

**THE IMPACT OF CUSTOMARY LAW AND ITS CONSTITUTIONAL PROTECTION
ON THE SOCIAL STATUS AND POLITICAL PARTICIPATION OF WOMEN IN
LESOTHO**

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DECLARATION

I, Thabang Ramakhula, declare that the thesis that I herewith submit for the Doctoral Degree Doctor of Law (LLD) at the University of the Free State, is my independent work, and that I have not previously submitted it for a qualification at another institution of higher education.

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Thabang Ramakhula

.....

Date

DEDICATION

To myself; for the many mountains, valleys and giants I had to face and overcome in order to complete this thesis. There truly is a warrior in me.

To my husband, my family and my friends for believing in me and making me see myself through your eyes.

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ABSTRACT

Lesotho has been experiencing a progressive decline in women's political participation, despite the existence of numerous interventions that have been aimed towards combating this status quo. With a goal towards understanding the causes for this progressive decline as well as why interventions fail to yield positive results, I examine the possible relationship between custom, customary law, the Constitution and women's social status and political participation in Lesotho. Towards this objective, I adopt a postcolonial and African feminist perspective to examine custom, customary law and the Constitutional protection afforded customary law in Lesotho. As a starting point, I explore the meaning and origins of custom from a general stance, and then go on to investigate the particular meaning of custom to the people who practice customs. This exploration affords a better understanding of not only custom, but also the value attributed to it by those who practice it, which value in turn enables it to exercise a form of authority over the overall being of such people. This authority, I find, makes custom instrumental in the formation and sustenance of social and political stereotypes as well as personal and communal beliefs and perspectives. I move on to customary law, particularly Lesotho's customary law. I trace the history of Basotho's customary law pre-colonialism into its codification during the colonial era. I argue in this discussion that the laws were instrumental in the formation and sustenance of women's subordination under men as well as in the modelling of the hegemony, episteme and power dynamics in men's favour, which have proven to negatively impact both women's social status and political participation. In discussing the Constitution of Lesotho, from its inception and its final state following a number of amendments, I highlight how it contains a number of issues that signal a lack of desire to promote women's empowerment or equality with men. I analyse the negative impact that the Constitution's adoption of a dual legal system, the inclusion of claw back clauses, as well as the umbrella protection it affords customary law have on Basotho women's social status and political participation.

In centring women in the discussion, it becomes clear that there exists a link between custom, customary law, the Constitution of Lesotho and women's social status and political participation. For one, I find that patriarchy is so deeply entrenched in the

fabric of Lesotho, that all spheres of society exude it - whether this is evidenced through the stereotypical shaping of the social view of women, their exclusion from the public sphere and relegation to the domestic sphere, or even the denial of women's access to the economic space of activity. The instrumental role played by law in the establishment of hegemony and episteme, which perpetuated women's marginalization vis-à-vis power relations, citizenship and political participation is also brought to the fore. I underscore how custom and law then jointly shaped and portrayed man as the standard, while simultaneously 'othering' women. This then reveals how custom and law were, and still are, weaponised against women. My conclusion in this thesis is then that custom, customary law and the Constitution of Lesotho negatively impact both Basotho women's social status and their political participation.

Key terms: custom, customary law, constitution, women's social status, women's political participation, power, politics, colonialism.

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Chapter One – Introduction

1.1 Research problem

The main research problem of the study is the extent to which the Constitution of Lesotho, 1993 (hereafter ‘the Constitution’) protects the Laws of Lerotholi in Basutoland, 1946 (hereafter ‘Laws of Lerotholi’) and how they together keep social subordination of women in place, with one concrete outcome of this being women’s low political participation. I focus on how section 18(4)(c) of the Constitution and the Laws of Lerotholi impact women’s status in society, with specific attention to women’s participation in political life and the extent to which feminist theoretical work can better unpack this negative impact.

I aim to contribute to scholarship concerning Basotho women’s social status and political participation by examining and analysing the correlation between customary law, Constitutional protection of customary law, women’s subordinate social status and women’s low political participation in Lesotho.

1.2 Research questions

The following research questions help me unpack the main research problem:

- 1.2.1 What are the main concepts and theoretical frameworks that could inform the investigation and analysis of the subordinate social status of women in Lesotho’s society and their consequent low participation in politics?
- 1.2.2 What is the relationship between the customary law of Lesotho (Laws of Lerotholi) and the Constitution of Lesotho on women’s subordinate status in Lesotho’s society?
- 1.2.3 What is the relationship between the Laws of Lerotholi, the Constitution and women’s political participation in Lesotho?

