. The rationale behind this is that although the right to acquire property for women is a Universal Right, the African legal system makes reference to issues that are specific to African countries. The engagement will further narrow down to the national laws of Lesotho and the Constitution of Lesotho which is the Supreme Law of the land. The engagement in national law will also include customary law as it plays a significant role in the legal framework of Lesotho.

Having engaged with legislation which will be observed throughout the research, this research will critically analyse the literature that other authors and researchers have contributed to the area of study. This research will critically analyse the literature review in order to put into context what other researchers have and have not addressed in their research, as well as derive important information to strengthen this research.

This research shall employ a gender analysis which involves analysing a given situation, a context or an environment in order to shed light on gender equality issues.¹⁰⁸

1.7 RESEARCH METHODOLOGY

This research shall be conducted through desk research. This research intends on using the following material: International law and interpretations of international law. National law of Lesotho which refers to the Constitution of Lesotho, Legislation in respect to property, policies, and national policy reports, as well as Customary Law. This research shall also use journal articles and books.

1.8 CHAPTER OVERVIEW

1.8.1 Chapter 1: Introduction

Chapter 1 of the introduction will give a brief background on the right to property using international and regional legal instruments, particularly the Maputo Protocol, as well as supporting commentaries. It will also include the problem statement of this research, the research questions this research aims at answering, as well as the objectives of this research. Furthermore, it will also include the research methodology to be used for this research as well as the overview of the chapters.

1.8.2 Chapter 2: International Norms and Standards on the right to property

Chapter 2 of this research will explore international legal instruments and regional legal instruments with respect to the right to property. This chapter will be aimed at defining what the right to property is, and the norms and standards established by legal instruments. In order to explore this, the research will make reference to comments by committees, special rapporteurs as well as academic writing.

1.8.3 Chapter 3: National Law and Policies on the realisation of the right to property

Chapter 3 will focus on the national law of Lesotho as regards property in Lesotho. It will critically analyse the effectiveness of legislation and policy in realising women's property rights. This chapter will also focus on the shortfalls of the legislation in realising the property rights of women in rural Lesotho.

1.8.4 Chapter 4: Laws of Lerotholi (customary law) and the effects on the right to property

Chapter 4 of this research will largely focus on the Laws of Lerotholi (customary law) with respect to property, examining the extent to which these laws protect the property rights of

¹⁰⁸ Office For Women 'Gender Analysis Toolkit' available at [Gender Analysis Toolkit \(cyjma.gld.gov.au\)](http://genderanalysis.gov.au) [accessed on 30 March 2021].

women. This chapter is aimed at establishing the property rights of women in Lesotho under customary law.

1.8.5 Chapter 5: The co-existence of the Customary Law and codified Law in respect to property rights

Chapter 5 of this research will focus on the dual legal system in Lesotho, common law and customary law, with respect to women's property rights. This chapter will be centred on establishing whether the co-existence of these two legal systems promotes the realisation of women's property rights, or results in conflict of laws which restrict the realisation of women's property rights in Lesotho.

1.8.6 Chapter 6: Observations, conclusions, and recommendations

Based on the findings of the chapters above, this chapter will draw observations from the research, and it will also make recommendations for the future.



CHAPTER 2- INTERNATIONAL NORMS AND STANDARDS ON THE RIGHT TO PROPERTY

2.0 INTRODUCTION

The following chapter shall establish the international and regional legal framework on the right to property. This chapter will include a brief introduction into the right to property by defining the scope and the content. This shall be followed by a discussion on the right to property under various legal instruments, specifically the Universal Declaration of Human Rights, the American Declaration on the Rights and Duties of a Man and the Protocol No.1 to the European Convention on Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. The chapter will conclude by establishing the right to property under the African Charter on Human and Peoples' as well as exploring the provisions on the right to property in the Protocol to the African Charter on Human and Peoples' Rights on the Rights on Women in Africa.

2.1 DEFINITION, SCOPE AND CONTENT OF THE RIGHT TO PROPERTY

According to Olomajobi, the definition of the word “property” is important to understanding property rights.¹⁰⁹ A workable definition of property is the definition we find in law which is “a bundle of rights- a collection of rights over things enforceable against others. It contemplates claims to tangible and intangible items”.¹¹⁰ Property can also be understood as anything one can own or exercise control over.¹¹¹ However, Ankora notes that various case law under international law and international human rights law favour the definition of property which equates property with any “vested right”.¹¹² Van Banning notes that this definition is very wide to the extent that it is wider than the actual concept of property rights.¹¹³

Various jurists, through their work, imply that access to property is very important when establishing one's economic status as well as one's empowerment.¹¹⁴ Property is classified as either movable or immovable and these include land, housing, livestock, and possessions one may use to start a business.¹¹⁵ The inability to obtain and access property results in various

¹⁰⁹ Olomajobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

¹¹⁰ Olomajobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

¹¹¹ Ankora T K *An Analysis of The Protocol To The African Charter On Human and Peoples' Rights on The Rights of Women in Africa: A Case of Women's Property Rights in Ghana* (published Master's Thesis, The University of Ghana, 2015) 18.

¹¹² Van Banning TRG *The Human Right to Property* (2001) 12.

¹¹³ Van Banning TRG (2001) 12.

¹¹⁴ Olomajobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

¹¹⁵ Ankora T K (2015) 18.

implications such as lack of empowerment and access to justice, and a lack of social status in society.¹¹⁶ The right to property is considered to be a complex right as it applies to many disciplines of legal systems such as civil law, criminal law as well as human rights law.¹¹⁷ Property and contract both form part of exchange and trade which are important because these are the basis on which an economic market is built.¹¹⁸ The accumulation of property is often associated with politics and power dynamics.¹¹⁹ It is argued that the protection of property rights can have the effect of maintaining the status quo; the status quo being the protection of those privileged against those who are disadvantaged and have no ownership of property.¹²⁰ The protection of property rights is said to be an instrument used to protect the rich and powerful in society.¹²¹ The legal obligation placed on states to respect property rights implies that the state is limited in its ability to interfere in matters concerning property and this plays a significant role in the protection of property rights of those at a greater advantage.¹²²

The right to property is not only a matter of morality but also a binding obligation.¹²³ Sprankling notes that the scope of the right to property is difficult to define, however there are four core aspects that may be used to map out the scope of the right to property.¹²⁴ Firstly, the right includes a relationship between a human being and a government entity.¹²⁵ International law prescribes the extent to which states must go to realise economic, social and cultural rights and this applies to the right to property by either logic or analogy.¹²⁶ This principle may also apply to intergovernmental bodies such as the United Nations.¹²⁷ The second aspect is that the right to property is not absolute but rather a relative right.¹²⁸ This right may be affected by factors such as cultural, social and economic factors that constantly evolve with time.¹²⁹ Interpreting this right as an absolute right may lead to consequences such as a block in land redistribution process. The right, in the simplest of terms means no one shall be arbitrarily deprived of the right to property.¹³⁰ The third aspect is that property is not only limited to the property one requires daily such as furniture and bank accounts but rather property of all kinds.¹³¹ The efforts to restrict that right to property to that of family property as intended by the Universal Declaration of Human

¹¹⁶ Olomojobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

¹¹⁷ Van Banning TRG *The Human Right to Property* (2001) 2.

¹¹⁸ Van Banning TRG (2001) 3.

¹¹⁹ Van Banning TRG (2001) 5.

¹²⁰ Van Banning TRG (2001) 5.

¹²¹ Van Banning TRG (2001) 5.

¹²² Van Banning TRG (2001) 7.

¹²³ Sprankling JG 'The Global Right to Property' (2014) 52(2) *Columbia Journal of Transitional Law* 497.

¹²⁴ Sprankling JG (2014) 497.

¹²⁵ Sprankling JG (2014) 498.

¹²⁶ Sprankling JG (2014) 498.

¹²⁷ Sprankling JG (2014) 498.

¹²⁸ Sprankling JG (2014) 499.

¹²⁹ Sprankling JG (2014) 499.

¹³⁰ Sprankling JG (2014) 500.

¹³¹ Sprankling JG (2014) 500.

Rights (UDHR) were not successful.¹³² The right to property is now interpreted to include both personal property as well as economic productive property.¹³³ The fourth aspect is that the right encompasses the property one enjoys individually as well as property one enjoys in the community of others.¹³⁴ The Western world focuses largely on the right to individual property but that is not to be interpreted globally because the concept of property differs in various regions.¹³⁵

Human beings are entitled to various rights on the basis that they are human and these rights are referred to as human rights.¹³⁶ These rights are inherent to all human beings regardless of their ethnicity, sex, nationality, place of residence, religion, language and any other status.¹³⁷ The core feature of human rights is its universality, and this establishes the notion that we are all entitled to our rights without discrimination.¹³⁸ These rights are interrelated and therefore they are interdependent and cannot be separated from one another.¹³⁹ It is important to note that human rights are both rights and obligations.¹⁴⁰ One has the privilege of enjoying one's rights; however, one has the obligation to respect the rights of another.¹⁴¹ Obligations also extend to states as they are obligated to respect, protect and fulfil these human rights.¹⁴² These human rights are guaranteed in legal instruments such as conventions, covenants, treaties, protocols and international customary law.¹⁴³ Categorising the right to property as a "right" or as a "human right" significantly affects the nature and content of the right.¹⁴⁴ Classifying the right to property as a "human right" implies that it is fundamental in nature. The term "human right" is used in reference to freedom, immunities, and benefits which every human is entitled to enjoy in his or her community.¹⁴⁵ There have been questions arising as to whether the human right to property is afforded to legal persons.¹⁴⁶ At the core of a human right is that it is a right afforded to a human being and not an entity.¹⁴⁷ It is also argued that Article 17 of the Universal Declaration of Human Rights suggests that this right is afforded to only natural persons through the use of the words "human beings" and therefore the right is only afforded to natural persons.¹⁴⁸

¹³² Sprankling JG (2014) 500.

¹³³ Sprankling JG (2014) 500.

¹³⁴ Sprankling JG (2014) 500.

¹³⁵ Sprankling JG (2014) 500.

¹³⁶ Ankora T K (2015) 19.

¹³⁷ Ankora T K (2015) 19.

¹³⁸ Ankora T K (2015) 19.

¹³⁹ Ankora T K (2015) 19.

¹⁴⁰ Ankora T K (2015) 19.

¹⁴¹ Ankora T K (2015) 19.

¹⁴² Ankora T K (2015) 19.

¹⁴³ Ankora T K (2015) 19.

¹⁴⁴ Sprankling JG (2014) 478..

¹⁴⁵ Sprankling JG (2014) 478.

¹⁴⁶ Sprankling JG (2014) 479.

¹⁴⁷ Sprankling JG (2014) 479.

¹⁴⁸ Sprankling JG (2014) 479.

2.2 International Legal Framework on the Right to Property

The Universal Declaration of Human Rights (UDHR) sets the ground for property rights.¹⁴⁹ Article 17 of the UDHR states that everyone has the right to own property either on their own or in association with others and further states that no one shall be arbitrarily deprived of the right to property.¹⁵⁰ The UDHR is an important global legal instrument concerning property rights because it contains a broad standard protecting property rights.¹⁵¹ Although the right to property is not expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 3 states that the state is under obligation to ensure that there is equal enjoyment of economic, social and cultural rights between men and women.¹⁵² Likewise, the International Covenant on Civil and Political Rights does not provide for the right to property, Article 26 provides for equality before the law and that can be applied not only to civil and political rights but to economic, social and cultural rights.¹⁵³ In present times, over two thirds of the member states to the United Nations are state parties to treaties that recognise the right to property.¹⁵⁴ These are treaties such as the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention); the African Charter on Human and Peoples' Rights (the African Charter); the American Convention on Human Rights (American Convention); and the Arab Charter on Human Rights (Arab Charter) to name a few.¹⁵⁵

2.2.1 The American Declaration on the Rights and Duties of a Man

The American Declaration on the Rights and Duties of a Man (ADRDM) was adopted in May 1948 before the UDHR.¹⁵⁶ The ADRDM contains a clause on property which states that every person has the right to own property as this is important to meet the essential needs for a decent living and helps to maintain the dignity of an individual.¹⁵⁷ This clause is significant because it creates a duty on American states to take measures to enable every individual to enjoy a minimum amount of property. In the ADRDM the right to property is drafted as a social right.¹⁵⁸ The right is further expressed in the American Convention on Human Rights which states, in Article 21, that “everyone has a right to use and enjoyment of his property”.¹⁵⁹ In drafting this Convention there was a proposal to draft the clause which stated, paraphrased, that every person has the right to use and enjoyment of property, as it is of paramount importance to the integrated development of his personality and the law guarantees this right to all persons.¹⁶⁰ This draft,

¹⁴⁹ Article 17, Universal Declaration of Human Rights 1948.

¹⁵⁰ Article 17, Universal Declaration of Human Rights 1948.

¹⁵¹ Article 17, Universal Declaration of Human Rights 1948.

¹⁵² International Covenant on Economic, Social and Cultural Rights 1966.

¹⁵³ Ankora T K (2015) 25.

¹⁵⁴ Sprankling JG (2014) 475.

¹⁵⁵ Sprankling JG (2014) 476.

¹⁵⁶ Van Banning TRG (2001) 60.

¹⁵⁷ American Declaration of the Rights and Duties of Man 1948.

¹⁵⁸ Van Banning TRG (2001) 60.

¹⁵⁹ American Declaration of the Rights and Duties of Man 1948,

¹⁶⁰ Van Banning TRG (2001) 61.

although rejected by drafters, is notable as it introduced the notion of “a minimal amount of property”; an amount that is necessary for the integrated development of personality.¹⁶¹ Article 21 was then drafted into three subsections; the first subsection providing for the right to use and enjoyment of one’s property; the second subsection being the prohibition on the deprivation of one’s property except for cases where compensation is awarded and it is in the interest of the public; and the third subsection which prohibits usury and any form of exploitation “by man for man”.¹⁶² The last clause found in the third subsection is notable as it suggests that property rights are limited by the rights of others, furthermore that a state is under the obligation to protect individuals against the property rights of others.¹⁶³

2.2.2 Protocol No.1 to the European Convention on Human Rights

Grgic notes that the European Convention on Human Rights does not make reference to the right to property because during the drafting of the convention, drafters could not reach an agreement as to the content of the right to property.¹⁶⁴ The right was later recognised in Article 1 of the Protocol No. 1 to the European Convention on Human Rights (The Protocol).¹⁶⁵ Article 1 of The Protocol states that “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property per general interest or to secure the payment of taxes or other contributions or penalties.”¹⁶⁶ In the *Marckx v Belgium* judgement it was stated that the fact that Article 1 recognises the peaceful enjoyment of property is a guarantee of the right to property.¹⁶⁷ Through this judgement, we see the possibility of extending the scope of Article 1 to guarantee the right to property other than simply protecting the right to property from confiscation.¹⁶⁸

The application of Article 1 of the Protocol was later spelled out in the case of *Sporrong and Lönnroth* which found that the three sentences of Article 1 create three rules of protection.¹⁶⁹ The rules are as follows: the general principle of peaceful enjoyment of property; the deprivation of property subject to conditions; and the entitlement of the state to control the use of property in accordance with general interest.¹⁷⁰ According to the judgement of *Marckx v Belgium* the scope of

¹⁶¹ Van Banning TRG (2001) 61.

¹⁶² American Convention on Human Rights, “*Pact of San Jose*”, Costa Rica 1969.

¹⁶³ Van Banning TRG (2001) 61.

¹⁶⁴ Grgic A et al *The Right to Property Under the European Convention on Human Rights: A Guide to The Implementation of The European Convention on Human Rights and its Protocols* (2007) 5.

¹⁶⁵ Grgic A et al (2007) 5.

¹⁶⁶ Article 1, The Protocol No.1 to The European Convention on Human Rights.

¹⁶⁷ *Marckx v. Belgium*, Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979.

¹⁶⁸ Sermet L *The European Convention on Human Rights and property rights* (1992) 8.

¹⁶⁹ Sermet L (1992) 8

¹⁷⁰ Sermet L (1992) 8.

Article 1 of the Protocol applies to only existing possessions and does not guarantee the right to acquire property.¹⁷¹ However, the notion of possessions is not limited to only existing possessions; other assets such as claims in respect of which an applicant can argue that he or she has at least a “legitimate expectation” that they will be realised qualifies as possessions.¹⁷²

Article 1 of the Protocol places negative and positive obligations on the state.¹⁷³ At the core of Article 1 is the protection of one against unjustified interference by the state in order to peacefully enjoy his or her possessions.¹⁷⁴ This is a negative obligation as it prohibits states from taking part in acts that infringes on one’s ability to enjoy one’s possessions such as expropriation and destruction of property and planning restrictions.¹⁷⁵ The application of Article 1 does not solely rely on the state not interfering in the enjoyment of possessions but also the state taking measures to promote the peaceful enjoyment of these possessions.¹⁷⁶ This is particularly the case where the peaceful enjoyment of possessions is directly reliant on positive measures from authorities.¹⁷⁷ The states obligation to take positive measures is seen in various cases, particularly in *Öneriyıldız v. Turkey* where the state was required to take measures to prevent the destruction of property, and the case of *Sovtransavto v. Ukraine* where the state was under the obligation to ensure that proceedings were fair to prevent the violation of the applicant’s property rights.¹⁷⁸

2.2.3 The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) establishes the duty for state parties to implement measures to eliminate all forms of discrimination that are enshrined in law, policies and practices.¹⁷⁹ This extends to areas of economic life as it further requires that women experience equal rights concerning the ownership of property and the administration of such property.¹⁸⁰ The United Nations Committee on the Elimination of Discrimination Against Women explores the notion of women’s equal enjoyment of property rights by recognising that the right to own and manage property are of importance to women’s enjoyment of financial independence.¹⁸¹

¹⁷¹ *Marckx v. Belgium, Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979.*

¹⁷² Grgic A et al (2007) 7.

¹⁷³ Grgic A et al (2007) 9.

¹⁷⁴ Grgic A et al (2007) 9.

¹⁷⁵ Grgic A et al (2007) 9.

¹⁷⁶ Grgic A et al (2007) 9.

¹⁷⁷ Grgic A et al (2007) 9.

¹⁷⁸ Grgic A et al (2007) 10.

¹⁷⁹ Article 2, Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

¹⁸⁰ Ankora T K (2015) 25.

¹⁸¹ Ankora T K (2015) 25.

2.3 The Right to Property under the African Human Rights System

The right to own property stepped out of an African tribal society when the right to property was granted as an individual right.¹⁸² During the time of African tribal societies, three principles were attributable to property rights.¹⁸³ The first principle was that there was no private ownership of land.¹⁸⁴ The second principle implied that one would be guaranteed to security of tenure for as long as tribal laws and customs were obeyed.¹⁸⁵ The third principle was that every person belonging to the tribe was guaranteed use of the land.¹⁸⁶ The African tribal society and property rights began to phase away upon the creation of the money economy.¹⁸⁷ Subsequent to the development of the money economy, the concept of commercial crops was introduced and this replaced the traditional subsistence farming. This system promoted the individualisation of tenure as opposed to traditional corporate and collective systems.¹⁸⁸

The period during which the right to property transitioned from an African tribal society to an individual right, Africa was largely dependent on natural resources such as land and minerals.¹⁸⁹ This period was also characterised by colonialism and the domination of plantations by foreign authorities through the establishment of rights under unacceptable conditions.¹⁹⁰ In the late 1970s, many states began to emerge from decolonisation and that resulted in the desire to regain authority of plantations from the foreign authorities and companies.¹⁹¹

2.3.1 The African Charter on Human and Peoples' Rights

The African Charter is a regional legal instrument drafted to address the rights of Africans.¹⁹² It is important to establish the African context prior to and during the drafting of the African Charter.¹⁹³ In the 1990s, countries in Southern Africa such as Zimbabwe and Botswana still held a significant amount of land in common.¹⁹⁴ In such countries, land was in abundance and registration was not a practice that was widely observed.¹⁹⁵ After decolonisation, factors such as the nationalisation of agricultural land and estates led to the neglect of protection of individual traditional rights.¹⁹⁶ This neglect has had a negative impact on those who are vulnerable in

¹⁸² Ault DE and Rutman GL 'The Development of Individual Property Rights in Tribal Africa' (1979) 22 *Journal of Law and Economics* 165.

¹⁸³ Ault DE and Rutman GL (1979) 165.

¹⁸⁴ Ault DE and Rutman GL (1979) 165.

¹⁸⁵ Ault DE and Rutman GL (1979) 165.

¹⁸⁶ Ault DE and Rutman GL (1979) 165.

¹⁸⁷ Ault DE and Rutman GL (1979) 171.

¹⁸⁸ Ault DE and Rutman GL (1979) 165.

¹⁸⁹ Van Banning TRG (2001) 62.

¹⁹⁰ Van Banning TRG (2001) 62.

¹⁹¹ Van Banning TRG (2001) 62.

¹⁹² Preamble, African Charter on Human and Peoples' Rights 1981.

¹⁹³ Van Banning TRG (2001) 62.

¹⁹⁴ Van Banning TRG (2001) 62.

¹⁹⁵ Van Banning TRG (2001) 62.

¹⁹⁶ Van Banning TRG (2001) 62.

society such as women and illiterate people and those who have limited rights such as hunter-gatherers.¹⁹⁷

The African Charter in Article 14 provides for property rights and states that the right to property shall be guaranteed.¹⁹⁸ It further states that this right may be encroached upon only in the interest of the public or in the interest of a community in accordance with law.¹⁹⁹ The clause on the right to property is criticised as it is said to be unclear on the instances to which the right may be restricted.²⁰⁰ The criticism is based on the fact that in Africa, property is confiscated with no recourse to justice.²⁰¹ The Kenyan case on the Endorois Indigenous People and their land best illustrates how the property rights of vulnerable people in society are not protected.²⁰² In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Endorois case), the Centre of Minority Rights Development filed a complaint, assisted by the Minority Rights Group International, against Kenya alleging that Kenya had violated the rights of the Endorois community which resulted in their displacement from their ancestral land.²⁰³ The Kenyan government evicted the Endorois community of about 60 000 people from their homes around Lake Bogoria.²⁰⁴ The purpose of these evictions was for the establishment of a Nature Reserve and tourist facilities.²⁰⁵ The Endorois community was displaced from their land with no adequate compensation for the loss of their property.²⁰⁶ The case was first brought before an international tribunal which ruled in favor of the Endorois community stipulating in its judgment that the evictions were a violation of the Endorois community's right to property as indigenous peoples.²⁰⁷ In the African Commission's judgment it stated that because of the clear historic attachment to that particular land, the Endorois community had property rights over that land.²⁰⁸ The African Commission's decision in the Endorois case gives way for the realisation of women's right to sustainable development provided for under Article 19 of the Maputo

¹⁹⁷ Van Banning TRG (2001) 62.

¹⁹⁸ Article 14, African Charter on Human and Peoples' Rights 1981.

¹⁹⁹ Article 14, African Charter on Human and Peoples' Rights 1981.

²⁰⁰ Ankumah E A *The African Commission on Human and Peoples Rights* (1996) 142.

²⁰¹ Ankumah (1996) 142.

²⁰² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

²⁰³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

²⁰⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

²⁰⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

²⁰⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

²⁰⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003

²⁰⁸ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003.

Protocol.²⁰⁹ Article 19(c) of the Maputo Protocol states that state parties should take appropriate measures to promote women's access to and control over land and guarantee their right to property.²¹⁰ Therefore the decision declaring that the Endorois community had property rights over the land in question subsequently provides for the right of the Endorois women to access and control land.²¹¹

In an African context, the right to property is interpreted to be a broad right which includes the protection of real rights of individuals and peoples as well as a right which may form a part of a person's patrimony.²¹² The right protects one's peaceful enjoyment of one's property but it may also be limited by the state in a manner that is non-arbitrary.²¹³ Article 14 extends protection to rights guaranteed by tradition and customary law, these being the right to access and use land and other natural resources which are held in common.²¹⁴ This subsequently creates a duty on the state to ensure security of tenure for rural communities.²¹⁵ The African Charter places other duties on the state concerning the right to property and these are as follows; the duty to ensure peaceful enjoyment of property and the protection from forced eviction; the duty to ensure that there are legitimate reasons for limiting the right to property for public need or in the general interest of the community; the duty to ensure that there is public participation and transparency in acquisition processes; and the duty to ensure that there is adequate compensation for public acquisition of property which fairly balances the rights of the individual and the greater interest of the society.

State parties to the African Charter are under the obligation to respect, protect and fulfil the rights of women.²¹⁶ Women's rights are considered to be rights and entitlements that are claimed for women and girls worldwide.²¹⁷ Despite the duty placed on states concerning the rights of women, in various communities these very rights are disregarded and violated.²¹⁸ These rights may be suppressed by law due to practices and behaviour in different societies.²¹⁹ Women's rights are grouped together and differentiated from other human rights because they often differ

²⁰⁹ Article 19, Protocol to the African Charter on Human and Peoples' Rights in Africa 2003.

²¹⁰ Article 19, Protocol to the African Charter on Human and Peoples' Rights in Africa 2003.

²¹¹ Article 19(c), Protocol to the African Charter on Human and Peoples' Rights in Africa 2003.

²¹² African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 19.

²¹³ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 19.

²¹⁴ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 19.

²¹⁵ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 20.

²¹⁶ Ankora T K (2015) 19.

²¹⁷ Hosken F P 'Toward A Definition Of Women's Human Rights' 1981 *Human Rights Quarterly* 1.

²¹⁸ Gray L C 'A woman's field is made at night: Gendered land rights and norms in Burkina Faso' (1999) 5(3) *Feminist Economist* 8.

²¹⁹ Ikimi ILI 'Development of The Human Rights of Women in A Cultural Milieu' (2018) 9 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 59.

from the freedom and rights that are recognised for men and boys.²²⁰ The Convention on the Elimination of All Forms of Discrimination (CEDAW) establishes the duty for state parties to take measures in order to eliminate all forms of discrimination that are enshrined in law, policies and practices.²²¹ This extends to areas of economic life as it further requires that women experience equal rights to the ownership of property and the administration of such property.²²² The United Nations Committee on the Elimination of Women explores the notion of women's equal enjoyment of property rights by recognising that the right to own and manage property is of importance to women's enjoyment of financial independence.²²³ Globally, the realisation of women's property rights increases their autonomy and decreases their dependence on men.²²⁴ Studies have shown the various effects of women's acquisition of property on their well-being and one of them being that women who have access to their property are at a greater advantage concerning avoiding and managing the Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS).²²⁵ However, despite the property rights awarded to women as well the positive impacts that the realisation of these rights have, women are still excluded from exercising their property rights.²²⁶

The ambiguity of Article 14 of the African Charter results in a substandard degree of protection of women's property rights.²²⁷ Although the African Charter is an important legal instrument concerning human rights in Africa, it does not adequately address various rights.²²⁸ The result of the inability to address certain rights adequately, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) was adopted, in accordance with Article 66 which encourages the adoption of legal instruments to supplement provisions of the African Charter.²²⁹ The Maputo Protocol was adopted to address various rights of women in Africa, rights that the African Charter does not extensively provide for.²³⁰ The Maputo Protocol attempts to lay down the foundation of women's property rights in Africa.²³¹

²²⁰ Ikimi Ili (2018)59.

²²¹ Van Banning TRG (2001)36.

²²² Ankora T K (2015) 25.

²²³ Ankora T K (2015) 20.

²²⁴ Ankora T K (2015) 20.

²²⁵ Ankora T K (2015) 20.

²²⁶ Gray L C 'A woman's field is made at night: Gendered land rights and norms in Burkina Faso' (1999) 5(3) *Feminist Economist* 8.

²²⁷ Van Banning TRG (2001) 63.

²²⁸ Ankora T K (2015) 26.

²²⁹ Preamble, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²³⁰ Preamble, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²³¹ Preamble, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

2.3.2 The Maputo Protocol

According to Viljoen, during the 1990's, women's rights movements began to gain momentum in Africa and this brought these rights to the attention of the African Commission.²³² This brought about the establishment of the position of the Special Rapporteur on The Rights of Women in Africa.²³³ In 1998, the process of drafting a document that would address the rights of women in Africa was already underway and that stirred a debate whether or not to adopt the legal instrument.²³⁴ Some participants of the debate were against the position of adoption as they argued that the Africa Charter extends the rights to "everyone" and not "every man" and therefore there was no need to create a supplementary legal document for women.²³⁵

Regardless of the reservations, the Maputo Protocol was then adopted as a legally binding instrument to supplement the African Charter.²³⁶ The preamble of the Maputo Protocol establishes that despite the ratification of various legal instruments such as the African Charter women are still victims of discrimination and harmful practices.²³⁷ It further states that the Maputo Protocol is not to be viewed as an instrument correcting deficiencies in international human rights law concerning women but rather as a response mechanism to the lack of implementation of such human rights.²³⁸ At the time when the Maputo Protocol was being drafted there were two relevant legal instruments that addressed the rights of women, these being the African Charter and CEDAW.²³⁹ The African Charter, in Article 2 states that the rights in the African Charter are to be enjoyed by everyone without discrimination on any ground.²⁴⁰ Article 18(3) of the African Charter places a duty on states to ensure that states eliminate all forms of discrimination against women.²⁴¹ Article 18(3) was criticised for merging the rights of women with those of children and disabled persons and also being situated in the Article that mainly focuses on family rights.²⁴² It is also argued that under the African Charter, some women's rights such as the right to property do not receive the necessary attention needed.²⁴³ The Maputo Protocol extends the scope of various rights enshrined in the African Charter, an example being extending the right to health care by taking measures to ensure that women in rural areas have

²³² Viljoen F 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 18.

²³³ Viljoen F (2009) 18.

²³⁴ Viljoen F (2009) 18.

²³⁵ Viljoen F (2009) 18.

²³⁶ Preamble, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²³⁷ Preamble, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²³⁸ Preamble, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²³⁹ Viljoen F (2009) 12.

²⁴⁰ Article 2, African Charter on Human and Peoples' Rights 1981.

²⁴¹ Article 18(3), African Charter on Human and Peoples' Rights 1981

²⁴² Viljoen F (2009) 19.

²⁴³ Viljoen F (2009) 21.

access to health care.²⁴⁴ The Maputo Protocol is criticised on the ground that it is inconsistent with the African Charter for two reasons.²⁴⁵ The first reason is that the Maputo Protocol omits the feature that right bearers are not only individuals but also peoples; and secondly it omits the feature that individual duties are named alongside individual rights.²⁴⁶

Viljoen notes that although CEDAW is a United Nations legal instrument aimed at the promotion of women's rights, it is criticised because it does not address the forms of discrimination and harmful practices women in Africa face such as child marriages and genital mutilation.²⁴⁷ The Maputo Protocol expands the protective scope of CEDAW in order to address the numerous issues faced by African women.²⁴⁸ The Maputo Protocol is the first legal instrument to recognise the right to medical abortion and it is also the first binding treaty to provide women with the right to know the HIV status of her partner.²⁴⁹ Among other differences, the Maputo Protocol recognises various manners through which women may be deprived of their property rights and therefore legislates in that regard.²⁵⁰

The Maputo Protocol provides for the right to property under various Articles; however the first notable Article is Article 1 which defines discrimination.²⁵¹ Article 1 defines discrimination for the purpose of the protocol as being "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life."²⁵² The African Commission interprets discrimination as any act or omission which has the effect of nullifying the equal enjoyment of one's socio-economic and cultural rights.²⁵³ The African Commission states that equality and non-discrimination ought to be interpreted to the "greatest extent possible" in order to facilitate the full enjoyment of socio-economic rights.²⁵⁴ To ensure the equal and full enjoyment of socio-economic rights, a duty is placed upon states to pay particular attention to vulnerable and disadvantaged groups.²⁵⁵ Article 2 provides for the various measures a state must take and these

²⁴⁴ Viljoen F (2009) 19.

²⁴⁵ Viljoen F (2009) 19.

²⁴⁶ Viljoen F (2009) 19.

²⁴⁷ Viljoen F (2009) 21.

²⁴⁸ Viljoen F (2009) 21.

²⁴⁹ Viljoen F (2009) 21.

²⁵⁰ Viljoen F (2009) 21.

²⁵¹ Article 1, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁵² Article 1, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003

²⁵³ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 16.

²⁵⁴ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 16.

²⁵⁵ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 16.

include legislative measures and regulatory measures, integration of gender perspectives in policies, and supporting national, regional, and continental initiatives and directives aimed at the eradication of discrimination against women.²⁵⁶ The African Commission acknowledges that in order to ensure the right to equality, special measures may need to put into place which could largely favour women and other vulnerable groups in order to reduce or suppress discrimination against them.²⁵⁷ These special measures should be aimed at the rapid improvement of the position of women in order to achieve substantive equality.²⁵⁸

In various countries in Africa such as Nigeria, married women have no control over property as their husbands exercise full control over matrimonial property.²⁵⁹ To a large extent, this dilemma is a result of religious and customary practices which are often enshrined in legislation.²⁶⁰ The lack of access to property segregates women from communal decision making activities.²⁶¹ Article 6(j) provides for a married woman's right to acquire property and administer it freely during the marriage.²⁶² This provision of the Protocol ceases to have any effect in various countries as there is lack of proactive national laws on the right and in cases where the right is provided for in national laws, there is close to no action taken to implement the right.²⁶³ However, there are countries such as Lesotho who have moved from national legislation prohibiting women's ability to acquire and administer their own property (*Deeds Registry Act of 1967*) to legislation which gives them full rights over their property (*Capacity of Married Persons Act*).²⁶⁴ According to Olomjobi, women are neglected and treated with prejudice in matters concerning the right to succession and the right to equal opportunity; this prejudice includes women undergoing divorce.²⁶⁵ Under customary law, the general rule is that upon divorce or separation, each party leaves the marriage with what he or she entered into the marriage with.²⁶⁶ This general rule disenfranchises women as they seldom enter into a marriage

²⁵⁶ Article 2, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁵⁷ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 16.

²⁵⁸ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 16.

²⁵⁹ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁶⁰ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁶¹ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁶² Article 6(j), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁶³ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁶⁴ Fogelman C 'Measuring Gender, Development, and Land: Data-Driven Analysis and Land Reform in Lesotho' (2016) 1 *World Development Perspectives* 37.

²⁶⁵ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁶⁶ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

with property and therefore leave with no property upon divorce.²⁶⁷ Article 7(d) provides for property rights during the process of separation, divorce and annulment of a marriage; it states that a woman shall have a right to an equitable share of the joint property deriving from the marriage.²⁶⁸ Although this right is guaranteed under the Maputo Protocol and national legislation, some court systems are reluctant on granting orders which ensure the equal share of marital property due to the fact that there is often insufficient proof to show that a woman has contributed economically to the joint estate.²⁶⁹ However, there are cases which illustrate the application of Article 7(d), one being *Patience Oghoyone v. Daniel Oghoyone* where the court ordered that a woman had an equitable share of their properties as well as a joint ownership over a business car.²⁷⁰

Customary law has denied women the access to ownership of land and this has limited women's ability to participate in economic development.²⁷¹ Ownership of land is vested in men and therefore women can only access land and resources through men.²⁷² Article 19(c) provides for the promotion of women's access to productive resources such as land and guarantees their right to property.²⁷³ According to Gray, the category of widows has been subjected to the customary rule that upon the husband's death, she loses rights over the land.²⁷⁴ The woman is also expected to leave the matrimonial house for the control of the deceased's family.²⁷⁵ There are some cases where a widow may be allowed to exercise control over the land and stay in the matrimonial home; however these cases are subject to conditions and one of these being that the widow does not remarry.²⁷⁶ Article 21(1) provides for a woman's right to inherit an equitable share of her late husband's property and the right to continue to live in her matrimonial house.²⁷⁷ *Seberu v Sunmonu*, although an old case that no longer represents the reality of the Yoruba people, illustrates the complexities surrounding a woman inheriting an equitable share of her late husband's property in Africa.²⁷⁸ In this case, one of the greatest complexities identified was that

²⁶⁷ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

²⁶⁸ Article 7(d), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁶⁹ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁷⁰ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁷¹ Gay J *Basotho Women's Options* (Phd Dissertation, Cambridge University, 1980).

²⁷² Gay J (1980).

²⁷³ Article 19(c), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁷⁴ Gay J (1980).

²⁷⁵ Gay J (1980).

²⁷⁶ Gay J (1980).

²⁷⁷ Article 21(1), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁷⁸ Olomjobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

in many societies, women themselves are considered property of the husband.²⁷⁹ In the case, the court stated that among the Yoruba people, a woman could not inherit from her late husband's estate because she too, is to be inherited by one of the husband's relatives.²⁸⁰ South African law of succession has developed to the extent that it protects a widow's right to inherit under both common law and customary law.²⁸¹ It has also made the court system accessible to hear disputes concerning inheritance from a late husband's estate.²⁸²

The order of customary succession is based on three principles.²⁸³ Firstly, a family unit is considered a cultural concept through which the material needs of the family is not the focal point; secondly male primogeniture places a significant role in succession; and thirdly the male line of descent is to be considered.²⁸⁴ Male primogeniture prevents a woman from inheriting an equitable share of her parents' properties as custom stipulates that the inheritance goes to the first male child.²⁸⁵ Common law however, legislates on the how property is to be distributed in cases of both intestate and testate succession.²⁸⁶ Article 21(2) provides for a woman's right to inherit an equitable share of her parent's properties.²⁸⁷ The application of Article 12(2) is seen through various cases and one notable case is *Bhe v Magistrate, Khayelitsha*, where a matter was brought before the court contesting a decision prohibiting a deceased's female children from inheriting from the deceased's estate on the basis that they were female.²⁸⁸ In its judgment, the court stated that a female child is entitled to inherit a share of her parent's estate just as a male child would.²⁸⁹

2.4 Conclusion

The right to property is diverse as it expands to various disciplines of law and is inclusive of various forms of property both tangible and intangible. The right to property was first recognised as a human right in the UDHR and has since then been recognised by various international legal instruments and regional instruments. Property plays different roles in different societies and therefore the realisation of the right to property also differs.

²⁷⁹ Olomojobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁸⁰ Olomojobi Y 'Women's Right to Own Property' available at <http://dx.doi.org/10.2139/ssrn.2716902> (accessed 8 May 2020).

²⁸¹ Schoeman-Malan MC 'Recent Developments Regarding South African Common and Customary Law of Succession' (2007) 1 *PER* 118.

²⁸² Schoeman-Malan MC (2007) 118.

²⁸³ Schoeman-Malan MC (2007) 115.

²⁸⁴ Schoeman-Malan MC (2007) 118.

²⁸⁵ Schoeman-Malan MC (2007) 120.

²⁸⁶ Schoeman-Malan MC (2007) 118.

²⁸⁷ Article 21(2), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

²⁸⁸ *Bhe And Others V Magistrate, Khayelitsha Aand Others* 2005 (1) SA 580 (CC).

²⁸⁹ *Bhe And Others V Magistrate, Khayelitsha Aand Others* 2005 (1) SA 580 (CC).

Although the right to property is a globally recognised human right that applies to all human beings without discrimination, the realisation of property rights in Africa is said to still face challenges. The African Charter provides for the right to property, a right that must be respected and protected by state parties, however, discriminatory laws and practices leave many vulnerable to the violation of their property rights. Women form part of those vulnerable to the violation of their property rights. To supplement and address factors that lead to the violation of women's rights, the Maputo Protocol was adopted. The Maputo Protocol addresses the property rights of women in Africa, putting into consideration the challenges that women in Africa face concerning their property rights.



CHAPTER 3- NATIONAL LEGISLATION AND POLICIES ON THE REALISATION OF THE RIGHT TO PROPERTY

3.0 INTRODUCTION

This chapter will introduce the country central to this research, Lesotho, and give a brief background to its legislative framework. It will further observe the national legislative framework on the right to property. The legislation central to this chapter is the *Constitution of Lesotho*, *The Deeds Registry Act*, *The Land Act of 1979* and *The Land Act of 2010* as well as the *Gender Policy of 2003*. CEDAW and the Maputo Protocol place a duty upon states to take appropriate measures, including legislative measures, to ensure the protection of women's property rights. This chapter will analyse whether or not Lesotho's legislative framework is in line with its obligations under international and regional law.

3.1 BACKGROUND OF LESOTHO'S LEGAL FRAMEWORK

The Kingdom of Lesotho gained its independence from Great Britain in 1966.²⁹⁰ After gaining its independence, the Kingdom of Lesotho established a constitutional monarchy.²⁹¹ The monarch is a ceremonial position and the head of government is the prime minister who holds executive powers.²⁹² The Upper House of the bicameral parliament is comprised of 22 principal chiefs who hold hereditary membership and 11 members who are appointed by the king based on the advice by the prime minister.²⁹³ The National Assembly is comprised of a total of 165 members who are elected for a 5 year term.²⁹⁴

The Kingdom of Lesotho is completely surrounded by South Africa.²⁹⁵ Apart from its capital city and a few semi-urban areas, Lesotho's economy largely thrives off subsistence farming in the lowlands and foothills as well as the rearing of animals.²⁹⁶ The country is not as rich in mineral resources and as industrial as the other countries within the Southern African region.²⁹⁷ However, Lesotho has great water resources which contributes to its economic development and has subsequently led to a bilateral treaty with South Africa through which Lesotho would supply

²⁹⁰ Yaun B, Connolly K & Bell ME 'Lesotho' in Yaun B, Connolly K & Bell ME *A Compendium of Countries with an Area-Based Property Tax* (2009) 117-121.

²⁹¹ Yaun B, Connolly K & Bell ME (2009) 117.

²⁹² Yaun B, Connolly K & Bell ME (2009) 117.

²⁹³ Yaun B, Connolly K & Bell ME (2009) 117.

²⁹⁴ Yaun B, Connolly K & Bell ME (2009) 117.

²⁹⁵ Maqutu WCM & Sanders AJGM 'The Internal Conflict of Laws in Lesotho' 1987 *Comparative and International Law Journal of Southern Africa* 377.

²⁹⁶ Maqutu WCM & Sander AJGM (1987) 377.

²⁹⁷ Maqutu WCM & Sander AJGM (1987) 377.

South Africa with water.²⁹⁸ Lesotho is divided into ten districts and the capital being Maseru.²⁹⁹ All the district headquarters are urban and this makes the total number of 15 urban centres.³⁰⁰ Lesotho Urban areas are not as big as those in other African countries.³⁰¹

According to Maqutu, Lesotho is a unique African country because it has one system of customary law which is applicable in the whole country.³⁰² However, despite the system of customary law, due to colonialism which imposed a mixed system of Roman-Dutch and English law, Lesotho is governed by a dual legal system.³⁰³ The remarkable survival of customary law despite the attempts to make it die down is said to be a unique feature in the legal system of Lesotho.³⁰⁴ The modern Lesotho citizen is subject to the governance of two sets of laws; customary and common law.³⁰⁵

3.2 LEGISLATIVE FRAMEWORK ON THE RIGHT TO PROPERTY

The following section will discuss the relevant legislation on women's right to property in Lesotho.