1.3 Hypotheses

- 1.3.1 Women's subordinate status in Lesotho's society is caused by, amongst other factors, the Laws of Lerotholi and the Constitutional protection of customary law.
- 1.3.2 The Laws of Lerotholi and the Constitution negatively impact women's political participation in Lesotho.

1.4 Motivation

Only 22 per cent of parliamentary seats are held by women in Lesotho.¹² This falls below the 30 per cent target set out in international instruments and protocols such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),³ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),⁴ as well as the African Union's 50 per cent target.⁵ The current 22 per cent parliamentary seats occupation in Lesotho is a drop from the 25 per cent achieved in the 2015 national elections.⁶ Lesotho also ranks 87 out of 146 in the World Economic Forum's 2022 Global Gender Gap Index.⁷ For Lesotho, being a democratic state, the above statistics do not reflect the principles of

¹ Gender Links for Equality and Justice "Women representation in Lesotho govt recedes", <https://genderlinks.org.za/pressreleases/lesotho-womens-representation-new-coalition-government/> (accessed on 20 October 2019).

² At the time of this thesis' submission, the 2022 parliamentary allocation of seats following the 2022 elections had not yet been finalized, so these statistics are for the previous parliament formed following the 2017 elections.

³ 1979.

⁴ 2003.

⁵ African Union "AU Strategy for Gender Equality & Women's Empowerment", https://au.int/sites/default/files/documents/36195-doc-au_strategy_for_gender_equality_womens_empowerment_2018-2028_report.pdf (accessed on 14 November 2022).

⁶ Gender Links for Equality and Justice "Women representation in Lesotho govt recedes", <https://genderlinks.org.za/pressreleases/lesotho-womens-representation-new-coalition-government/> (accessed on 20 October 2019).

⁷ World Economic Forum 2022:10.

equality or citizens' participation on which democracy is anchored. These statistics also highlight a prevailing problem – women's low political participation in Lesotho's politics.

This status quo has prevailed despite an increase in the overall social situation of women from pre-colonial and colonial times, where they were heavily subordinated under men and in some cases overtly excluded from political participation. The status quo has also stood firm even in the face of initiatives aimed towards increasing women's presence in political spaces, such as the Local Government (Amendment) Act,⁸ Local Government Elections (Amendment) Act,⁹ and the Gender and Development Policy 2018 – 2030. The Local Government (Amendment) Act and Local Government Elections (Amendment) Act provide that women should constitute at least one third of local government structures. The Gender and Development Policy 2018 – 2030 has as one of its objectives taking "... measures that ensure women and other marginalized groups equal access and full participation with men in governance structures, leadership, political and economic decision making."¹⁰ These initiatives failed to end the status quo and bring about a significant rise in either women's qualitative participation in the political sphere or their emancipation from the subordinate position they have occupied in society for centuries.¹¹

Viljoen and Nsibirwa posit that custom falls amongst the factors contributing to the status quo of women's low political participation in Lesotho.¹² This is, among other justifications, because custom has been found to gain and hold authority over the people it is invented and practised among.¹³ This authority affords custom the power to socialize people's view of politics and women's place in them,¹⁴ more so in societies where women do not have a leadership or political voice through, for example,

⁸ Section 4(3).

⁹ Section 18(1)(a).

¹⁰ Gender and Development Policy 2018 – 2030:22.

¹¹ Mataga 2008:3.

¹² Viljoen & Nsibirwa 2006:360.

¹³ *The case of Tanistry* (1608) Davis 28, 80 E.R. 516.

¹⁴ Sibani 2018:58.

suffrage.¹⁵ This authority exercised by custom over people goes as far as also playing a significant role in societal perspective of laws, women's social status and even how voters view female candidates.¹⁶ Customary laws were, for example, found to have facilitated women being seen and treated as subordinate in Lesotho's society.¹⁷ Custom thus clearly plays a role in the socialization process, in that it forms part of the process of shaping and predetermining societies' beliefs, views and thus actions.¹⁸ This socialization is even more powerful and effective in nations like Lesotho where women are customarily barred from participation in and occupation of all governance platforms and structures, such as the *khotla* and *pitso* institutions, as well as the chieftaincy.