3.2.1 THE CONSTITUTION OF LESOTHO

The Constitution of Lesotho states that Lesotho is a sovereign and democratic Kingdom and the Constitution is the supreme law of the land.³⁰⁶ The executive authority in Lesotho is vested in the king however the exercise of this power is subject to exceptions.³⁰⁷ It is to be exercised in accordance with the advice of cabinet members and a minister under the general authority of the cabinet.³⁰⁸ The Constitution of Lesotho contains a Bill of Rights through which fundamental human rights and freedoms are recognised and protected.³⁰⁹ The recognition of these rights and freedoms are to be recognised irrespective of "race, tribe, and place of origin or residence, political opinions, colour, creed or sex".³¹⁰ The rights considered are rights such as the right to life, the right to freedom from torture and slavery, freedom of movement and residence, right to personal liberty, the right to respect for private and family life and the right to freedom from

²⁹⁸ Maqutu WCM & Sander AJGM (1987) 377.

²⁹⁹ Mturi AJ, Makatjane T & Molise N 'Gendered Differentials in Housing Characteristics and Household Possessions in Lesotho Urban Areas' (1999) 55 *GENUS* 122.

³⁰⁰ Mturi AJ, Makatjane T & Molise N (1999) 122.

³⁰¹ Mturi AJ, Makatjane T & Molise N (1999) 122.

³⁰² Maqutu WCM & Sander AJGM (1987) 378.

³⁰³ Maqutu WCM & Sander AJGM (1987) 379.

³⁰⁴ Maqutu WCM & Sander AJGM (1987) 379.

³⁰⁵ Modo IVO 'Dual Legal System, Basotho Culture and Marital Stability' (2002) 33 *Journal of Comparative Family Studies* 377.

³⁰⁶ Section 2, Constitution of Lesotho 2001.

³⁰⁷ Constitution of Lesotho 2001.

³⁰⁸ Constitution of Lesotho 2001.

³⁰⁹ Section 4, Constitution of Lesotho 2001.

³¹⁰ Section 4, Constitution of Lesotho 2001.

arbitrary seizure of property.³¹¹ The Bill of Rights also contains limitations to the rights provided in order to ensure that the enjoyment of these rights do not prejudice the rights of others or the public interest.³¹²

According to Juma, the right to equality is one of the most fundamental rights where the protection of human rights is concerned.³¹³ In the Lesotho Constitution, the right to equality is not only protected as an individual right but also within the general rights contained in the Bill of rights.³¹⁴ Section 18 of the Constitution provides for freedom from discrimination which states that no law shall make any provision which is discriminatory either of itself or in the application of it however, Section 18(4) (d) does not offer protection to citizens against discrimination under customary law.³¹⁵ Section 19 provides for equality before the law and equal protection of the law.³¹⁶ The Constitution does not define what equality before the law and equal protection of the law is and neither does it draw a link between equality and differentiation that leads to unfair discrimination as other Constitutions do.³¹⁷ In the South African Constitution equality is linked to the prohibition of unfair discrimination and this is observed in the case of *Prinsloo v Van der Linde*.³¹⁸ In the *Prinsloo* case, the court stated that “unfair discrimination” is defined as “treating persons differently in a way which impairs their fundamental dignity as human beings.”³¹⁹ Equality before the law can be defined to simply mean equal treatment for persons in similar situations and equal protection of the law means that existing laws are applied or enforced equally on all people in similar situations.³²⁰ In a concluding observation by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) to Lesotho, the Committee on the Elimination of Discrimination Against Women noted that Section 18 of the Constitution of Lesotho does not provide for an explicit prohibition of discrimination against women as defined by Article 1 of CEDAW.³²¹ According to the CEDAW Committee, the Constitution has adopted exceptions to the principle of non-discrimination in various aspects such as marriage, divorce, property and other matters that fall under personal law as well as matters where customary law is found applicable.³²² In the concluding observation, the Committee on the Elimination of Discrimination Against Women recommended that Lesotho

³¹¹ O’Leary B L ‘The Constitution of Lesotho: An Outline’ (1968) 1 *The Comparative and International Law Journal of Southern Africa* 269.

³¹² O’Leary B L (1968) 269.

³¹³ Juma L ‘Chieftainship Succession and Gender Equality in Lesotho: Negotiating the Right to Equality in a Jungle of Pluralism’ (2013) 22 *Texas Journal of Women and the Law* 172.

³¹⁴ Juma L (2013) 173.

³¹⁵ Section 18, Constitution of Lesotho 2001.

³¹⁶ Section 18, Constitution of Lesotho 2001.

³¹⁷ Juma L (2013) 173.

³¹⁸ *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012.

³¹⁹ *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012,

³²⁰ Juma L (2013) 174.

³²¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

³²² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

speed up its Constitutional review and pay special attention to sections of the Constitution, such as Section 1, that give way to discrimination against women.³²³ The CEDAW Committee also recommended that Lesotho includes the prohibition of discrimination against women in both its Constitution and appropriate legislation concerning matters such as marriage, divorce, devolution of property as well as where customary law is applicable.³²⁴

The right to property is provided for in Chapter III, section 34, which states that “Lesotho shall adopt policies which encourage its citizens to acquire property including land, houses, tools and equipment; and shall take such other economic measure as the state shall consider affordable”.³²⁵ It is further addressed under Chapter IX which provides that in Lesotho, land is vested in the nation and the power to grant interests and rights is vested in the King in trust for the Basotho Nation.³²⁶ This power is also exercised by the Chiefs on behalf of the king in accordance with the Constitution and any other law applicable.³²⁷

3.2.2 THE LAND ACT OF 1979

The principal legislation as regards land is the Land Act of 1979 (Act of 1979) which is a consolidation between the Land Act of 1973 and the Administration of Lands Act of 1973.³²⁸ According to af Ornas, in 1973, the National Assembly enacted two Acts in order to control and bring efficiency in land distribution.³²⁹ The Land Act of 1973 was repealed by the Act of 1979 and the Administration of Land Act never came into effect because it was strongly opposed by chiefly groups.³³⁰ The Act of 1979 was enacted and it recognised the principle of the King being the guardian of the nation’s land.³³¹ The Act of 1979 recognised negotiability and transferability of land in lease hold terms but it withdrew the legal right to own a piece of land without any limitations on its use.³³² The Act of 1979 brought discontent to many Basotho citizens because unlike previous land laws, it stated that land would be held in trust by the state and not “His Majesty the King”.³³³ The Act of 1979 was largely criticised by chiefs because it was viewed to weaken the powers of the chiefs in land allocation as well as a shift away from the customary regime.³³⁴

³²³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

³²⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

³²⁵ Section 34, Constitution of Lesotho 2001.

³²⁶ O’Leary B L (1968) 268.

³²⁷ O’Leary B L (1968) 268.

³²⁸ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 35.

³²⁹ af Ornas AH & Salih MA *Environmental Stress and Security in Africa* (1989) 123.

³³⁰ af Ornas AH & Salih MA (1989) 123.

³³¹ af Ornas AH & Salih MA (1989) 123.

³³² af Ornas AH & Salih MA (1989) 123.

³³³ af Ornas AH & Salih MA (1989) 124.

³³⁴ af Ornas AH & Salih MA (1989) 125.

The Act of 1979 is the principal law governing the administration of land held under customary law which applies to most of the land in Lesotho.³³⁵ Ntlaloe's study points out that the Act of 1979 had the following main features and objectives; the granting of title to land through leasehold; the conversion of title to land; setting aside land for public purposes; the establishment of a land tribunal; and the granting of public servitude.³³⁶ The implementation of the Act of 1979 was accompanied by various problems and one of them was that chiefs continued to allocate land illegally and used backdated land allocation certificates; this created difficulties in the conversion of the title of land.³³⁷

The Land Act of 1979 was criticised on the basis that it did not recognise the rights of women to own land.³³⁸ The Act makes no reference to gender equality in its provisions.³³⁹ In fact, the Act of 1979 confirmed common customary practices that barred women from ownership of land.³⁴⁰ For instance, the Act of 1979 provided for the first-born male 'mojalefa' of the deceased to inherit land and thus excluding the widow or the female child.³⁴¹ This was later changed by the 1992 amendment Act which recognised women's inheritance rights governed by customary law.³⁴² It provided that where a male whom land had been allotted to died, the widow would be given the same rights over the land as her deceased husband had.³⁴³ The Land Act of 1992 also gives women the capacity to acquire land, both for agricultural and dwelling purposes.³⁴⁴

3.2.3 THE DEEDS REGISTRY ACT 1969

According to the General Comment 7 of the African Commission on Human and Peoples' Rights, the contribution of women in acquiring marital property has been significantly undermined by various factors such as gender discriminatory registration laws and policies.³⁴⁵ These laws and policies discourage women from owning property such as land and housing jointly with their spouse.³⁴⁶ These laws and policies are also inclined to giving preference to

³³⁵ Daemane MMM 'Problems of Land Tenure System in Lesotho Since Post-Independence: Challenging Perspectives for Sustainable Developments in Land Administration and Management' (2012) 14 *Journal of Sustainable Development in Africa* 166.

³³⁶ Ntlaloe KH *Assessment of the extent to which Lesotho's Land Act 1979 (Act #17) had and impact on urban morphology and patterns of Land development in Maseru and its peri-urban areas: The case of Mapeleng and Sekamaneng* (Master's Dissertation, University of Natal, 1998) 30.

³³⁷ Ntlaloe KH (1998) 36.

³³⁸ Ntlaloe KH (1998) 36.

³³⁹ Lesotho Land Act of 1979.

³⁴⁰ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

³⁴¹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

³⁴² UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

³⁴³ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

³⁴⁴ Molapo ELM *Women and Patriarch in Lesotho: A Deconstructive Study* (PHD Thesis, University of Free State, 2005) 21.

³⁴⁵ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

³⁴⁶ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to*

male spouses where registration of property is concerned.³⁴⁷ The concept of marital power which grants the male spouse power to administer the property of the female spouse has also undermined women's ability to acquire property.³⁴⁸

In an effort to reform customary rules pertaining to the allocation and distribution of land, the government enacted the Deeds Registry Act of 1969.³⁴⁹ The Deeds Registry Act was aimed at facilitating the registration of titles to non-agricultural and urban land.³⁵⁰ The Deeds Registry Act is the principal statute concerning the registration of deed.³⁵¹ The Deeds Registry Act provides for rules and procedures pertaining to the registration transfers, bonds and subleases.³⁵²

The Deeds Registry Act has been condemned to be gender discriminatory, particularly towards women.³⁵³ According to the Deeds Registry Act, a statement giving the particulars of the marital status of a woman is needed in order to register deeds in favour of a woman.³⁵⁴ Women who are married out of community of property require the "assistance" of their husbands in order to register property in their name; this is not the case where a husband's marital power is excluded in a prenuptial contract.³⁵⁵ The same provision is found in the Administration of Estates Proclamation of 1935 which provides for the husband's marital power unless excluded in a prenuptial contract.³⁵⁶ In the case of women married in community of property, unless the property is excluded from the community of property, property shall not be registered in their name.³⁵⁷ This status of women under the law means that women cannot be allocated land and this also means that registration of joint property in a marriage is rare.³⁵⁸ The Deeds Registry Act also gives the registrar the authority to refuse to register property in the name of a married woman whose rights are governed by customary law unless the registrar is compelled by the court.³⁵⁹

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- ³⁴⁷ *Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.
African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.
- ³⁴⁸ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.
- ³⁴⁹ Leduka RC 'Lesotho Urban Land and Market Scoping Study' (2012) 2 Roma 5.
- ³⁵⁰ Leduka RC (2012) 5.
- ³⁵¹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 35.
- ³⁵² Lesotho Deeds Registry Act of 1969.
- ³⁵³ Lesotho Deeds Registry Act of 1969.
- ³⁵⁴ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 43.
- ³⁵⁵ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.
- ³⁵⁶ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 65.
- ³⁵⁷ S 14(3), Lesotho Deeds Registry Act of 1969.
- ³⁵⁸ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 44.
- ³⁵⁹ S (14) (6), Lesotho's Deeds Registry Act of 1969.

The Deeds Registry Act still exists as it has not yet been abolished.³⁶⁰ This is contrary to obligations established under international law such as CEDAW.³⁶¹ Article 2 of CEDAW states that parties are to undertake, without delay, appropriate measures in order to eliminate discrimination against women.³⁶² Furthermore, Article 2(f) places the obligation on member states to take appropriate legislative measures to modify or abolish laws that are discriminatory against women.³⁶³ Article 16(2) of CEDAW addresses marital property and it states that spouses have equal rights to the ownership, acquisition, management, administration, enjoyment and disposition of property.³⁶⁴ The Maputo Protocol contains similar provisions as those contained in CEDAW however these provisions specifically address women in Africa.³⁶⁵ Article 6 (j) of the Maputo Protocol places a duty upon member states to ensure that a married woman has the right to freely administer and manage her property.³⁶⁶ This provision is based on the fact that under most African cultures, women have no separate identities from their husbands as they are considered perpetual minors and for that reason they are unable to administer and manage their own property.³⁶⁷ With reference to Article 2 and Article 16 of CEDAW, and Article 6(j) of the Maputo Protocol, Lesotho Deeds Registry Act is inconsistent with obligations placed by international and regional laws based on the reasons that Lesotho has not yet abolished the Deeds Registry Act which is discriminatory against women, and that the Deeds Registry Act prohibits women from managing and administering their own property.³⁶⁸

In practice, courts have not favoured women and instead have a tendency to refer to customary practices even in cases where the parties relevant to the case are married in accordance with civil law.³⁶⁹ In *Kurubally v Kurubally*, a woman sought an order from the court to divide joint property during the subsistence of the marriage.³⁷⁰ The order was to serve as a measure to protect her share of the property from her husband's gambling habit.³⁷¹ The court ruled in favour of her husband and the woman was unable to have her share divided from the joint property.³⁷² In *Matjeloane v Matjeloane*, a woman was also denied an order to divide joint property to prevent

³⁶⁰ Molapo ELM *Women and Patriarch in Lesotho: A Deconstructive Study* (PHD Thesis, University of Free State, 2005) 21.

³⁶¹ Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

³⁶² Article 2, Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

³⁶³ Article 2(f), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

³⁶⁴ Article 16(2), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

³⁶⁵ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

³⁶⁶ Article 6(j), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

³⁶⁷ Ebuku KSA 'A New Hope for African Women: Overview of Africa's Protocol on Women's Rights' (2004) 13 *Nordic Journal of African Studies* 267.

³⁶⁸ Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women 2003.

³⁶⁹ S (14) (6), Lesotho's Deeds Registry Act of 1969.

³⁷⁰ *Kurubally v Kurubally* (CIV/T/573/83 , CIV/APN/270/83) [1985] LSCA 98.

³⁷¹ *Kurubally v Kurubally* (CIV/T/573/83 , CIV/APN/270/83) [1985] LSCA 98.

³⁷² *Kurubally v Kurubally* (CIV/T/573/83 , CIV/APN/270/83) [1985] LSCA 98.

the husband from wasting their matrimonial property pending divorce.³⁷³ In this case, the court stated that a husband's marital power was absolute and that it applied to the whole matrimonial property and also extended to the person of the wife.³⁷⁴ The tendency to give preference to men in matters concerning matrimonial property is contrary to the principle guaranteed in the Constitution of Lesotho.³⁷⁵ Section 18(1) of the Constitution provides that no one shall be subjected to unfair discrimination and furthermore, section 18(2) states that no one shall be subjected to discrimination in the performance of the functions of any public office or any public authority.³⁷⁶ The cases presented above illustrate the violation of section 18 because the judiciary discriminates against women as regards matrimonial property by making decisions that favor men regarding the administration and management of property.³⁷⁷

3.2.4 THE LAND ACT 2010

The principle of non-discrimination and equality established in various international legal instruments including CEDAW and the Maputo protocol is important and central to women's land rights.³⁷⁸ CEDAW and the Maputo protocol place an obligation upon states to ensure that women enjoy their rights freely without discrimination and that is inclusive of land rights.³⁷⁹ Equality required from these legal instruments is not only formal equality but practical equality as well.³⁸⁰ Article 14(2) of CEDAW states that member states ought to take appropriate measures to eliminate discrimination against women in rural areas and to ensure, bearing equality in mind, the development of their rural areas.³⁸¹ Article 14(2) (g) places an obligation upon states to ensure that women in rural areas have equal treatment in land reform.³⁸² Article 15(a) of the Maputo protocol places the duty upon states to ensure that women have access to land as a means of food security.³⁸³ Article 19(d) of the Maputo Protocol also places a duty upon states to ensure that women have access and control over land.³⁸⁴

The government of Lesotho proposed a Land Bill in 2009 to improve the efficiency in Land administration and management.³⁸⁵ The Land Bill was intended to replace the Land Act of

³⁷³ *Matjeloane v Matjeloane* 1977 LLR 4.

³⁷⁴ *Matjeloane v Matjeloane* 1977 LLR 4.

³⁷⁵ Section 18, Constitution of Lesotho 2001.

³⁷⁶ Section 18, Constitution of Lesotho 2001.

³⁷⁷ Section 18, Constitution of Lesotho 2001.

³⁷⁸ Kaarhus R, Benjaminsen TA, Hellum A & Ikdahl I 'Women's Land Rights in Tanzania and South Africa: A Human Rights Based Perspective Forum' (2005) 32 *Forum for Development Studies* 455.

³⁷⁹ Kaarhus R, Benjaminsen TA, Hellum A & Ikdahl I (2005) 455.

³⁸⁰ Kaarhus R, Benjaminsen TA, Hellum A & Ikdahl I (2005) 455.

³⁸¹ Article 14(2), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

³⁸² Article (14)(g), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

³⁸³ Article 15 (a), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

³⁸⁴ Article 19(d), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

³⁸⁵ Sekatle, Pontso. "Securing land rights for the poor and marginalized in Lesotho." In *World Bank Annual Conference on Land Policy and Land Administration*, 2010.

1979.³⁸⁶ The Land Bill was adopted to reflect the critical factor of land in social and economic growth.³⁸⁷ The Land Bill was later on gazetted as the Land Act of 2010 (Act of 2010).³⁸⁸ The main objective of the Act of 2010 is to modernise land administration; regularise peri-urban land and settlements; and facilitate investments which include foreign investments; and most importantly, abolish customary land tenure in rural areas.³⁸⁹ The Preamble of the Land Act of 2010 states that the purpose of the Land Act is as follows; "...repeal and replace the law relating to land, provide for the grant of titles to land, the conversion of titles to land, the better securing of titles to land, the administration of land, the expropriation of land for public purposes, the grant of servitudes, the creation of land courts and the settlement of disputes relating to land; systematic regularisation and adjudication; and for connected purposes".³⁹⁰

The Act of 2010 was enacted to create an environment that is favourable for economic investment because for years, Lesotho lacked efficient land markets which would allow foreign investors to participate.³⁹¹ The Act of 1979 limited foreign investors and that presented as a negative effect on improving the commercial use of land.³⁹² One notable difference between the Act of 1979 and the Act of 2010 is that the latter has reduced partnership interest which foreign investors are required to have with Basotho nationals in order to acquire land.³⁹³ The Act of 2010, in section 6(1)(c), stipulates that Basotho nationals should own at least 20% of land that is acquired by foreign investors as opposed to the Act of 1979 which required Basotho nationals to own at least 51% of the land.³⁹⁴

The Act of 2010 addresses the issue of land tenure insecurity in rural areas.³⁹⁵ The dual nature of Lesotho's legal system where both common law and customary law apply legitimizes a parallel customary land tenure system.³⁹⁶ Land rights under customary law are inherited along patriarchal lines and this excludes women from inheriting land and thus despite their dominance as household heads because of the migration of Basotho men into South Africa, women are prohibited from owning land.³⁹⁷ This prohibition also extends to the inheritance of land upon the passing of the husband; such land rights had to be waived.³⁹⁸ Section 10(1) of the Act of 2010 states that where persons are married in community of property "any title to immovable property

³⁸⁶ Sekatle, Pontso. "Securing land rights for the poor and marginalized in Lesotho." In *World Bank Annual Conference on Land Policy and Land Administration*, 2010.

³⁸⁷ Sekatle, Pontso. "Securing land rights for the poor and marginalized in Lesotho." In *World Bank Annual Conference on Land Policy and Land Administration*, 2010.

³⁸⁸ Leduca RC (2012) 9.

³⁸⁹ Leduca RC (2012) 9.

³⁹⁰ Lesotho Land Act of 2010.

³⁹¹ Nte B & Nkumanda V 'Land and Rural Transformation' (2018) *Political Economy Southern Africa Editorial* 1.

³⁹² Nte B & Nkumanda V (2018) 1.

³⁹³ Nte B & Nkumanda V (2018) 1.

³⁹⁴ Section 6, Lesotho Land Act of 2010.

³⁹⁵ Nte B & Nkumanda V (2018) 2.

³⁹⁶ Nte B & Nkumanda V (2018) 2.

³⁹⁷ Nte B & Nkumanda V (2018) 2.

³⁹⁸ Nte B & Nkumanda V (2018) 2.

allocated to or acquired by anyone of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both”.³⁹⁹ This provision is applicable to all forms of marriages and irrespective of the date on which the marriage was entered into.⁴⁰⁰ This provision removes previous provisions that only allowed for male ownership and subsequently allows women who own land to gain access to credit if they wish to invest in land.⁴⁰¹

Issues of inheritance are always accompanied by the issue as to whether customary law or common law should apply.⁴⁰² Although the Act of 2010 protects women’s rights to acquire land, it does not protect women’s inheritance rights.⁴⁰³ The Act of 2010 has an exemption for customary law and this leaves women vulnerable when they try and protect their inheritance rights in a statutory court of law.⁴⁰⁴ In *Khatala v Khatala*, it was established that in matters concerning inheritance in cases of dual marriages, the courts have favoured the application of customary law.⁴⁰⁵ The lack of consolidated laws on inheritance has led to undermined protection of women’s property rights concerning inheritance due to the customary practices exempted by the Act of 2010.⁴⁰⁶ The customary practice known as “property grabbing” allows the male relatives of the deceased dispossess the widow of the deceased’s property.⁴⁰⁷ Women in such positions struggle to defend their possessions because of their emotional vulnerability.⁴⁰⁸ The exemption for customary law in the Act of 2010 can be seen as failure of Lesotho to meet its obligation placed upon it by Article 21 of the Maputo Protocol.⁴⁰⁹ Article 21(1) places an obligation upon states to ensure that a widow inherits from her husband’s property.⁴¹⁰ Women find themselves in even more vulnerable positions when the marriage was unregistered or when they struggle to prove their marital status to the courts.⁴¹¹ Women who have lost property as a result of dispossession by the male relatives have pointed out how patriarchal power, social networks, bribes and corruption have been used to undermine statutory process and structures.⁴¹² In *Tsaone v Tsaone*, the court stated that the son of the deceased had superior rights over the deceased’s property and not the widow despite the fact that the couple had been married under

³⁹⁹ Section 10 (1), Lesotho Land Act of 2010.

⁴⁰⁰ Section 10 (1), Lesotho Land Act of 2010.

⁴⁰¹ Nte B & Nkumanda V (2018)2.

⁴⁰² UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 46.

⁴⁰³ Paradza G ‘Women’s Access to Land and Housing in Lesotho’ (2008) *Habitat for Humanity Lesotho* 37.

⁴⁰⁴ Paradza G (2008) at 37.

⁴⁰⁵ *Khatala v Khatala* (CIV/APN/233/2000) (CIV/APN/233/2000) [2001] LSHC 108.

⁴⁰⁶ Paradza G (2008) 37.

⁴⁰⁷ Paradza G (2008) 34.

⁴⁰⁸ Paradza G (2008) 34.

⁴⁰⁹ Article 21, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

⁴¹⁰ Article 21, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

⁴¹¹ Paradza G (2008) 34.

⁴¹² Paradza G (2008) 35.

civil law.⁴¹³ The reason behind the judgement was that customary law does not provide for the inheritance of a widow.⁴¹⁴

The vulnerability that women find themselves in also extends to the ability of a female child to inherit.⁴¹⁵ This situation is not made any better because female children are limited in the avenues they can use to challenge these practices.⁴¹⁶ In the case of *Mahase v Mahase*, an unmarried adult woman (the plaintiff) wanted to inherit from the estate of her adoptive father.⁴¹⁷ The plaintiff's uncle contested the inheritance on the ground that she was female.⁴¹⁸ The Court agreed with the plaintiff's uncle and declared that he was the rightful heir to the estate.⁴¹⁹ All of this was in spite of the argument that Lesotho is bound by international legal instruments such as CEDAW, which prohibit discrimination.⁴²⁰ The court relied on technical grounds stating that Lesotho had not incorporated specific aspects of these international instruments into their own national laws.⁴²¹ The technical ground on which the court relied on is in itself an indicator that Lesotho has not met its obligation under CEDAW which requires, in Article 2 (a), that a state embodies the principle of non-discrimination in its legislation.⁴²² Lesotho is also under the obligation, as stipulated in Article 2(a), to practically realise the principle of non-discrimination as other appropriate measures.⁴²³ Furthermore, Article 21(2) of the Maputo Protocol places a duty upon states to ensure that women and men have equal rights to inherit from their parents; this is an obligation Lesotho has failed to meet.⁴²⁴ The CEDAW Committee in its concluding observation to Lesotho urged government to fully implement its obligations established by CEDAW and also stated that the implementation of the convention is indispensable from the realisation of the Millennium Goals.⁴²⁵

3.2.5 POLICIES

CEDAW and the Maputo Protocol both place an obligation upon states to implement policies and programmes to combat all forms of discrimination against women.⁴²⁶ Article 2 of CEDAW places a duty on states to adopt policy that will eliminate discrimination against women in all

⁴¹³ *Tsosane v Tsosane* 1971-1973 LLR 1.

⁴¹⁴ *Tsosane v Tsosane* 1971-1973 LLR 1.

⁴¹⁵ Paradza G (2008) 35.

⁴¹⁶ Paradza G (2008) 35.

⁴¹⁷ *Mahase v Mahase* (C of A (CIV) 38/2010) [2011] LSCA 31.

⁴¹⁸ *Mahase v Mahase* (C of A (CIV) 38/2010) [2011] LSCA 31.

⁴¹⁹ *Mahase v Mahase* (C of A (CIV) 38/2010) [2011] LSCA 31.

⁴²⁰ *Mahase v Mahase* (C of A (CIV) 38/2010) [2011] LSCA 31.

⁴²¹ *Mahase v Mahase* (C of A (CIV) 38/2010) [2011] LSCA 31.

⁴²² Article 2 (a), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

⁴²³ Article 2 (a), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

⁴²⁴ Article 21(1) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

⁴²⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁴²⁶ Article 1(c), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

forms.⁴²⁷ Article 7(b) places a duty upon states to ensure that women participate in the formulation of policy.⁴²⁸ Article 2(c) of the Maputo Protocol states that member states are under the obligation to integrate gender perspectives in their policy decisions, development plans and programmes as well as activities in all spheres of life.⁴²⁹

Policy responses in Lesotho have largely taken the form of legislation with the hopes that effective implementation is all that is needed to solve matters pertaining to land and property rights.⁴³⁰ However, there are policies that the Lesotho government has adopted to address property rights.⁴³¹

The Lesotho Housing and Land Development Corporation (LHLDC) was set up based on a recommendation in the National Housing Policy which was prepared through the assistance of the World Bank.⁴³² Although the National Housing Policy was not fully adopted, some aspects of it were followed and the major one being the merger of the then “Lower Income Housing Company” and the “Lesotho Housing Corporation” into the LHLDC.⁴³³ The LHLDC is mandated to provide opportunities for land and housing ownership for all income groups.⁴³⁴ It is tasked with the duty to acquire and develop land for housing.⁴³⁵ The majority of the LHLDC’s projects are in Maseru and other urban centres and therefore, projects are limited for those who live outside of the urban centres.⁴³⁶

The co-existence of customary and common law has confused the status of women in Lesotho because each law is used when it suits the individuals who are usually males.⁴³⁷ Both common law and customary law have negative implications concerning women.⁴³⁸ This reality of women in Lesotho resulted in the adoption of the Gender Policy 2003 which is aimed at taking gender concerns into account in all national policies, programs, budgets and plans in order to achieve gender equality in Lesotho.⁴³⁹ The Gender Policy aims at addressing discrimination against women in Lesotho.⁴⁴⁰ Aspects of the Gender Policy address, specifically, issues pertaining to property rights and inheritance.⁴⁴¹ The Gender Policy condemns the Deeds Registry Act because

⁴²⁷ Article 2, Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

⁴²⁸ Article 7(b), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

⁴²⁹ Article 2 (c), Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa 2003.

⁴³⁰ Ledula RC (2012) 4.

⁴³¹ Ledula RC (2012) 19.

⁴³² Ledula RC (2012) 19.

⁴³³ Ledula RC (2012) 19.

⁴³⁴ Ledula RC (2012) 19.

⁴³⁵ Ledula RC (2012) 19.

⁴³⁶ Ledula RC (2012) 19.

⁴³⁷ Mokobori P *‘Gender and Development Policy’* (National University of Lesotho, 2009).

⁴³⁸ Mokobori P *‘Gender and Development Policy’* (National University of Lesotho, 2009).

⁴³⁹ Mokobori P *‘Gender and Development Policy’* (National University of Lesotho, 2009).

⁴⁴⁰ Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴¹ Government of Lesotho: Gender and Development Policy, 2003.

it is a barrier to the progression of women and poverty alleviation.⁴⁴² Furthermore, the policy recommends the repeal of the Deeds Registry Act.⁴⁴³ Among other policy objectives such as education, training and health care services, the Gender Policy makes direct reference to land.⁴⁴⁴ The Gender Policy establishes that many customary practices are detrimental to married women, especially in the allocation of land.⁴⁴⁵ The Gender Policy makes reference to inheritance rights for the girl child and points out that such area requires reform.⁴⁴⁶ Finally, the Gender Policy calls for Lesotho to honour its international commitments.⁴⁴⁷ The adoption of the gender policy can be seen to be in accordance with Article 2 of CEDAW and Article 2(c) of the Maputo protocol which both place a duty upon states adopt policy in order to eliminate discrimination against women and to integrate gender perspectives into policy.⁴⁴⁸

Tamale notes that there is a patriarchal belief that women cannot and should not speak up thus confining women to the domestic arena of a family home.⁴⁴⁹ Tamale creates a metaphor that resembles the position of women in Africa which; a female chicken that does not crow.⁴⁵⁰ This metaphor is used to describe how women in Africa are unable to go against patriarchal values and norms, and if they do so, it is viewed as a bad thing.⁴⁵¹ Tamale notes that in Africa, the African male's duty is to assume the position of power and allow his voice reign.⁴⁵² When women begin crossing these boundaries, voicing out their opinions and participating in development, it is seen as a taboo.⁴⁵³ This patriarchal belief is echoed in legislation and policies; the Lesotho Gender Policy is aimed at debunking the patriarchal belief that women should only be confined in the domestic arena.⁴⁵⁴

3.3 CONCLUSION

Lesotho has made progress concerning the property and land right of women. It has progressed from the Act of 1979 which made no reference to women owning land to the Act of 2010 which allows women to own land. It has also progressed from the Deeds Registry Act which prohibited women from registering property in their own names, especially those married in community of property, to the Act of 2010 which stipulates that women married in community of property also

⁴⁴² Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴³ Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴⁴ Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴⁵ Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴⁶ Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴⁷ Government of Lesotho: Gender and Development Policy, 2003.

⁴⁴⁸ Article 2, Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Article 2, Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁴⁴⁹ Tamale S *When Hens Begin To Crow: Gender and Parliamentary Politics in Uganda* (2008) 1.

⁴⁵⁰ Tamale S (2008) 1.

⁴⁵¹ Tamale S (2008) 1.

⁴⁵² Tamale S (2008) 1.

⁴⁵³ Tamale S (2008) 1.

⁴⁵⁴ Government of Lesotho: Gender and Development Policy, 2003.

hold ownership of land acquired in the marriage. The progression is also observed in the adoption of the LHLDC which is mandated to provide opportunities to acquire land for all income groups. The Gender Policy has also played a role in the progress of property and land rights for women in Lesotho as it plays a significant role in addressing discrimination against women and considering women in the adoption of policies, programs and budgets. The Gender Policy has also pointed out flaws in the Legal system of Lesotho and has pointed out the areas that require development.

However, despite the remarkable changes, the legal system still has flaws that need to be addressed in order to further the property rights of women in Lesotho and these flaws have been noted by both the African Commission on Human and Peoples' Rights and the Committee on the Prohibition of Discrimination Against Women. The first flaw is that the Constitution exempts customary law from the principle of equality. This poses as a great challenge because customary law has a negative impact on the property rights of women and therefore, exempting customary law from the principle of equality is in itself allowing discrimination to occur where customary law applies. As established by the Committee on the Elimination of Discrimination Against Women, this contravenes the obligation placed upon Lesotho by international law to combat discrimination formally and also in practice. Secondly, the Act of 2010 has an exemption clause for customary law concerning inheritance. The effect of this is that women have been made vulnerable in respect to their inheritance rights because the exemption clause allows customary practices to come into play. Lesotho is under the obligation, established by both CEDAW and Maputo Protocol, to ensure that widows inherit from the estate shared with the deceased and that women have the same inheritance rights as men as regards the property of parents. Lesotho is largely reliant on legislation as a form of policy and thus there are limited policies concerning property rights for women. The Lesotho legal framework requires consolidated laws concerning property rights, and it could benefit from the enactment of more policies and development projects that extend to rural areas of Lesotho and not only the urban centres.

In conclusion, by establishing the Gender Policy and enacting the Land Act of 2010, Lesotho met some of its obligations under international law. However, clauses that exempt customary law found in the constitution and the Land Act of 2010, the discrimination women face at the hands of the judiciary and the fact that the Deeds' Registry Act has not been abolished or amended establishes that Lesotho has not met some of its obligations imposed by international and regional law. Some of Lesotho's laws are inconsistent with international norms and standards and also violate certain provisions and rights found in the Maputo Protocol and CEDAW.



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CHAPTER 4- LAWS OF LEROTHOLI (CUSTOMARY LAW) AND THE EFFECTS ON THE RIGHT TO PROPERTY

4.1 INTRODUCTION

This chapter centres on the Laws of Lerotholi and customary law concerning property in Lesotho. This chapter will examine the extent to which women's property rights are protected. In order to establish property rights of women under customary law, this chapter begins by discussing the Laws of Lerotholi and the manner in which it has influenced the present customary law in Lesotho. Customary practices surrounding the acquisition of land, marital property, succession and inheritance shall be central to this chapter.

4.2 THE LAWS OF LEROTHOLI

The Kingdom of Lesotho, unlike many other African states, is solely inhabited by the Basotho people who are homogenous.⁴⁵⁵ They all share one common ancestry.⁴⁵⁶ Prior to the 1800s, the Basotho were loose communities with no overall ruler but instead formed parts of small chiefdoms.⁴⁵⁷ Patriarchal customs were widely practised then; however, the customs and traditions were constantly changed.⁴⁵⁸ As other Bantu groups in Southern Africa, the Basotho reared cattle and the women engaged in subsistence farming.⁴⁵⁹ The economy revolved around the homestead and the chief.⁴⁶⁰

The Laws of Lerotholi are said to be the most important written source of information concerning the customary law and practices in the Kingdom of Lesotho.⁴⁶¹ In 1903, the earliest version of the Laws of Lerotholi was drawn up by the National Council.⁴⁶² The National Council, which was aimed at strengthening the power of the chiefs, was adopted in 1903 and during its first session, a proposal for a written formulation of Sesotho Law was brought up.⁴⁶³ After days of deliberating and debating, the National Council adopted eighteen resolutions.⁴⁶⁴ Poutler notes that the session strongly gravitated towards reforming the native system in order to obtain greater security of property and land tenure.⁴⁶⁵ Native Laws consisted of tribal customs

⁴⁵⁵ Juma L 'The Laws of Lerotholi: Role and Status of Codified Rules of Custom in The Kingdom of Lesotho' (2011) 23 *Pace International Law Review* 97.

⁴⁵⁶ Juma L (2011) 97.

⁴⁵⁷ Juma L (2011) 97.

⁴⁵⁸ Juma L (2011) 97.

⁴⁵⁹ Juma L (2011) 98.

⁴⁶⁰ Juma L (2011) 98.

⁴⁶¹ Poulter S 'The Place of The Laws of Lerotholi in The Legal System of Lesotho' (1972) 71 *African Affairs* 144.

⁴⁶² Poulter S (1972) 144.

⁴⁶³ Poulter S (1972) 151.

⁴⁶⁴ Poulter S (1972) 151.

⁴⁶⁵ Poulter S (1972) 151.

and judgements and opinions of important and respected chiefs.⁴⁶⁶ These resolutions were printed and circulated around Sesotho and they were named the Laws of Lerotholi or the Lerotholi code.⁴⁶⁷

The Laws of Lerotholi were contemplated to equally protect the prerogative of chiefs and the rights of the common people.⁴⁶⁸ On one hand, the Laws of Lerotholi regulated matters such as the succession of chieftainship, the power of chiefs to hold courts and the allocation of land whilst on the other hand; it protected the right to property, the right to a trial before punishment and the right to be allocated land for cultivation.⁴⁶⁹ The Laws of Lerotholi also addressed matters such as family law, with provisions governing inheritance and the position of widows, allocation of property, and compensation for seduction and abduction.⁴⁷⁰ The Laws of Lerotholi remained without change for fifteen years until, during the period of 1917-1918, seven new laws were enacted.⁴⁷¹ These laws concerned, *inter alia*, court proceedings, amendments to laws pertaining to bride price and dowry and the observance of public holidays.⁴⁷² The Laws were further amended and some portions have become obsolete.⁴⁷³ The current version of the Laws of Lerotholi is a merger of the 1903 version and the subsequent amendments, rules and proclamations made by the Paramount Chief.⁴⁷⁴

With the flux nature of customary laws in Lesotho, the Laws of Lerotholi began to be phased out by various proclamations such as the Native Courts Proclamation of 1938 which abolished the chief's traditional courts.⁴⁷⁵ The process of codification of customary laws was never complete and as a result the Laws of Lerotholi could not be re-enacted to form part of the Native Proclamation of 1938 and further affirmed by the colonial legislative authority.⁴⁷⁶ In the case of *Griffith v Griffith (The Regency case)* the Laws of Lerotholi were described as “lacking official recognition” but helpful in establishing the existence of a customary practice amongst the Basotho people and the extent to which such a customary practice applied.⁴⁷⁷ In this decision, the court stipulated that the Laws of Lerotholi were not equal to any written law and that they were to retain the status of any other unwritten customary law.⁴⁷⁸ Post-independence, the hierarchy has remained the same with the Laws of Lerotholi recognised as a source of customary law in

⁴⁶⁶ Poulter S (1972) 151.

⁴⁶⁷ Duncan P *Sotho Laws and Customs* (2006) xiii.

⁴⁶⁸ Laden G 'Basutoland and the Basutos' (1901) 17 *Scottish Geographical Magazine* 348.

⁴⁶⁹ Poulter S (1972) 152.

⁴⁷⁰ Poulter S (1972) 152.

⁴⁷¹ Poulter S (1972) 152.

⁴⁷² Poulter S (1972) 152.

⁴⁷³ Juma L (2011) 117.

⁴⁷⁴ Juma L (2011) 117.

⁴⁷⁵ Poulter S (1972) 115.

⁴⁷⁶ Juma L (2011) 117.

⁴⁷⁷ *Griffith v. Griffith*, 1926-53 HCTLR 50 (Lesotho).

⁴⁷⁸ *Griffith v. Griffith*, 1926-53 HCTLR 50 (Lesotho).

Lesotho.⁴⁷⁹ The Constitution of Lesotho makes reference to customary law in sections 18, 45, and 154; however it makes no reference to the Laws of Lerotholi.⁴⁸⁰ The Laws of Lerotholi hold an important position in the legal system of Lesotho to the extent that they dictate not only the economic and social activities of rural communities but also the nature of political governance in Lesotho.⁴⁸¹

4.2.1 THE BASOTHO CUSTOMARY LAWS

According to Juma, African customary law is often thought of as a collection of traditional practices and customs that derive from culture and which dictate the manner in which people live their lives.⁴⁸² This understanding of customary law led to the belief that African customary law had no role in matters of public law and commerce.⁴⁸³ It was argued that law and institutions necessary for economic development were not to be sought for in African law.⁴⁸⁴ Such assumptions rose from equating custom to law.⁴⁸⁵ It is important to distinguish law from custom in order to facilitate the recognition of the role that African law plays in a legal system.⁴⁸⁶ Allott notes that custom refers to practice (what people do) and it is “the raw material out of which customary norm is manufactured”.⁴⁸⁷ Nabudere notes that law, on the other hand, is the norm (what people ought to do).⁴⁸⁸ From a judicial perspective, African customary law is said to be rigid and static.⁴⁸⁹ This is a misunderstanding that stems from the fact that African customary law has never been allowed to grow.⁴⁹⁰ African customary law has also faced a lot of distortions and alterations that they no longer represent the core principles and values of the African society.⁴⁹¹

According to Modo, customary laws are indigenous norms and mores that are central to the governance of the lives of people.⁴⁹² An important characteristic of customary laws is that they are learned through the process of enculturation from a young age.⁴⁹³ As children play out in the village, they learn to act out the roles of men and women in a household and they soon become

⁴⁷⁹ Juma L (2011) 121.

⁴⁸⁰ Constitution of Lesotho 2001.

⁴⁸¹ Juma L (2011) 144.

⁴⁸² Juma L 'From 'Repugnancy' to 'Bill of Rights': African Customary Law in Lesotho and South Africa' 2007 *Speculum Juris* 92.

⁴⁸³ Juma L (2007) 92.

⁴⁸⁴ Seidman R B 'Law and Economic Development' 1966 *Wisconsin LR* 1011.

⁴⁸⁵ Juma L (2007) 92.

⁴⁸⁶ Juma L (2007) 92.

⁴⁸⁷ Allott A N 'The People as Lawmakers: Custom, Practice and Public Opinion as Source of Law in Africa and England' (1977) 21 *Journal of African Law* 15.

⁴⁸⁸ Allott A N (1977) 15.

⁴⁸⁹ Nabudere D W 'Towards the Study of Post-traditional Systems of Justice in the Great Lakes Region of Africa' (2002) 8 *East Africa Journal of Peace & Human Rights* 17.

⁴⁹⁰ Juma L (2007) 94.

⁴⁹¹ Juma L (2007) 94.

⁴⁹² Modo I V 'Dual Legal System, Basotho Culture and Marital Stability' (2002) 33 *Journal of Comparative Family Studies* 379.

⁴⁹³ Modo I V (2002) 379.

acquainted with the roles.⁴⁹⁴ Central to these laws are rules surrounding marriage, inheritance of property, communal system of abode, and cordiality and respect towards one another including strangers.⁴⁹⁵ Sociologists refer to custom or culture as behaviour that is observed by human beings in human groups such as family, social class, playgrounds and churches.⁴⁹⁶

According to Nhlapo, a feature that is viewed to be central to customary law is patriarchy; however it is argued that it was supported by checks and balances which ensured the welfare of women and children.⁴⁹⁷ It is further argued that it is as a result of distortions that customary law has adopted this rigid posture and male dominance.⁴⁹⁸ Customary law has been used to deny women of several rights such as the right to acquire land and thus negatively impacting their capacity to participate in economic activities in their regions.⁴⁹⁹ Customary law has also enacted perpetual minority over women and thus making them subject to male figures in their lives such as fathers, brothers and husbands.⁵⁰⁰ The status of perpetual minority rids women from protection offered by the law.⁵⁰¹

Customary Law in Lesotho governs the way people live through various principles and practices and these practices are often founded on the superiority of men.⁵⁰² One of such principles and practices is bride wealth, known as “bohali” in Lesotho.⁵⁰³ In Lesotho, “ngoana ke oa likhomo” which means “the child belongs to the cattle”.⁵⁰⁴ According to Sesotho custom, rights in a woman are transferred on marriage from one male guardian, her father or a male representative in the family, to another male guardian, her husband.⁵⁰⁵ When a man discovers the woman he wants to marry, he tells his family who then approaches the woman’s family to inform them of their desire to marry the woman.⁵⁰⁶ If the woman’s family approves, the two families arrange for a day on which there will be an exchange of the bride wealth, bohali.⁵⁰⁷ Bohali is paid in cattle and the families negotiate on how many cattle the man’s family is to pay.⁵⁰⁸ The

494 Modu I V (2002) 379.

495 Modu I V (2002) 4.

496 Schoefield H *The Philosophy of Education* (1982) 108.

497 Nhlapo T R ‘African Customary Law in the Interim Constitution’ in Liebenberg (ed) *Towards the Final Constitution: A Critique of the Interim Constitution From a Gender Perspective: The Way Forward* (1995) 162.

498 Nhlapo T R (1995) 162.

499 Nyamu M C ‘Are Local Norms and Practices Fences or Pathways? The Example of Women’s Property Rights’ in An-Na’im A (ed) *Cultural Transformation and Human Rights in Africa* (2002) 137.

500 Nhlapo T R (1995) 162.

501 Nhlapo T R (1995) 162.

502 Nhlapo T R (1995) 162.

503 Murray C ‘High Bridewealth, Migrant Labour and The Position of Women in Lesotho’ (1977) 21 *Journal of African Law* 84.

504 Murray C (1977) 84.

505 Murray C (1977) 82.

506 Modu I V (2002) 379.

507 Modu I V (2002) 379.

508 Modu I V (2002) 379.

man's family can either pay the bride wealth in full, half, or according to an agreement.⁵⁰⁹ The power men exercise over women is seen as being facilitated by the practice of bohali because Basotho husbands believe that they have bought their wives.⁵¹⁰ This subsequently means that marital power is vested upon men.⁵¹¹ According to the Committee on Elimination of Discrimination Against Women's concluding observation on Lesotho, the practice of bohali is a harmful practice, deeply rooted in patriarchy and that is stereotypical, that discriminates against women.⁵¹² Juma notes that male primogeniture or patrilineality is another practice observed under customary law in Lesotho.⁵¹³ The rule of male primogeniture is a rule that excludes women from any form of succession.⁵¹⁴ The rule of male primogeniture favours men and not women in matters of inheritance as well as succession.⁵¹⁵ The rule of male primogeniture has prohibited women from chieftainship succession because, under customary law, chieftainship succession is only applicable to the male descendants of the chief and not the female descendants.⁵¹⁶

4.3 CUSTOMARY LAW ON THE PROPERTY RIGHTS OF WOMEN

The following section will discuss the property rights of women under customary law in Lesotho. The discussion will largely focus on property rights concerning the acquisition of land, marital property as well as inheritance under customary law. It is important to note that there is a standard imposed on states by international law to ensure that states eliminate cultural practices that are harmful to women and that hinder them from the enjoyment of their human rights.⁵¹⁷ According to Article 2 (1) (f) of the Maputo Protocol, state parties are under the obligation to commit themselves to eliminate harmful cultural and traditional practices which are based on the inferiority of women and stereotypes against women.⁵¹⁸

⁵⁰⁹ Modo I V (2002) 379.

⁵¹⁰ Mosetse P *Gender Stereotypes and Education in Lesotho* (Phd Thesis, University of Free State, 2006) 308.

⁵¹¹ Kanono L M, Monaphathi T E, Seeiso S M and Tsotsi M N 'The Legal Situation of Women in Southern Africa' in Stewart J E and Armstrong A K (ed) *Women and Law in Southern Africa* (1990) 54.

⁵¹² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁵¹³ Juma L 'Chieftainship Succession and Gender Equality in Lesotho: Negotiating the Right to Equality in a Jungle of Pluralism' (2013) 22 *Texas Journal of Women and the Law* 161.

⁵¹⁴ Maunatlala KR *The Role of Male Primogeniture and The Role of Women to Inherit Under Customary Law of Succession* (LLM Thesis, University of Pretoria, 2019) 15.

⁵¹⁵ Juma L (2013) 191.

⁵¹⁶ Juma L (2013) 199.

⁵¹⁷ Article 2, Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁵¹⁸ Article 2(1)(f), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

4.3.1 LAND ALLOCATION

Traditionally, land in Lesotho was governed by customary law and the rules and regulations were codified under the Laws of Lerotholi.⁵¹⁹ Poutler notes that according to the Laws of Lerotholi, land was considered to be communal property and it was not capable of being owned by one individual.⁵²⁰ Chiefs held land in trust on behalf of the community and such land would be allocated, by the chief, for the use of the allottee and his family. Chiefs were said to have an administrative title over land at a village level.⁵²¹ The rights to be allocated land were tied to one's membership in a community; however it was possible to allocate land to outsiders.⁵²²

Under customary law, land was allocated to married males for agricultural and residential purposes based on their requirements.⁵²³ Three pieces of land were allocated to each married male for cultivation purposes.⁵²⁴ The first piece was for maize, the second for wheat and the third for sorghum.⁵²⁵ In order to be allocated land, there are certain requirements to be met; the person had to be a bona fide Sotho (a citizen of Lesotho); the person has to be married and male; the person has to succumb to the supreme power of the king; the person has to be declared a loyal subject by his chief; and lastly, the person has to agree to observe the obligations expected of him by the community.⁵²⁶ If a person meets the criteria, that person will be given rights over that land for life or for a limited period of time.⁵²⁷ If the chief feels as though the land allocated is being misused (overgrazing, inability to fight soil erosion or left barren for more than two years), the chief can revoke the land.⁵²⁸ Due to the fact that women are viewed as minors under customary law, they cannot be allocated land and neither can they make decisions on the cultivation of land.⁵²⁹ Basotho women who are married can only access land through their husbands.⁵³⁰ In the case of unmarried women or divorcees, land can be accessed through a male

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- ⁵¹⁹ Poulter SM *Legal Dualism in Lesotho: A Study of The Choice of Law Question in Family Matters* (1981) 160.
⁵²⁰ Poulter SM (1981) 160.
⁵²¹ Thahane M *Who Owns the Land in Lesotho? Land Disputes and The Politics of Land Ownership in Lesotho* Lesotho: Institute Of South African Studies, National University of Lesotho (1998) 6.
⁵²² UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 36.
⁵²³ Thahane M (1998) 6.
⁵²⁴ Makhanya EM *The Use of Land Resource for Agriculture in Lesotho* (Phd Thesis, University of London, 1977) 77.
⁵²⁵ Makhanya EM (1977) 77.
⁵²⁶ Ntlaloe KH *Assessment of The Extent to Which Lesotho's Land Act 1979 (Act #17) Had an Impact on Urban Morphology and Patterns of Land Development in Maseru and Its Peri-Urban Areas: The Case of Mapeleng and Sekamaneng* (Master's Thesis, University of Natal, 1998) 25.
⁵²⁷ Ntlaloe KH (1998) 25.
⁵²⁸ Bruce JW 'A Layman's Guide to the Land Act 1979' Seminar Paper on Land Act Policy and Agricultural Development (1984).
⁵²⁹ Selebalo QC 'Land Reform and Poverty Alleviation: Lesotho's Experiences During the Last Two Decades' Presented at the Regional Conference for Land Reform Poverty Alleviation in Southern Africa (2001) 8.
⁵³⁰ Moseitse P (2006) 129.

guardian such as the father or brother.⁵³¹ The reality is that customary law in Lesotho denies women access and control over land and this has a negative impact on their status in society.⁵³²

The denial of women access to and control over land is a violation of Section 34 of the Constitution of Lesotho.⁵³³ Section 34 of the Constitution provides for economic opportunities for the citizens of Lesotho and provides for the right to acquire property including land.⁵³⁴ Apart from the violation of the constitutional right to economic opportunities, the cultural practices that deny women access to and control over land also violate international norms and standards.⁵³⁵ Article 5(a) of the Maputo Protocol states that states have a duty to ensure that women have access to adequate food and nutrition and therefore, states ought to take appropriate measures to ensure that women are provided access to land.⁵³⁶ Article 19 of the Maputo Protocol provides for the right to sustainable development of women and it states that women have the right to fully enjoy their right to sustainable development.⁵³⁷ In achieving this goal, Article 19(c) states that the state should take appropriate measures to promote women's access and control over land and guarantee their right to property.⁵³⁸

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated that rural women in Lesotho, who form majority of the state, are disadvantaged in matters concerning the acquisition of land.⁵³⁹ The state of rural women in Lesotho is characterised by poverty.⁵⁴⁰ The CEDAW Committee raised its concerns about traditional practices that prevent women in rural Lesotho from acquiring and owning land.⁵⁴¹ The CEDAW Committee urged Lesotho to pay attention to the rural women and to ensure that they have access to fertile land and also address customs and practices that have a negative impact on the acquisition and ownership of land.⁵⁴²

⁵³¹ Moseitse P (2006) 129.

⁵³² Moseitse P (2006) 304.

⁵³³ Constitution of Lesotho 2001.

⁵³⁴ Section 34, Constitution of Lesotho 2001.

⁵³⁵ Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁵³⁶ Article 5(a), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁵³⁷ Article 19, Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁵³⁸ Article 19(c), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁵³⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁵⁴⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁵⁴¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁵⁴² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

4.3.2 MARITAL PROPERTY

In order to form a Sesotho customary marriage, certain factors affect the capacity of the parties to marry as follows; age, consent, mental capacity, relations by consanguinity or affinity, parties to an existing or previous marriage.⁵⁴³ There is no prescribed age for marriage under customary law. In the case of a male, upon return from circumcision, he is considered a man and thus eligible for marriage.⁵⁴⁴ On the other hand, women are considered perpetual minors so there is no prescribed age, however eligibility is determined by their ability to procreate which is as a result of puberty.⁵⁴⁵ The laws of Lerotholi provide that in order for a customary marriage to be valid, both parties must consent.⁵⁴⁶ Under Sesotho customary law, it is required that to form a marriage, both parties should be sane or else the marriage is not valid.⁵⁴⁷ A general rule of Sesotho customary law is that a person has the choice to marry any person of choice however this is subject to an exception.⁵⁴⁸ A person cannot marry a blood relative in the direct line of descendancy or ascendancy. This essentially means a marriage between a brother and sister, father and daughter, mother and son, grandfather and granddaughter, and grandmother and grandson is not a valid marriage.⁵⁴⁹ Lastly, a Sesotho customary marriage is viewed as being inherently polygamous.⁵⁵⁰ This is followed by the rule, established in *Khatala v Khatala*, that a Sesotho male who is already a party to an existing marriage can marry as many wives as he can in accordance with customary rites.⁵⁵¹ However, where a Sesotho male is married under civil law, he is unable to marry another woman under customary rites and this is because a civil marriage is monogamous in its nature.⁵⁵² In the case of a widow, it is unclear whether a widow is entitled to remarry after the death of her husband, however, it is believed that she may remarry given that she obtains a divorce order from the deceased's family or her family returns the bohali to the deceased's family.⁵⁵³ The basis of this principle is that a woman is not only married to the husband, but to the husband's family as a whole.⁵⁵⁴

The Basotho are known to have strong family relationships and the strength of the family is measured by the behaviour of the children.⁵⁵⁵ The family unit in Lesotho is patrilineal and patrilocal in nature and it consists of the parents, paternal uncles and their wives, as well as

⁵⁴³ Letsika Q 'The Place of Sesotho Customary Law Marriage Within the Modern Lesotho Legal System' (2005) 2 *University of Botswana Law Journal* 76.

⁵⁴⁴ Letsika Q (2005) 76.

⁵⁴⁵ Poulter SM *Law and population growth in Lesotho* Law and Population Project, Faculty of Law, National University of Lesotho (1981) 24.

⁵⁴⁶ Letsika Q (2005) 77.

⁵⁴⁷ Poulter SM (1981) 46.

⁵⁴⁸ Letsika Q (2005) 78.

⁵⁴⁹ Letsika Q (2005) 78.

⁵⁵⁰ Maqutu WCM 'Contemporary Problems in The Family Law of Lesotho' 1985 *Lesotho Law Journal* 199.

⁵⁵¹ *Khatala v Khatala* (1963 - 66) H.C.T.L.R 97;

⁵⁵² *Tsilo v Tsilo and others* (1985 90) L.L.R 294.

⁵⁵³ Poulter SM (1981) 47.

⁵⁵⁴ Letsika Q (2005) 88.

⁵⁵⁵ Matsela FZA *The Indigenous Education of the Basotho and its Implications for Educational Development in Lesotho* (Unpublished Phd Thesis, University of Massachusetts, 1979) 95.

grandparents.⁵⁵⁶ According to Lesotho culture, the duty of a man is to create a link between his ancestors and his descendants and thus family increases the members of his lineage.⁵⁵⁷ In the case of a woman, family connections lose strength because patrilocality requires a woman to leave her birth village and join her husband's village.⁵⁵⁸ Patrilocality essentially means that once a woman is married, she ceases to enjoy the privileges from her family as she is no longer a part of the family; she forms part of her husband's family and she is no longer subject to the control of her father but rather that of her husband.⁵⁵⁹ Once a Sesotho woman enters her marital home, she takes on the following responsibilities; child bearing and rearing and contributing to the management and economic welfare of the family.⁵⁶⁰ The social and economic status of a woman largely depends on the existence of her marriage.⁵⁶¹

The Basotho social system, which is polygamist at large, requires that a married man provides each of his wives a house and cattle to sustain the home.⁵⁶² The property of one wife cannot be used as the property of another wife.⁵⁶³ This principle is based on the maxim "malapa ha a jane" which means "houses do not eat one another".⁵⁶⁴ Once a husband has allocated property to a house, the property shall remain the property of that house.⁵⁶⁵ A house is comprised of the husband, wife and children and that property is to be used for that house.⁵⁶⁶ A house may acquire property in various ways such as the cattle received as bohali and property acquired by the working husband or working wife.⁵⁶⁷

Women generally suffer from unequal rights to property during the existence of a marriage and as well as upon dissolution of a marriage.⁵⁶⁸ Customary marriages are generally in community of property and both spouses own the property that they brought into the marriage.⁵⁶⁹ Customary law awards a man marital power over his wife and as a result, customary law vests marital powers in the man to administer the joint property.⁵⁷⁰ The man is also entitled to administer the

⁵⁵⁶ Ashton H *The Basuto* (1967) 17.

⁵⁵⁷ Poulter SM *Law and population growth in Lesotho* Law and Population Project, Faculty of Law, National University of Lesotho (1981) 18.

⁵⁵⁸ Ashton H (1967) 17.

⁵⁵⁹ Ashton H (1967) 17.

⁵⁶⁰ Moseitse P (2006) 114.

⁵⁶¹ Moseitse P (2006) 114.

⁵⁶² *Griffith v. Griffith*, 1926-53 HCTLR 50 (Lesotho).

⁵⁶³ *Griffith v. Griffith*, 1926-53 HCTLR 50 (Lesotho).

⁵⁶⁴ *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

⁵⁶⁵ *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

⁵⁶⁶ *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

⁵⁶⁷ *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

⁵⁶⁸ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁵⁶⁹ Mamashela M 'Women and Development in Africa: With Special Reference to The Legal Disabilities of Married Women in Lesotho' (1985) 15 *Journal of Eastern African Research and Development* 166.

⁵⁷⁰ Moseitse P (2006) 114.

wife's property separately.⁵⁷¹ Under customary law, a woman cannot conclude contracts, mortgage property in her name or register property in her personal right.⁵⁷² Essentially, women exercise limited or no decision making power in a marriage.⁵⁷³ The marital power enables a husband to alienate, pledge or mortgage the wife's movable and immovable property without her consent.⁵⁷⁴ Since the husband is the sole administrator of the property, it is difficult for women to protect their share of the property when there is suspicion of maladministration.⁵⁷⁵ If a woman suspects her husband is not administering her portion of the estate well, she is very unlikely to be able to prove that he is acting in deliberate fraud.⁵⁷⁶ This customary practice can be viewed as a violation of various provisions under international law, CEDAW and the Maputo Protocol.⁵⁷⁷ Article 15(2) of CEDAW states that a state must give women equal rights to conclude contracts as well as equal rights to administer property.⁵⁷⁸ Article 16 of CEDAW places a duty upon states to ensure that there is equality between spouses in matters concerning marriage and family relations.⁵⁷⁹ Article 16(1) (h) states that spouses should be awarded equal rights in respect to the acquisition, ownership, management and administration of property.⁵⁸⁰ Similar provisions are found under the Maputo Protocol regarding the administration of marital property.⁵⁸¹ Article 6 of the Maputo Protocol states that states should ensure that both men and women have equal rights in a marriage.⁵⁸² Article 6(j) of the Maputo Protocol provides women the right to acquire property as well as the right to administer it freely.⁵⁸³ Awarding the husband the power to solely administer the estate and taking away such power from a wife is a violation of the above mentioned Articles of both CEDAW and the Maputo Protocol.⁵⁸⁴ In the Concluding observations of the CEDAW Committee to Lesotho, it was noted that there remains a persistence of harmful and discriminatory customary practices regarding property rights in marriages.⁵⁸⁵ In the concluding observation, the CEDAW Committee called upon Lesotho to prepare a family code

⁵⁷¹ Mamashela M (1985) 166.

⁵⁷² Moseitse P (2006) 123.

⁵⁷³ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁵⁷⁴ Mamashela M (1985) 166.

⁵⁷⁵ Mamashela M (1985) 167.

⁵⁷⁶ Mamashela M (1985) 167.

⁵⁷⁷ Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women 2003.

⁵⁷⁸ Article 15(2), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁵⁷⁹ Article 16, Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁵⁸⁰ Article 16(1)(h), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁵⁸¹ Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁵⁸² Article 6, Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁵⁸³ Article 6(j), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁵⁸⁴ Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁵⁸⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

that addresses unequal property and land rights.⁵⁸⁶ The CEDAW Committee also called upon Lesotho to ensure that there is equality between men and women in marriages and to take necessary measures in order to ensure that women have an equal share in marital property.⁵⁸⁷

The vulnerable position of married women and marital property increases where divorce is concerned.⁵⁸⁸ According to the African Commission on Human and Peoples' Rights women in Africa are adversely affected by discrimination and inequality that is associated with marital property during the dissolution of a marriage.⁵⁸⁹ For women, marital property rights can be considered to be most important in the context of a divorce mainly because they are important to their economic and social well-being after the dissolution of the marriage.⁵⁹⁰ Apart from the economic and social well-being of women, the African Commission has stated that these rights are important to women because "they deserve them".⁵⁹¹ Under Basotho customary law, once bohali has been paid, the prospects of divorce are slim because a woman has been married into a family or a lineage.⁵⁹² However, in the cases where there is a divorce, the woman is to return to her family and bohali must be returned to the husband's family.⁵⁹³ Due to the fact that a customary marriage is in community of property, the wife's property is submerged into that of her husband.⁵⁹⁴ As a result of the matrimonial property system under customary law, when a divorce takes place, there is no division of property.⁵⁹⁵ The only property a woman is entitled to upon divorce is smaller property and not larger property such as immovable property acquired during the marriage.⁵⁹⁶ Women experience great difficulty in accessing the marital property when the marriage has been dissolved and therefore they often only depend on the good will of their ex-husbands to access the marital property.⁵⁹⁷ There are instances where customary law courts rule in favour of property settlement however, the High Court and Supreme Court have an

⁵⁸⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁵⁸⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁵⁸⁸ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁵⁸⁹ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁵⁹⁰ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁵⁹¹ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁵⁹² *Modo I V* (2002) 380.

⁵⁹³ *Modo I V* (2002) 380.

⁵⁹⁴ *Modo I V* (2002) 381.

⁵⁹⁵ *Modo I V* (2002) 381.

⁵⁹⁶ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

⁵⁹⁷ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

inclination to set aside such judgements.⁵⁹⁸ The inability of women to access their share of property after divorce is a violation Article 7 of the Maputo Protocol.⁵⁹⁹ Article 7(d) of the Maputo Protocol states that upon divorce, both spouses have an equitable share to the joint property deriving from the marriage.⁶⁰⁰

According to the African Commission, Article 7(d) should be interpreted to mean both men and women share equal rights during separation, divorce or annulment of the marriage.⁶⁰¹ Equitable sharing should be seen in accordance to the principle of substantive equality which recognises that equality can only be achieved if historical, social, religious, political and economic factors are put into consideration.⁶⁰² The rationale behind substantive equality is to ensure that injustice is avoided and all forms of contribution in the household or marriage are put into consideration.⁶⁰³ Equitable sharing in this context gives recognition to the reproductive role women play in a marriage through labour and caregiving as an investment in the household or marriage.⁶⁰⁴ There are factors to be considered when establishing the equitable share: the duration of the marriage, whether the couple has children, the reason behind the separation, divorce or annulment, and the responsibilities of each spouse.⁶⁰⁵

4.3.3 INHERITANCE OF PROPERTY

In Southern Africa, inheritance under customary law is subject to the rule of male primogeniture.⁶⁰⁶ However, there are legal systems in Africa, such as the South African legal system, that have declared the rule of male primogeniture as unconstitutional.⁶⁰⁷ In the *Bhe* case,

⁵⁹⁸ *Mwiya v Mwiya* 1975 ZLR; C Vs C SCZ, 2000 (Zimbabwe).

⁵⁹⁹ Article 7, Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶⁰⁰ Article 7(d), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶⁰¹ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁶⁰² African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁶⁰³ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁶⁰⁴ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁶⁰⁵ African Commission on Human and Peoples' Rights, *General Comment No.6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(d))*, 2020.

⁶⁰⁶ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

⁶⁰⁷ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

Langa DCJ found that the rule of male primogeniture is discriminatory against women and 'illegitimate' children who are particularly vulnerable groups in society and not in the position to protect themselves.⁶⁰⁸ The Constitutional Court of South Africa stated that the rule of male primogeniture subjects women to the status of perpetual minority and further violates their right to dignity.⁶⁰⁹ The rules surrounding inheritance are in no doubt more favourable to men than women.⁶¹⁰ Basotho customary law provides that inheritance is passed through the male line except in the rare case where a will is present.⁶¹¹ Wills registered in the Lesotho Deed's register are very few and this stems from the fact that women and men are reluctant to draft wills as there are cultural expectations based on the patriarchal nature of customary law.⁶¹² According to customary law, the eldest son is entitled to inherit the parent's property when the father dies and this means that the widow cannot inherit the property that they acquired during the marriage.⁶¹³ In *Tsosane v Tsosane*, the court held that the son has superior rights over the widow regarding inheritance of property.⁶¹⁴ The heir is identified as the first son of the first wife and the reason for that is the heir is to remain in the family and perpetuate the lineage.⁶¹⁵ There are instances when the widow may be allowed to inherit the property of the deceased acquired during the marriage and one is where the widow and the deceased never had a son.⁶¹⁶ There are limitations to this exception; firstly, the control of the property is under the supervision of the men in her marital family; and secondly, in the event that the widow re-marries, she forfeits the property.⁶¹⁷ In general, widows have a very limited right to inherit and they often only have secondary rights to use the property of the deceased husband.⁶¹⁸ The customary law that gives the first born son superior rights over the widow regarding inheritance of property violates rights relating to that of a widow found in the Maputo Protocol.⁶¹⁹ Article 21(1) of the Maputo Protocol states that a widow has the right to inherit an equitable share from her late husband's estate and therefore the customary practice that prohibits a widow from inheriting is a violation of Article 21(1).⁶²⁰

⁶⁰⁸ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

⁶⁰⁹ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

⁶¹⁰ Juma L (2013) 191.

⁶¹¹ Poulter SM *Law and population growth in Lesotho* Law and Population Project, Faculty of Law, National University of Lesotho (1981) 36.

⁶¹² Letuka PM, Mamashela K, Matashane-Marite B, Morolong M & Motebang SM *Family Belonging for Women* (1998) 168.

⁶¹³ Moseitse P (2006) 127.

⁶¹⁴ *Tsosane v Tsosane* 1971-1973 LLR 1.

⁶¹⁵ Letuka P, Matashane K, Mamashela MP, Mbatha L and Mohale M 'Women and Law in Southern Africa' Maseru: Research Project Women and Law in Southern Africa (1994) 154.

⁶¹⁶ Moseitse P (2006) 127.

⁶¹⁷ Moseitse P (2006) 127.

⁶¹⁸ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 21.

⁶¹⁹ Article 21, Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶²⁰ Article 21(1), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in

In cases where the heir is the first-born male, he is under the obligation to ensure that he provides for the widow and her children.⁶²¹ In such cases, the outcome is often that the widow has usufructuary rights over the property which correlates with other rights that the widow may have had over the property whilst the deceased was still alive.⁶²² In the case of *Lekaota v Lekaota*, the heir to the property of the deceased sold a part of the estate without the consent of the widow.⁶²³ In this case, the court ruled that the widow had usufructuary rights over the property and therefore was entitled to the return of the property.⁶²⁴ Widows in Lesotho oppose customary law in this regard because the heirs are irresponsible and often leave them in compromising positions as they dispose of the property as they wish.⁶²⁵

Customary law prohibits a female child from inheriting from her late father's estate.⁶²⁶ The Laws of Lerotholi prohibit a female from inheriting from her natal family because she is expected to be married into another family where she is to assume a marital role.⁶²⁷ In *Mahase v Mahase*, a female child was prohibited from inheriting from her late father's estate because her uncle contested that it was not in line with customary law which stipulates that a female child cannot be an heir.⁶²⁸ A female is also prohibited from inheriting from marital family because the first son of the first wife is the legal heir.⁶²⁹ In the cases where a parent is able to draft a will, there is a general pattern that the first male son is the one to inherit all the property whilst the female child inherits kitchen utensils, clothes and blankets.⁶³⁰ From this pattern, we see how the female child inherits property of very little value as opposed to the male child who inherits property of greater value such as the family homestead.⁶³¹ However, there are some communities that, nowadays, refuse to be bound by the customary practice of male primogeniture and instead allocate property for female children to inherit.⁶³² There are also instances where the heir is not determined by gender but rather which child contributes the most to the wealth of the family and that leaves room for female children to inherit property.⁶³³ It is unfortunate that in the cases where communities manage to break the customary norm, the courts are less accommodating and favour the application of customary law.⁶³⁴ In *Mohlabane v Mohlabane*, an adopted son brought an application before the court to annul the allocation of property which had been made to the

Africa 2003.

⁶²¹ Juma L (2013) 191.

⁶²² Juma L (2013) 191.

⁶²³ *Lekaota v. Lekaota*, 1963-1966 HCTLR 38 (LSHC).

⁶²⁴ *Lekaota v. Lekaota*, 1963-1966 HCTLR 38 (LSHC).

⁶²⁵ Juma L (2013) 191.

⁶²⁶ Juma L (2013) 191.

⁶²⁷ Moseitse P (2006) 127.

⁶²⁸ *Mahase v Mahase* (CIV/APN/534/2002 unreported).

⁶²⁹ Moseitse P (2006) 127.

⁶³⁰ Molapo ELM *Women and Patriarchy in Lesotho: A Deconstructive Study* (Phd Thesis, University of The Free State, 2005) 122.

⁶³¹ Molapo ELM (2005) 122.

⁶³² Juma L (2013) 192.

⁶³³ Juma L (2013) 192.

⁶³⁴ Juma L (2013) 192.

female child who contributed to the wealth of the family.⁶³⁵ The court annulled the allocation of property regardless of the fact that the son had not contributed to the acquisition of the property.⁶³⁶ The court merely affirmed the position of customary law without looking into the merits of the case and the reality of life.⁶³⁷ Prohibiting a female child from inheriting from the parents' property is a violation of Article 21(2) of the Maputo Protocol.⁶³⁸ Article 21(1) states that women and men shall have equal rights to inherit from their parents' estates.⁶³⁹

In summary, widows and female children are very vulnerable to disinheritance for the following reasons; the heir is the first born male of the first wife; when there is no male son, the widow is the heir but under the supervision of the deceased's family; disputes surrounding the property are referred to the brothers of the deceased; and if the widow lived separately from the deceased before the death, a council is needed to declare her as the rightful widow or else she may not inherit.⁶⁴⁰ The CEDAW Committee in its concluding observation to Lesotho has noted that harmful practices surrounding inheritance that are discriminatory towards women are still persistent in Lesotho.⁶⁴¹ The CEDAW Committee has called on Lesotho to prepare a unified family code that will be in compliance with CEDAW which addresses unequal inheritance rights.⁶⁴²

4.4 CONCLUSION

A core feature of customary law in Lesotho is patriarchy which means that men maintain a superior role in society and family life. Women under customary law are considered to be perpetual minors and thus limited in various aspects. One could say that the effects of patriarchy and the status of a perpetual minor are that women have legal disabilities.

Women are perceived to be unable to handle affairs outside of managing a matrimonial home. As a result of that, women in Lesotho cannot be allocated land. This rule is codified in the laws of Lerotoli that only permits married men to have land allocated to them. Women can only access land through the male figures in their lives such as their fathers and husbands. This is a violation of Section 34 of the Constitution of Lesotho as well as Articles 5(a), 19 and 19(c) of the Maputo Protocol. In present times, where women have started venturing into business and working on

⁶³⁵ *Mohlabane v. Mohlabane* CC 249/91 (LSHC).

⁶³⁶ *Mohlabane v. Mohlabane* CC 249/91 (LSHC).

⁶³⁷ Juma L (2013) 192.

⁶³⁸ Article 21(2), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶³⁹ Article 21(2), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶⁴⁰ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

⁶⁴¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁶⁴² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

various projects, the fact that they cannot have land allocated to them limits their economic growth and participation in society.

The situation surrounding marital property is ambiguous for various reasons. Firstly, when a Basotho woman enters into her matrimonial home, she is given a house for her and her family and this house may not be taken away from her; however, the woman can never leave her matrimonial home as the owner of the house. It is built for her and her children; however it remains the property of her husband's family. Secondly, when a woman enters a customary marriage, she is married in community of property and therefore her property is submerged into that of her husband's. The husband has marital power and therefore is the one in charge of administering the property, including the wife's property. In essence, he is permitted to administrate the property as he so wishes and the wife has little to no say in it. Upon marriage, the wife loses control and potentially ownership of her property. Thirdly, in the rare case of divorce, the property is not split and therefore the woman leaves her marriage with none of the property she entered into it with. These customary practices amount to a violation of Article 15 and 16 of CEDAW which provide women and married women the right to administer their property freely as well as Article 6 of the Maputo Protocol.

In terms of inheritance of property, a widow and a female child are vulnerable and are least likely to inherit. The rule concerning inheritance is that the first born male of the first wife is the one to inherit. The rule has been confirmed in case law where the courts have stated that a firstborn male of the first wife has superior inheritance rights to that of a widow. There are instances where a widow and a female child may inherit but these are subject to restrictions. A widow may inherit where there is no firstborn male child; however the property is under the supervision of male relatives of the deceased. A female child may inherit given that she has contributed to the wealth of the family but the application of this rule is limited because it has often been set aside by courts. The customary practice that restricts widows and women from inheriting from the estate of the deceased is a violation of Article 21 of the Maputo Protocol which provides for the inheritance of both a widow and a female child.

In conclusion, customary law in Lesotho proves to be significantly inconsistent with the international norms and standards regarding the property rights of women. There are violations of various Articles under the Maputo Protocol, CEDAW and the Constitution of Lesotho itself. From the above analysis, it can be concluded that Lesotho is not meeting the standards imposed upon it by International Law as regards the property rights of women in rural Lesotho.

CHAPTER 5- THE CO-EXISTENCE OF CUSTOMARY LAW AND CODIFIED LAW IN RESPECT TO PROPERTY RIGHTS

5.0 INTRODUCTION

The following chapter will focus on the dual legal system of Lesotho with the aim of establishing whether the co-existence of customary law and common law promotes the realisation of women's property rights without discrimination, or results in conflict of laws which restrict the realisation of women's property rights in rural Lesotho. This chapter will also establish whether or not Lesotho is in compliance with legal obligations imposed on it by International law concerning women's property rights. This chapter will make reference to the Maputo Protocol as well as CEDAW as legal instruments establishing the norms and standards pertaining to women's property rights.

Lesotho has its indigenous laws as well as the additional law that was received from the Cape Colony, Britain and Holland; Roman-Dutch and English Law which is amended and supplemented by statutory law and case law.⁶⁴³ The average Lesotho citizen is governed by both customary law and common law.⁶⁴⁴ The customary law of Lesotho applies to the whole country and is said to operate in the matrix of the general law.⁶⁴⁵ The general law of Lesotho defines Sesotho customary law as the indigenous law of the land which is practiced by the people of Lesotho.⁶⁴⁶

5.1 CUSTOMARY LAW AND CODIFIED LAW CONCERNING PROPERTY RIGHTS

The following section will compare and contrast customary law and codified law as regards property rights concerning women, specifically land, marital property and properties which are inherited. This section will also make reference to the Maputo Protocol and CEDAW in order to establish whether or not the co-existence of customary law and codified law lead to the realisation of women's property rights in Lesotho.

5.1.1 LAND RIGHTS

Land is an important factor in social reproduction and when it is managed well, it improves on human and economic development.⁶⁴⁷ Shumba's research has established that 70% to 80% of

⁶⁴³ Modo IVO 'Dual Legal System, Basotho Culture and Marital Stability' (2002) 33 *Journal of Comparative Family Studies* 377.

⁶⁴⁴ Modo IVO (2002) 377.

⁶⁴⁵ Maqutu WCM & Sanders AJGM 'The Internal Conflict of Laws in Lesotho' 1987 *Comparative and International Law Journal of Southern Africa* 379.

⁶⁴⁶ Maqutu WCM & Sanders AJGM (1987) 379.

⁶⁴⁷ Shumba D 'Women and Land: A Study on Zimbabwe' (2011) 13 *Journal of Sustainable Development in Africa* 236.

subsistence farming in Africa is done by women and on average, 60% of harvesting is done by African women.⁶⁴⁸ Furthermore, women in sub-Saharan Africa produce up to 80% of all staple foods.⁶⁴⁹ However, despite women's contribution in agriculture, they own less than 10% of land.⁶⁵⁰ To further prove this point, Banda notes in her research that in Kenya, 95% of land is owned by men.⁶⁵¹ This is viewed as a drawback in sustainable development.⁶⁵² Women are said to be handicapped by the fact that they cannot afford land, and also by the fact that there are policies and practices that prevent women from acquiring land.⁶⁵³ Gender-based discrimination in laws, customs as well as practices has caused severe inequalities in women's ability to access land as well as control land.⁶⁵⁴ Although many countries have taken note of the important role that women play in agriculture, very few have paid attention to the fact that land tenure systems are discriminatory against women.⁶⁵⁵ The effect of this is that women will continue to remain marginalised and poor.⁶⁵⁶ Richardson notes that the denial of access to land to women is a contributing factor to the feminisation of poverty.⁶⁵⁷ According to Banda, the key to women's legal disenfranchisement in various legal systems is the restriction placed on their ability to own, manage, and inherit property.⁶⁵⁸ Global platforms have acknowledged that women's rights to inherit and own land should be recognised and realised.⁶⁵⁹

Article 14(g) of CEDAW provides for the right to land.⁶⁶⁰ It states that rural women have the right to access agricultural credit loans, marketing facilities, appropriate technology and equal treatment in land reform and land resettlement schemes.⁶⁶¹ It is important to state that the main objective of this article is to ensure women are not discriminated against in matters pertaining to land reform.⁶⁶² Although Article 14(g) of CEDAW is marginal, the CEDAW Committee has adopted an approach that is considered to be active concerning the land rights of women.⁶⁶³ In concluding observations, the CEDAW Committee has established the centrality of land rights to

⁶⁴⁸ Shumba D (2011) 237.

⁶⁴⁹ Shumba D (2011) 237.

⁶⁵⁰ Shumba D (2011) 237.

⁶⁵¹ Banda F & Office of the High Commissioner for Human Rights- Gender Unit *Project on Mechanism to Address Laws That Discriminate Against Women* (2008) 98.

⁶⁵² Shumba D (2011) 237.

⁶⁵³ Shumba D (2011) 236.

⁶⁵⁴ Banda F (2008) 98.

⁶⁵⁵ Shumba D (2011) 237.

⁶⁵⁶ Shumba D (2011) 237.

⁶⁵⁷ Richardson AM 'Women 's Inheritance Rights in Africa: The Need to Intergrate Cultural Understanding and Legal Reform' (2004) 11 *Human Rights Brief* 19.

⁶⁵⁸ Banda F 2008) 98.

⁶⁵⁹ Shumba D (2011) 237.

⁶⁶⁰ Article 14(g), Convention on the Elimination of All Forms of Discrimination against Women 1979.

⁶⁶¹ Article 14(g), Convention on the Elimination of All Forms of Discrimination against Women 1979.

⁶⁶² Gilbert J 'Land Rights as Human Rights: The Case For A Specific Right to Land' (2013) 15 *Sur-International Journal on Human Rights* 122.

⁶⁶³ Gilbert J (2013) 122.

the fulfilment of women's human rights.⁶⁶⁴ Concluding observations by the CEDAW Committee have identified key issues relating to women's land rights and one of them being the guarantee of non-discrimination in access to land under both customary and formal legal systems.⁶⁶⁵ Another key issue is that the right to land is closely linked to means of livelihood such as food and water; this relationship is also established in the Maputo Protocol.⁶⁶⁶

Article 15 of the Maputo Protocol provides for the right to food security and states that state parties are to ensure that women have access to adequate and nutritious food.⁶⁶⁷ According to Banda, a significant number of African women live in the rural areas and this makes Article 15 the most important for rural women.⁶⁶⁸ This Article encapsulates the challenges faced by rural women in African countries.⁶⁶⁹ Article 15(a) of the Maputo Protocol further states that state parties should provide women access to land as a means of producing nutritious food.⁶⁷⁰ Article 19 of the Maputo Protocol provides for sustainable development and states that women have the right to fully enjoy their sustainable development.⁶⁷¹ Article 19(c) states that state parties should undertake appropriate measures to promote women's access to and control over reproductive resources such as land.⁶⁷² Banda notes that although there are women who work the land as well as feed their families the produce of the land, Article 19(c) of the Maputo Protocol recognises that women are often not granted the right to own the land.⁶⁷³ This is because of discriminatory sanctions imposed by law or cultural norms and traditions.⁶⁷⁴ It has also been noted that given the resistance to women acquiring land, the Maputo Protocol could have rather specified that states have a duty to ensure that women have equal access to land ownership with men.⁶⁷⁵ According to Elson, having an entitlement implies that one has "access to an accountable process in which the discretion of the decision maker is limited".⁶⁷⁶

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⁶⁶⁴ Gilbert J (2013) 122.

⁶⁶⁵ Gilbert J (2013) 122.

⁶⁶⁶ Gilbert J (2013) 123.

⁶⁶⁷ Article 15, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.

⁶⁶⁸ Banda F 'Blazing A Trail: The African Protocol on Women's Rights Comes Into Force' (2006) 50 *Journal of African Law* 82.

⁶⁶⁹ Banda F (2006) 82.

⁶⁷⁰ Article 15(a), Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶⁷¹ Article 19, Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶⁷² Article 19(c), Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁶⁷³ Banda F (2006) 82.

⁶⁷⁴ Banda F (2006) 82.

⁶⁷⁵ Banda F (2006) 83.

⁶⁷⁶ Elson D 'Gender, Justice, Human Rights, and Neo-Liberal Economic Policies' in Molyneaux M and Razavi S (eds.) *Gender, justice, Development and Rights* (2003) 78.

In Lesotho land rights are regulated under the Constitution and the Land Act of 2010.⁶⁷⁷ Section 34 states that “Lesotho shall adopt policies which encourage its citizens to acquire property including land, houses, tools and equipment; and shall take such other economic measures as the state shall consider affordable”.⁶⁷⁸ Initially, land rights were regulated under the Land Act of 1979, a consolidation between the Administration of Lands Act of 1973 and the Land Act of 1973.⁶⁷⁹ The Land Act of 1979 did not recognise women’s right to own land.⁶⁸⁰ The Land Act of 1979 made no reference to gender equality and rather confirmed customary practices that prevented women from access to and ownership of land.⁶⁸¹ The government proposed a Land Bill in 2009 and it was later gazetted as the Land Act of 2010 which replaced and repealed all other laws relating to land.⁶⁸² Section 10 of the Land Act of 2010, which states that “any title to immovable property allocated to or acquired by anyone of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both”, removes previous provisions that prohibited women from owning land.⁶⁸³ Section 10 of the Land Act of 2010 enables women to own land and also gain access to credit in order to invest in land.⁶⁸⁴ This section can be viewed as one that gives room for the realisation of women’s property rights, particularly land rights.⁶⁸⁵ However, although Section 10 of the Land Act of 2010 protects women’s right to acquire land, it does not protect their right to acquire land in cases of inheritance.⁶⁸⁶ The Land Act of 2010 has an exemption for customary law in matters concerning the inheritance of land.⁶⁸⁷

The position under customary law is significantly different from the position under statutory law because under customary law, women are not allocated land.⁶⁸⁸ According to Basotho customary law, land is only allocated to married men.⁶⁸⁹ In order to be allocated land, there are certain requirements to be met; the person has to be a bona fide Sotho (a citizen of Lesotho); the person has to be married and male; the person has to succumb to the supreme power of the king; the

⁶⁷⁷ Leduka RC ‘Lesotho Urban Land and Market Scoping Study’ (2012) 2 *Roma* 9.

⁶⁷⁸ Section 34, Constitution of Lesotho 2001.

⁶⁷⁹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 35.

⁶⁸⁰ Ntlaloe KH *Assessment of the extent to which Lesotho's Land Act 1979 (Act #17) had and impact on urban morphology and patterns of Land development in Maseru and its peri-urban areas: The case of Mapeleng and Sekamaneng* (Master’s Dissertation, University of Natal, 1998) 36.

⁶⁸¹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

⁶⁸² Sekatle, Pontso. "Securing land rights for the poor and marginalized in Lesotho." In *World Bank Annual Conference on Land Policy and Land Administration*, 2010.

⁶⁸³ Section 10 (1), Lesotho Land Act of 2010.

⁶⁸⁴ Nte B & Nkumanda V ‘Land and Rural Transformation’ (2018) *Political Economy Southern Africa Editorial* 2.

⁶⁸⁵ Nte B & Nkumanda V (2018) 2.

⁶⁸⁶ Paradza G ‘Women’s Access to Land and Housing in Lesotho’ (2008) *Habitat for Humanity Lesotho* 37.

⁶⁸⁷ Paradza G (2008) 37.

⁶⁸⁸ Thahane M *Who Owns the Land in Lesotho? Land Disputes and The Politics of Land Ownership in Lesotho* Lesotho: Institute Of South African Studies, National University of Lesotho (1998) 6.

⁶⁸⁹ Thahane M (1998) 6.

person has to be declared a loyal subject by his chief; and lastly, the person has to agree to observe the obligations expected of him by the community.⁶⁹⁰

The co-existence of common law and customary law concerning women's rights to acquire land does not result in the realisation of women's property rights in rural Lesotho and this is an observation that has been made by the CEDAW Committee.⁶⁹¹ The CEDAW Committee expressed its concern towards women in rural Lesotho (who also make up majority of the women in Lesotho) due to the fact that they are characterised by poverty.⁶⁹² The Committee stated that it was concerned about the prevalence in customs and traditional practices that prevent women from acquiring land in Lesotho.⁶⁹³ The prevalence of customs and traditional practices in matters pertaining to women's ability to acquire land is also seen through the judiciary where judges prefer to refer to customary law in deciding on matters pertaining to land rights.⁶⁹⁴ The prevailing attitudes surrounding women's land rights are that of patriarchy and this is one of the main reasons why judges shy away from gender equality when deciding on matters pertaining to land in Lesotho.⁶⁹⁵ According to Mapetla, access to land is a gendered process in Lesotho.⁶⁹⁶ The dual legal system is said to have shaped a "dominant gender contract system" that gives men more rights over property such as land.⁶⁹⁷ Men are vested with the right to own land in order to provide food, shelter and meet other major household needs.⁶⁹⁸

5.1.2 MARITAL PROPERTY RIGHTS

According to Joireman, across Sub-Saharan Africa, women's rights to both movable and immovable property have been insecure or unrecognised.⁶⁹⁹ In many Sub-Saharan countries there is an absence of legal protection for the co-ownership of marital property.⁷⁰⁰ Some countries lack statutory law that provides for the right for a man and a woman who are married to co-own property due to the fact that they are not members of the same lineage.⁷⁰¹ Women's property rights are considered to be vulnerable because under customary law, women do not own

⁶⁹⁰ Ntlaloe KH *Assessment of The Extent to Which Lesotho's Land Act 1979 (Act #17) Had an Impact on Urban Morphology and Patterns of Land Development in Maseru and Its Peri-Urban Areas: The Case of Mapeleng and Sekamaneng* (Master's Thesis, University of Natal, 1998) 25.

⁶⁹¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁶⁹² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁶⁹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁶⁹⁴ *Khatala v Khatala* (CIV/APN/233/2000) (CIV/APN/233/2000) [2001] LSHC 108.

⁶⁹⁵ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 65.

⁶⁹⁶ Mapetla M 'Gendered Access to Housing in Lesotho' 1999 *Journal Storage* 70.

⁶⁹⁷ Mapetla M (1999) 70.

⁶⁹⁸ Mapetla M (1999) 70.

⁶⁹⁹ Joireman S F 'An Unholy Trinity: AIDS, Poverty and Insecure Property Rights For Women in Africa' (2006) 34 *Human Rights and Human Welfare Working Paper* 6.

⁷⁰⁰ Joireman S F (2006) 6.

⁷⁰¹ Joireman S F (2006) 12.

nor co-own any property.⁷⁰² It is believed that a woman can only claim ownership over her clothing and jewellery and in cases such as divorce, a woman can only keep her personal effects but all other property belongs to the husband.⁷⁰³

CEDAW provides for women's marital property rights under Article 15 and Article 16.⁷⁰⁴ Article 15(1) of CEDAW places a duty on the state to accord women equality with men before the law.⁷⁰⁵ Article 15(2) of CEDAW further stipulates that, among other rights, state parties must accord women equal rights to administer property.⁷⁰⁶ Article 16 of CEDAW places the obligation upon state parties to ensure that appropriate measures are taken to eliminate discrimination in matters relating to marriage and family relations and to ensure equality between men and women.⁷⁰⁷ Article 16(1)(h) states that state parties should ensure that equal rights are afforded to spouses in respect to ownership, acquisition, management, administration, enjoyment and disposition of property.⁷⁰⁸ It is important to note that some state parties have entered into reservations as regards Article 15 and Article 16 of CEDAW.⁷⁰⁹ These reservations are problematic as they were raised against what the UNICEF Executive describes as the fundamental issues such as nationality, legal capacity and equality in the family.⁷¹⁰ Article 16 of CEDAW is the Article with the most number of reservations.⁷¹¹ However, the CEDAW Committee has declared reservation to Article 16 as being contrary to the object and purpose of CEDAW and thus, invalid.⁷¹² Article 15 reservations are mostly concerned with women's legal capacity, the right to make decisions for themselves as well as their families, and the right to inherit and own property.⁷¹³ Women's lack of legal capacity in a family set up renders them subject to the authority of male heads with little to no bargaining power.⁷¹⁴ Article 16 is mainly concerned with women's right to equality during a marriage and also during the dissolution of a marriage.⁷¹⁵ Article 16 speaks to women's ability to live as equal partners and to care for themselves and their children.⁷¹⁶ These reservations are largely based in Sharia Law.⁷¹⁷ Notably,

⁷⁰² Joireman S F (2006) 12.

⁷⁰³ Joireman S F (2006) 12.

⁷⁰⁴ Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁷⁰⁵ Article 15(1), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁷⁰⁶ Article 15(2), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁷⁰⁷ Article 16 (1), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁷⁰⁸ Article 16(1)(h), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁷⁰⁹ Freeman MA 'Reservations to CEDAW: An Analysis for UNICEF' (2009) *Policy and Practice* i.

⁷¹⁰ Freeman MA (2009) i.

⁷¹¹ Freeman MA (2009) i.

⁷¹² Freeman MA (2009) 5.

⁷¹³ Freeman MA (2009) 9.

⁷¹⁴ Freeman MA (2009) 9.

⁷¹⁵ Freeman MA (2009) 9.

⁷¹⁶ Freeman MA (2009) 9.

⁷¹⁷ Freeman MA (2009) 15.

Lesotho only entered a reservation concerning chieftaincy and male succession to the throne but later withdrew the reservations in 2004.⁷¹⁸

The Maputo Protocol further provides for women's marital property rights in Africa.⁷¹⁹ Under various African cultures, women are regarded as perpetual minors and thus having no separate identity from their husband.⁷²⁰ Due to the fact that women are considered perpetual minors, they cannot acquire property in their own name.⁷²¹ However, Article 6(j) of the Maputo Protocol provides married women the right to acquire, administer, and manage their own property freely.⁷²² Ebeku notes that women married under customary law in various Africa societies have no rights to any property acquired during the marriage.⁷²³ It has also been established that under customary law, women do not have the right to divorce.⁷²⁴ However, Article 7 of the Maputo Protocol provides for the right to divorce, annulment and separation.⁷²⁵ Furthermore, Article 7(d) of the Maputo Protocol states that in the event of a divorce, annulment or separation, women and men shall have the right to an equitable sharing of the joint property.⁷²⁶

Under statutory law in Lesotho, the Deeds Registry Act of 1969, which is condemned for being gender discriminatory towards women, has not yet been abolished.⁷²⁷ The Deeds Registry Act prohibits married women from administering and managing their own property.⁷²⁸ This is contrary to the obligation placed upon Lesotho by Article 2(f) of CEDAW which requires the government to abolish laws that are discriminatory towards women.⁷²⁹ It is also contrary to Article 16(2) of CEDAW and Article 6(j) of the Maputo Protocol which provide women the right to administer and manage their own property freely.⁷³⁰ Under the Basotho customary law, customary marriages are usually in community of property and marital powers are vested in the husband to administer property.⁷³¹ The husband is also granted powers to administer the wife's

⁷¹⁸ Freeman MA (2009) 11.

⁷¹⁹ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003

⁷²⁰ Ebeku KSA 'A New Hope For African Women: Overview of Africa's Protocol on Women's Rights' (2004) 1 *Nordic Journal of African Studies* 267.

⁷²¹ Ebeku KSA (2004) 267.

⁷²² Article 6(j), Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁷²³ Ebeku KSA (2004) 267.

⁷²⁴ Ebeku KSA (2004) 267.

⁷²⁵ Article 7, Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁷²⁶ Article 7(d), Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁷²⁷ Lesotho Deeds Registry Act of 1969.

⁷²⁸ Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁷²⁹ Article 2(f), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁷³⁰ Article 16(2), Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Article 6(j), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

⁷³¹ Mamashela M 'Women and Development in Africa: With Special Reference to The Legal Disabilities of

property separately.⁷³² This position under customary law is inconsistent with Article 16(2) of CEDAW and Article 6(j) of the Maputo Protocol which both provide married women the right to freely administer and manage their own property.⁷³³ Modo notes that under Basotho customary law, there is no right for a woman to divorce her husband, however, in the unlikely event that she can divorce her husband, she leaves the marriage with no property because her property would have been submerged into that of her husband's property.⁷³⁴ Banda notes that regardless of the many pronouncements by human rights bodies, there is very little recognition of women's right to an equitable share of marital property upon divorce.⁷³⁵ In fact, in countries such as England, it took until 2003 before a woman considered as a "house maker" was given an equitable share of marital property upon divorce.⁷³⁶ The stance under Basotho customary law is inconsistent with that of the Maputo Protocol.⁷³⁷ According to Article 7 of the Maputo Protocol, a woman has the right to divorce and furthermore, Article 7(d) provides women the right to an equitable share of the joint property upon divorce, separation or annulment.⁷³⁸ A married woman's inability to receive an equitable share of the joint property under Basotho customary law is inconsistent with the obligations under the Maputo Protocol.⁷³⁹

The co-existence of customary law and common law concerning women's property rights does not permit the realisation of women's property rights in rural Lesotho. The Deeds Registry Act of 1969, prohibits women from administering and managing property.⁷⁴⁰ This is observed in how some legal practitioners in Lesotho refuse to effect registration in the names of the women.⁷⁴¹ Under customary law, once a woman is married, her property is submerged into that of her husband's and her husband is granted marital powers.⁷⁴² This prevents married women from being able to administer and manage the property as the power granted to the man is absolute.⁷⁴³ This is also reflected in case law. In the cases of *Matjeloane v Matjeloane* and *Kurubally v*

732 Married Women in Lesotho' (1985) 15 *Journal of Eastern African Research and Development* 166.

733 Mamashela M (1985) 166.

734 Article 16(2), Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Article 6(j), Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003.

735 Modo I V 'Dual Legal System, Basotho Culture and Marital Stability' (2002) 33 *Journal of Comparative Family Studies* 381.

736 Banda F (2008) 98.

737 Banda F (2008) 98

738 Article 7, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.

739 Article 7(d), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.

740 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.

741 Lesotho Deeds Registry Act 1969.

742 UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 43.

743 Mamashela M (1985) 166.

744 *Matjeloane v Matjeloane* 1977 LLR 4.

Kurubally, both women were denied access to their share of marital property due to the marital powers of the husband which were believed to extend to even the “person of the wife”.⁷⁴⁴

5.1.3 WOMEN’S RIGHT TO INHERIT PROPERTY

One of the many hurdles to the realisation of women’s human rights in Africa is said to be the denial of women’s right to inherit land and property.⁷⁴⁵ In a significant amount of traditional societies in Sub-Saharan Africa, the use of land, housing, and transfer of both land and housing is regulated by customary law which, in its nature, excludes women from inheriting property.⁷⁴⁶ The implication of this is that without secure land and property rights, orphans and widows are often left homeless and vulnerable after the death of a father or husband.⁷⁴⁷ Disinheritance is a serious threat to women’s economic security and independence as well as their human rights to food and housing.⁷⁴⁸ According to Ebeku, Article 21 of the Maputo Protocol is a revision of many customary laws in Africa that deny women the right to inherit property either from their late husbands or from their parents.⁷⁴⁹ Article 21(1) of the Maputo Protocol states that a widow shall have the right to an equitable share in the inheritance of the property of her late husband and also that she has the right to continue to live in the matrimonial home.⁷⁵⁰ There is a question as to whether “equal” and “equitable” have the same meaning; the CEDAW Committee argues that these words do not carry the same meaning.⁷⁵¹ In its concluding observation to a report submitted by Paraguay, it was noted by the CEDAW Committee that these words were not interchangeable.⁷⁵² It further stated that the purpose of CEDAW was to eliminate discrimination between men and women by ensuring de jure and de facto equality; therefore the CEDAW Committee recommended that the state use “equality” henceforth.⁷⁵³ Article 21(2) states that women shall have the right to inherit, equally, from their parents’ properties.⁷⁵⁴

Under Basotho customary law, in the common case where there is no will, inheritance is passed down through the male line.⁷⁵⁵ Very few wills are registered under the Lesotho Deeds Register and that indicates that customary law is dominant in cases of inheritance.⁷⁵⁶ Under the Basotho

⁷⁴⁴ *Matjeloane v Matjeloane* 1977 LLR 4. See also *Kurubally v Kurubally* (CIV/T/573/83 , CIV/APN/270/83) [1985] LSCA 98.

⁷⁴⁵ Richardson AM ‘Women’s Inheritance Rights in Africa: The Need to Intergrate Cultural Understanding and Legal Reform’ (2004) 11 *Human Rights Brief* 19.

⁷⁴⁶ Richardson AM (2004) 19.

⁷⁴⁷ Richardson AM (2004) 19.

⁷⁴⁸ Richardson AM (2004) 19.

⁷⁴⁹ Ebeku KSA (2004) 267

⁷⁵⁰ Article 21(1), Protocol to the African Charter on Human and Peoples’ Rights on The Rights of Women in Africa 2003.

⁷⁵¹ Banda F (2006) 78.

⁷⁵² Banda F (2006) 78.

⁷⁵³ Banda F (2006) 78.

⁷⁵⁴ Article 21(2), Article 21, Protocol to the African Charter on Human and Peoples’ Rights on The Rights of Women in Africa 2003.

⁷⁵⁵ Moseitse P *Gender Stereotypes and Education in Lesotho* (Phd Thesis, University of Free State, 2006) 127.

⁷⁵⁶ Letuka PM, Mamashela K, Matashane-Marite B, Morolong M & Motebang SM *Family Belonging for*

customary law, the eldest son is entitled to inherit from the deceased and that essentially means a widow is subject to disinheritance from the property acquired during a marriage.⁷⁵⁷ The courts in Lesotho have also applied the customary rule by stipulating that the eldest son has superior rights regarding the inheritance of property.⁷⁵⁸ Although there are instances when a widow may be allowed to inherit property that has been acquired during the marriage, the greater scheme is that the eldest son of the first wife is entitled to inherit the property in order to remain in the family and perpetuate the lineage.⁷⁵⁹ Widows are often only left with secondary rights to use the property of the deceased husband.⁷⁶⁰ Similarly, a female child is also prohibited from inheriting from her late parent's estate because the eldest son of the first wife is deemed the heir.⁷⁶¹ In cases where parents are able to draft wills, the female child is most likely to inherit property such as clothes, blankets and kitchen utensils whilst the male child is likely to inherit the property which is of great value.⁷⁶²

The position in Lesotho does not provide for the realisation of rural women's property rights. Statutory law such as the Land Act of 2010 exempts customary law in cases of inheritance.⁷⁶³ The Constitution of Lesotho also exempts customary law where equality and non-discrimination is concerned.⁷⁶⁴ Customary law leaves widows and female children vulnerable to disinheritance because under customary law, the first male child of the first wife is entitled to inherit the property of the deceased.⁷⁶⁵ This observation was made by the CEDAW Committee in its concluding observation to Lesotho, where the CEDAW Committee expressed its concerns about the persistence of discriminatory customary laws and practices in matters such as inheritance and property rights.⁷⁶⁶

5.2 CONCLUSION

Lesotho is a country rich in customary law that applies to all its citizens and despite attempts to make it die down; it is a remarkably strong source of law in the country.⁷⁶⁷ Due to colonisation, Roman-Dutch and English Law were imposed upon the legal system of Lesotho and today,

Women (1998) 168

⁷⁵⁷ Moseitse P (2006) 127.

⁷⁵⁸ *Tsosane v Tsosane* 1971-1973 LLR 1.

⁷⁵⁹ Letuka P, Matashane K, Mamashela MP, Mbatha L and Mohale M 'Women and Law in Southern Africa' Maseru: Research Project Women and Law in Southern Africa (1994) 154

⁷⁶⁰ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 21.

⁷⁶¹ Moseitse P (2006) 127.

⁷⁶² Molapo ELM *Women and Patriarchy in Lesotho: A Deconstructive Study* (Phd Thesis, University of The Free State, 2005) 122

⁷⁶³ Paradza G 'Women's Access to Land and Housing in Lesotho' (2008) *Habitat for Humanity Lesotho* 37.

⁷⁶⁴ Section 18, Constitution of Lesotho 2001.

⁷⁶⁵ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

⁷⁶⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁷⁶⁷ Maqutu WCM & Sanders AJGM 'The Internal Conflict of Laws in Lesotho' 1987 *Comparative and International Law Journal of Southern Africa* 377.

Lesotho has a dual legal system.⁷⁶⁸ Apart from its National Legislation, Lesotho has also adopted various international legal instruments, particularly CEDAW and the Maputo Protocol which provide for norms and standards pertaining to women's property rights. CEDAW and the Maputo Protocol have placed obligations upon Lesotho concerning the realisation of women's property rights and that includes women in the rural areas who make up the majority of the population in Lesotho. In Lesotho, where there is a dual legal system, the co-existence of these laws needs to result in the realisation of women's property rights in order to fulfil the obligations placed upon it by legal instruments such as CEDAW and the Maputo Protocol. Land Rights, marital property rights and inheritance of property were used to establish whether or not the co-existence of customary law and codified law in Lesotho resulted in the realisation of rural women's property rights.

Where land is concerned, the Land Act of 2010 has progressed from that of 1979 by permitting women to have land registered in their names. However, under customary law, land cannot be allocated to a woman. Only married men in Lesotho are allowed to have land allocated to them for purposes of sustaining their households and providing for their families. Women can only access land through men. The Land Act of 2010 further exempts customary law in cases of inheritance of land, often leaving women vulnerable to customary practices concerning inheritance. In this case, the co-existence of both codified and customary law does not provide for the realisation of women's property rights in rural Lesotho.

The Deeds Registry Act of 1969, although no longer used, has not been abolished as required by Article 2 of CEDAW. The Deeds Registry Act was condemned for not permitting married women to have property registered in their names and thus prohibiting them from managing their own property freely. The Deeds Registry Act of 1969 echoed the customary law principle that awards a husband marital power and thus absolute control over the marital property. This has also been seen in court decisions. Basotho customary law gives women the status of a perpetual minor and therefore husbands have full control over the marital property and how it is disposed of. Cases of divorce are rare under customary law, however, when a divorce is successful, because a woman's property is submerged into that of her husband's, she leaves the marriage with no access to her share of the marital property. In the case of marital property, the co-existence of codified law and customary law does not provide for the realisation of women's property rights in Lesotho.

Laws and customary practices resulting in the disinheritance of women have left widows and female children vulnerable. The Constitution of Lesotho exempts customary law in cases where discrimination is concerned. Legislation such as the Land Act of 2010 exempts customary law in cases of inheritance. Under Basotho customary law, the eldest male child from the first wife is entitled to inherit and therefore the widow(s) and female children of the deceased cannot inherit

⁷⁶⁸ Maqutu WCM & Sander AJGM (1987) 379.

from the estate. The co-existence of customary law and codified law concerning women's right to inherit does not provide for the realisation of women's property rights in rural Lesotho.



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CHAPTER 6- OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

6.0 INTRODUCTION

Based on the findings of the previous chapters, the following concluding chapter will draw observations from the research and also make recommendations to Lesotho concerning the realisation of rural women's property rights.

6.1 SUMMARY OF FINDINGS AND CONCLUSION

This research set out to conduct an analysis on women's property rights under both customary and common law in Lesotho, with the aim of establishing whether or not these rights of women in rural areas are being realised. This research further sets out to establish whether the co-existence of customary law and common law in Lesotho allows women in rural areas to exercise their property rights as established in various international legal instruments such as UDHR, the ICESCR, CEDAW and Maputo Protocol as well as national legislation in Lesotho. In order to complete the above-mentioned task, it was important to establish the international and regional legal framework on the right to property (norms and standards) as well as the definition, scope and content of this right. This was then followed by the task of establishing Lesotho's National Legislation and Policies concerning women's right to property. This research established that the co-existence of both common law and customary law is unfavourable to women's property rights in rural areas. Customary law prohibits women from exercising their property rights whilst common law tends to be ambiguous in matters pertaining to women's property rights. Below are the findings of each of the tasks carried out.

6.1.1 INTERNATIONAL NORMS AND STANDARDS ON THE RIGHT TO PROPERTY

Property, which is very important when establishing one's economic status and empowerment, can simply be understood as anything one can own or have access to control over.⁷⁶⁹ The right to property is a complex right, often difficult to define, as it extends to various disciplines of law such as criminal law, civil law and human rights law.⁷⁷⁰ Although the scope and content of the right to property is difficult to define, the research outlined four core aspects to the right to property; first, the right includes a relationship between an individual and a government entity; secondly, the right to property is not an absolute right but rather a relative right; thirdly, property is not limited to furniture and money in the bank but various kinds of property such as shares;

⁷⁶⁹ Ankora T K *An Analysis of The Protocol To The African Charter On Human and Peoples' Rights on The Rights of Women in Africa: A Case of Women's Property Rights in Ghana* (published Master's Thesis, The University of Ghana, 2015) 18.

⁷⁷⁰ Van Banning TRG *The Human Right to Property* (2001) 2.

and fourthly the right encompasses property one enjoys as an individual as well as property one enjoys in community with others.⁷⁷¹

The right to property was first recognized in the Universal Declaration of Human Rights under Article 17, which states that everyone has the right to own property either on their own or in association with others and further states that no one shall be arbitrarily deprived of the right to property.⁷⁷² The right to property is not expressed under the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR).⁷⁷³ The right to property is recognised in various regional legal instruments around the world such as the American Declaration on the Rights and Duties of a Man which states that every person has the right to own property as this is important to meet the essential needs for a decent living and helps to maintain the dignity of an individual; Protocol No.1 to the European Convention on Human Rights which provides that every person, both legal and natural, is entitled to the peaceful enjoyment of his possessions; and The Convention on the Elimination of Discrimination Against Women which provides women the right to own and manage their property freely.⁷⁷⁴

In Africa, the right to property is provided for under Article 14 of the African Charter which states that the right to property shall be guaranteed.⁷⁷⁵ The right to property in Africa is interpreted broadly to protect the real rights of individuals and peoples as well as a right which forms part of a person's matrimony.⁷⁷⁶ It also extends protection rights provided for under tradition and customary law.⁷⁷⁷ It is important to note that the ambiguity of Article 14 of the African Charter degraded the protection of women's property rights.⁷⁷⁸ The African Charter generally does not sufficiently address rights pertaining to women in Africa and that is the reason the Maputo Protocol came into existence. The Maputo Protocol provides for women's land and property rights.⁷⁷⁹ Article 6(j) of the Maputo Protocol provides for women's right to own, manage and administer property freely; Article 7(d) of the Maputo Protocol provides that women have the right to an equitable share of marital property during the process of separation, divorce of annulment; Article 19(c) provides for the promotion of women's access to reproductive resources such as land; Article 21(1) provides for a woman's right to inherit an equitable share of

⁷⁷¹ Sprankling JG 'The Global Right to Property' (2014) 52(2) *Columbia Journal of Transitional Law* 497.

⁷⁷² Article 17, Universal Declaration of Human Rights 1948.

⁷⁷³ Ankora T K (2015) 25.

⁷⁷⁴ American Declaration of the Rights and Duties of Man 1948. See also Article 1, The Protocol No.1 to The European Convention on Human Rights. See also The Convention on the Elimination of Discrimination Against Women 1979.

⁷⁷⁵ Article 14, African Charter on Human and Peoples' Rights 1981.

⁷⁷⁶ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 19.

⁷⁷⁷ African Commission on Human and Peoples' Rights: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 19.

⁷⁷⁸ Van Banning TRG (2001) 63.

⁷⁷⁹ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

her late husband's property and to remain in the marital home; and Article 21(2) provides for a woman's right to inherit an equitable share of her parent's property.⁷⁸⁰

6.1.2 LESOTHO'S NATIONAL LEGISLATION AND POLICIES ON THE RIGHT TO PROPERTY

Lesotho is a unique country due to the fact that there is one system of customary law applicable to all citizens.⁷⁸¹ However, due to colonization, the legal system of Lesotho does not only comprise of customary law but also English and Roman-Dutch Law; it is a dual legal system.⁷⁸² The modern Lesotho citizen is subject to both customary law and common law.⁷⁸³ Both these legal systems regulate property right; this section will focus on property rights under common law.

When considering the property rights of women in Lesotho, one of the fundamental rights is the right to equality found in Section 18 of the Constitution of Lesotho, which provides for the freedom from discrimination.⁷⁸⁴ It is important to note that Section 18 of the Constitution exempts customary law where discrimination is concerned.⁷⁸⁵ The Constitution of Lesotho provides for the right to property under Section 34 which places a duty on the state to adopt legislation and policies which shall encourage its citizens to acquire property including land and housing.⁷⁸⁶ Where Land is concerned, it is important to note that there are two acts to refer to; the Land Act of 1979 and the Land Act of 2010. The Land Act of 1979 was said to be gender discriminatory and enforced customary practices that prohibited women from owning land.⁷⁸⁷ However, the Land Act of 2010 has played a part in realising the property rights of women in Lesotho by recognizing a woman's right to own and access land.⁷⁸⁸ The Land Act of 2010, however, exempts customary law in matters concerning the inheritance of land.⁷⁸⁹ The implication of this is that the customary rule of male primogeniture excludes women from inheriting land.⁷⁹⁰

⁷⁸⁰ Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁷⁸¹ Maqutu WCM & Sanders AJGM 'The Internal Conflict of Laws in Lesotho' 1987 *Comparative and International Law Journal of Southern Africa* 378.

⁷⁸² Maqutu WCM & Sander AJGM (1987) at 379.

⁷⁸³ Modo IVO 'Dual Legal System, Basotho Culture and Marital Stability' (2002) 33 *Journal of Comparative Family Studies* 377.

⁷⁸⁴ Section 18, Constitution of Lesotho 2001.

⁷⁸⁵ Section 18, Constitution of Lesotho 2001.

⁷⁸⁶ Section 34, Constitution of Lesotho 2001.

⁷⁸⁷ Ntlaloe KH *Assessment of the extent to which Lesotho's Land Act 1979 (Act #17) had and impact on urban morphology and patterns of Land development in Maseru and its peri-urban areas: The case of Mapeleng and Sekamaneng* (Master's Dissertation, University of Natal, 1998) 30.

⁷⁸⁸ Section 10 (1), Lesotho Land Act of 2010.

⁷⁸⁹ Paradza G 'Women's Access to Land and Housing in Lesotho' (2008) *Habitat for Humanity Lesotho* 37.

⁷⁹⁰ Moseitse P *Gender Stereotypes and Education in Lesotho* (Phd Thesis, University of Free State, 2006) 127.

The Deeds Registry Act of 1969 is viewed as gender discriminatory towards women as it places barriers for women often prohibiting them from registering property in their names.⁷⁹¹ According to the Deeds Registry Act, a statement giving the particulars of marital status is needed in order to register property in favour of a woman and women who are married in community of property require assistance from their husbands to register property in their names; this is not the case when a married man desires to register property in his name.⁷⁹² The Deeds Registry Act still exists and it has not been abolished.⁷⁹³ This is despite the obligation placed on Lesotho by CEDAW to modify or abolish laws that are discriminatory against women.⁷⁹⁴ CEDAW and the Maputo Protocol place a duty upon states to implement policies that eliminate discrimination as well as integrate gender perspectives in the formulation of policy.⁷⁹⁵ Policy response in Lesotho, to a great extent, takes the form of legislation; however there are a few policies that have been implemented by the Lesotho government concerning property rights.⁷⁹⁶ The Lesotho Housing and Land Development Corporation (LHLDC) was established based on the recommendation in the National Housing Policy and it is mandated to provide land and housing opportunities for all income groups in Lesotho.⁷⁹⁷ Unfortunately most of the LHLDC's projects are in the capital city, Maseru, and other urban centres; limited projects extend to those outside of the urban centres.⁷⁹⁸ In 2003, Lesotho adopted the Gender Policy which is aimed at taking all gender concerns into national policy, programs and budgets with the goal to achieve gender equality in Lesotho.⁷⁹⁹ The Gender Policy addresses women's property rights and inheritance and also condemns the Deeds Registry Act of 1969, further recommending its repeal.⁸⁰⁰ The Gender Policy acknowledges that many customary practices are detrimental to women's ability to acquire land.⁸⁰¹ Important to note is that the Gender Policy calls upon Lesotho to honour its international obligations.⁸⁰²

6.1.3 LAWS OF LEROTHOLI (CUSTOMARY LAW) AND THE EFFECTS ON WOMEN'S RIGHT TO PROPERTY

A core feature to Basotho customary law is patriarchy; male dominance.⁸⁰³ Under Basotho customary law, women are considered as perpetual minors and therefore they are subjected to

⁷⁹¹ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 43.

⁷⁹² UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 43.

⁷⁹³ Molapo ELM *Women and Patriarch in Lesotho: A Deconstructive Study* (PHD Thesis, University of Free State, 2005) 21.

⁷⁹⁴ Article 2(f), Convention on the Elimination of All Forms Of Discrimination Against Women 1979.

⁷⁹⁵ Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁷⁹⁶ Leduca RC (2012) 19.

⁷⁹⁷ Leduca RC (2012) 19.

⁷⁹⁸ Leduca RC (2012) 19.

⁷⁹⁹ Mokobori P 'Gender and Development Policy' National University of Lesotho.

⁸⁰⁰ Government of Lesotho: Gender and Development Policy, 2003.

⁸⁰¹ Government of Lesotho: Gender and Development Policy, 2003.

⁸⁰² Government of Lesotho: Gender and Development Policy, 2003.

⁸⁰³ Juma L 'Chieftainship Succession and Gender Equality in Lesotho: Negotiating the Right to Equality in a

legal disabilities; they are perceived as being unable to handle affairs outside of managing the matrimonial home.⁸⁰⁴ Under Basotho customary law, land is allocated to married men for the purposes of residence and cultivation.⁸⁰⁵ Women can only access land through the male figures in their lives.⁸⁰⁶ Where marital property is concerned, the position under Basotho customary law is ambiguous. When a Basotho woman is married into a family, she is given a house of her own, one that cannot be taken away from her.⁸⁰⁷ However, in the event that she leaves the family she is married into, she can never leave as the owner of the house.⁸⁰⁸ The reality is that the house is built for her and her children to reside in, but it remains the property of her husband.⁸⁰⁹ When one is married under Basotho customary law, one is married in community of property, therefore when a Basotho woman is married, her property is submerged into that of her husbands'.⁸¹⁰ Due to the fact that a woman is considered a perpetual minor, the husband is granted marital powers and these powers extend to the administration and management of marital property.⁸¹¹ Upon marriage, a woman loses control and ownership of her property.⁸¹² In the unlikely event of a divorce, a woman is not entitled to her share of the matrimonial property and leaves the marriage with nothing but only her personal items such as clothing and jewellery.⁸¹³

Inheritance under Basotho customary law is inclined to leave widows and female children vulnerable.⁸¹⁴ Where inheritance is concerned, the rule of male primogeniture applies. Under Basotho customary law, the first male child of the first wife is entitled to inherit.⁸¹⁵ This rule has been echoed in case law.⁸¹⁶ Although there are cases when a female child may inherit, there are restrictions, and usually the female child inherits small properties such as blankets, cutlery etc.⁸¹⁷ A widow may inherit where there is no male child; however this is subject to the supervision of the male relatives of the deceased.⁸¹⁸

804 Jungle of Pluralism (2013) 22 *Texas Journal of Women and the Law* 161.

804 Nhlapo T R 'African Customary Law in the Interim Constitution' in Liebenberg (ed) *Towards the Final Constitution: A Critique of the Interim Constitution From a Gender Perspective: The Way Forward* (1995) 162.

805 Thahane M *Who Owns the Land in Lesotho? Land Disputes and The Politics of Land Ownership in Lesotho* Lesotho: Institute Of South African Studies, National University of Lesotho (1998) 6.

806 Moseitse P (2006) 308.

807 *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

808 *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

809 *Ramothello v Ramothello* (CIV/T/727/86) (CIV/T/727/86) [1989] LSHC 30 (30 June 1989).

810 Mamashela M 'Women and Development in Africa: With Special Reference to The Legal Disabilities of Married Women in Lesotho' (1985) 15 *Journal of Eastern African Research and Development* 166.

811 Moseitse P (2006) 114.

812 Moseitse P (2006) 114.

813 UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 19.

814 UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45

815 Moseitse P (2006) at 127.

816 *Tsosane v Tsosane* 1971-1973 LLR 1.

817 Molapo ELM *Women and Patriarchy in Lesotho: A Deconstructive Study* (Phd Thesis, University of The Free State, 2005) 122.

818 Moseitse P (2006) 127.

6.1.4 THE CO-EXISTENCE OF CUSTOMARY LAW AND CODIFIED LAW IN RESPECT TO PROPERTY RIGHTS

Lesotho citizens are subject to a dual legal system; customary law and Roman-Dutch Law (codified law).⁸¹⁹ The aim of this research was to establish whether or not the co-existence of these laws results to realisation of rural women's property rights, subsequently fulfilling the obligations imposed upon it by international and regional legal instruments such as CEDAW and the Maputo Protocol. Land rights, marital property rights and inheritance rights were used to establish whether or not the co-existence of customary law and codified law result in the realisation of rural women's property rights in Lesotho.

The Land Act of 2010 permits women to have land registered in their names, however, under customary law, land is allocated to married men and not women; women can only access land through male figures.⁸²⁰ The Land Act of 2010 has an exemption for customary law in cases of inheritance of land, often leaving women vulnerable to disinheritance.⁸²¹ In cases where women's land rights are concerned, the co-existence of customary law and codified law does not provide for the realisation of women's property rights in rural Lesotho. Where marital property is concerned, the Deeds Registry Act of 1969 has not been abolished or replaced.⁸²² The Deeds Registry Act prohibits women from registering property in their own names, thus preventing them from freely managing and administering property.⁸²³ The Deeds Registry Act echoes the position under customary law where women are considered as perpetual minors and incapable to handling affairs apart from managing the home.⁸²⁴ Under customary law, a woman's property is submerged into her husband's property.⁸²⁵ The husband has marital powers and is able manage and administer the property as he desires.⁸²⁶ Upon divorce, because a woman's property is submerged into her husband's property; she leaves the marriage with no property apart from her personal items.⁸²⁷ In cases where marital property is concerned, the co-existence of customary law and codified law does not provide for the realisation of rural women's property rights.

Laws surrounding inheritance in Lesotho often leave widows and female children vulnerable.⁸²⁸ The Constitution of Lesotho exempts customary law in cases where discrimination is concerned.⁸²⁹ The Land Act of 2010 exempts customary law in matters concerning

⁸¹⁹ Modo IVO (2002) 377.

⁸²⁰ Nte B & Nkumanda V 'Land and Rural Transformation' (2018) *Political Economy Southern Africa Editorial* 2.

⁸²¹ Paradza G 'Women's Access to Land and Housing in Lesotho' (2008) *Habitat for Humanity Lesotho* 37.

⁸²² Lesotho Deeds Registry Act of 1969.

⁸²³ Lesotho Deeds Registry Act of 1969.

⁸²⁴ Modo IVO (2002) 381.

⁸²⁵ Modo IVO (2002) 381.

⁸²⁶ Mamashela M 'Women and Development in Africa: With Special Reference to The Legal Disabilities of Married Women in Lesotho' (1985) 15 *Journal of Eastern African Research and Development* 166.

⁸²⁷ Modo IVO (2002) 381.

⁸²⁸ UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

⁸²⁹ Section 18, Constitution of Lesotho 2001.

inheritance.⁸³⁰ Under customary law, the first male child of the first wife is entitled to inherit from the deceased's estate.⁸³¹ This customary law principle excludes widows and female children from inheriting and therefore, the co-existence of customary law and codified law concerning women's right to inherit does not provide for the realisation of women's property rights in rural Lesotho.⁸³²

6.2 RECOMMENDATIONS

The research and observations point to the fact the property rights of rural women in Lesotho are not being realised and Lesotho is not meeting the obligations placed upon it by international and regional legal instruments. This section will briefly discuss the recommendations proposed in order to achieve the realisation of women's property rights in rural Lesotho.

6.2.1 INCORPORATION OF CEDAW AND MAPUTO PROTOCOL INTO NATIONAL LEGISLATION

It is of paramount importance that the government of Lesotho prioritises the full incorporation of CEDAW and the Maputo Protocol into its national legislation. This is essential to bring into force the legal instruments, as well as achieve the elimination of discrimination and the realisation of women's property rights. It is important that the government of Lesotho takes the necessary measures to ensure that its national legislation is in line with CEDAW and the Maputo Protocol as well as echoes the values and principles of these international legal instruments; the principle of non-discrimination and the promotion of gender equality.⁸³³

6.2.2 MODIFY, ABOLISH, REPEAL AND REPLACE DISCRIMINATORY LAWS

Article 2(f) of CEDAW states that state parties should ensure that they modify or abolish existing laws which constitute discrimination against women.⁸³⁴ Lesotho's legal system comprises of various laws are discriminatory against women. The Deeds Registry Act of 1969, which prohibits women from registering property in their own names, is discriminatory against women. Lesotho's government should abolish the Deeds Registry Act of 1969 and enact a Deeds Registry Act that recognises women's right to own property and provides for the registration of property for women. Although the Land Act of 2010 is a significant step towards the realisation of women's property rights, the exemption of customary law (which in its nature prohibits women from owning land) in matters pertaining to inheritance is discriminatory. Lesotho's government should modify ensuring that it does not exempt customary law.

⁸³⁰ Paradza G (2008) 37.

⁸³¹ Moseitse P (2006) 127.

⁸³² UN-HABITAT *Law, Land, Tenure and Gender Series: Southern Africa* (2005) 45.

⁸³³ Preamble, Convention on The Elimination of All Forms of Discrimination Against Women 1979. See also Preamble, Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa, 2003.

⁸³⁴ Article 2(f), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

6.2.3 CONSTITUTIONAL REVIEW

According to Article 2 of CEDAW, states are under the obligation to take appropriate measures to ensure that the principle of equality between men and women is embodied in their national constitutions.⁸³⁵ Although the Constitution of Lesotho provides for equality under section 18, the very same section exempts customary law in cases where equality is concerned. It is therefore important that the government of Lesotho urgently reviews its constitution.⁸³⁶ The government of Lesotho should repeal and replace section 18 of the Constitution and all other sections that allow for discrimination based on gender.

6.2.4 ELIMINATION OF PATRIARCHAL STEREOTYPES AND PRACTICES

Patriarchal stereotypes and practices have informed the belief that women are unable to own and manage property in Lesotho. It is therefore important to eliminate these stereotypes and practices in order to achieve the realisation of women's property rights. The government of Lesotho should put in place a comprehensive strategy aimed at the elimination of patriarchal stereotypes and practices that lead to the discrimination of women.⁸³⁷ The government of Lesotho could engage in educational drives in communities aimed at informing its citizens about the dangers of patriarchal practices and the importance of eliminating such practices and stereotypes. Gender stereotypes alluding to the idea that women cannot manage land and property but can merely manage a home should be debunked.

In summary, the government of Lesotho should prioritize the full incorporation of CEDAW and the Maputo Protocol into its national legislation in order to achieve the elimination of discrimination as well as the realisation of women's property rights.⁸³⁸ The government of Lesotho should abolish, repeal and replace discriminatory laws such as the Deeds Registry Act and bring into force legislation that provides women the ability to register property in their own names, manage and administer it freely.⁸³⁹ The government of Lesotho should review its Constitution and repeal sections that allow for discrimination based on gender; particularly sections of the Constitution that exempt customary law where discrimination is concerned.⁸⁴⁰ The government of Lesotho should put in place a comprehensive strategy aimed at the elimination of patriarchal stereotypes and practices that lead to the discrimination of women.⁸⁴¹

⁸³⁵ Article 2(a), Convention on The Elimination of All Forms of Discrimination Against Women 1979.

⁸³⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸³⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸³⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸³⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸⁴⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸⁴¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

The government should consider the needs of rural women in Lesotho and address the negative customary practices which prohibit women from fully enjoying their right to property.⁸⁴² The government of Lesotho should formulate a unified family code that addresses women's unequal inheritance rights, land rights and property rights.⁸⁴³ The government should put in place measures, including legislative measures, to ensure that there is equality between men and women in marriage and family relations.⁸⁴⁴



⁸⁴² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸⁴³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

⁸⁴⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho*, 8 November 2011.

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