This is a key observation, as it highlights the importance of not overlooking the role played by custom in the shape and occurrences we observe in any society. This is more so when looking into the lives of women, as custom has also often been found to discriminate against women and perpetuate their subjugation under men in various ways and in different spheres of society.

Custom, despite its negative relationship with women, was over the years cemented and empowered into customary law through endowment with binding authority following constant observation and practise.¹⁹ In the case of Lesotho, customary law has been so heavily embedded and cemented into society that it has even been afforded umbrella protection under the Constitution.²⁰ This is problematic for women because, as I highlight above, custom has often been found to discriminate against women and possess provisions that subjugate women under men. The Constitutional protection of customary law thus essentially protects the discrimination and

¹⁵ Slotwinski & Stutzer 2019:1.

¹⁶ See Olaleye 2004:89 This report touches on how the patriarchal social image of women and men, presenting women as followers and men as leaders, negatively impacts women's leadership aspirations.

¹⁷ Eldredge 1991:728.

¹⁸ Sibani 2018:58.

¹⁹ Hamnett 1975:14.

²⁰ Section 18(4)(c).

subjugation of women under men. This means women are left without recourse against customary discrimination and subordination.

This study then becomes imperative to understanding the relationship between the Constitution, the customary laws of Lesotho and women's low participation in Lesotho's political sphere. With the deeply engrained influence that customary issues have on women's political participation,²¹ it is important to interrogate them in line with women's political participation.

I therefore undertake my research in this thesis in light of this emerging link between custom and how women participate in the political sphere, with a goal to play a role in the increase of women's political participation in Lesotho. To this end, I follow two parts of Viljoen and Nsibirwa's suggested three-pronged approach, although not in the order they suggest. First, I explore the link between Basotho women's social subjugation and how men have traditionally been granted authority and women placed on its periphery.²² Secondly, I undertake an analysis of the centrality of Lesotho's customs and traditional authority,²³ which exclude women from leadership.²⁴

My goal in and through this thesis is, therefore, first to analyse whether there is a link between the customary laws of Lesotho and the Constitutional protection of customary laws, and the subordinate status that Basotho women labour under in Lesotho. Secondly, my goal is to analyse whether there is a link between the customary laws of Lesotho and the Constitutional protection of customary laws, and the low political participation of Basotho women.

²¹ Kiamba 2008:10,12.

²² Viljoen & Nsibirwa 2006:359.

²³ As I highlight in following chapters, Lesotho's traditional authority possesses legal authority even in present-day Lesotho.

²⁴ Viljoen & Nsibirwa 2006:359.

1.5 Method and Theoretical Approach

Desktop study is adopted as a research method for purposes of this study. Desktop study entails a critical overview and analysis of literature and texts such as the Constitution (1993), Laws of Lerotholi, other relevant pieces of legislation, case law and academic text.

The theoretical approaches I adopt are postcolonial theory²⁵ and African feminism. Postcolonial theory is an umbrella term for the various theories and practices whose primal focus is exploring and understanding colonialism's clear and enduring cultural, political, social and economic legacies in the present day.²⁶ It also includes scholarly and creative work aimed towards the investigation of the colonisation of states by Europe in terms of the actions of the colonisers, the reactions of the colonised and the resultant struggles both during and post colonialism. Postcolonialism is thus a study of all the social, political, cultural, and economic changes brought about by the impact of colonialism on the colonised states and their people. Although it takes various forms and interventions, the fundamental claim of postcolonial theory is shared by all these forms: we cannot understand the world as it is now apart from its relationship with imperialism and colonialism.

Although its primal focus is colonialism, postcolonial theory is also of relevance to this thesis due to its focus on the link between hegemonic discourses, psychoanalysis and how to deconstruct power and knowledge within them. My argument in this thesis - how customary law and the Constitutional protection of customary law negatively affects women, denying them full identity, citizenship, and both a role and a voice in Lesotho's political sphere - is also informed by postcolonial theory's exploration of the denial of voice and identity to the marginalised. Postcolonial theory thus provides me with ideas and concepts that help me explore and analyse the extent to which the Constitution protects the Laws of Lerotholi and how they together keep social

²⁵ While decolonization theories do deal with issues of colonialism and political identity, hence a seeming better fit, I find that postcolonial theory's inclusion of and concern with issues such as hybridity, representation and power is more closely connected with the focus of my examinations in this thesis.

²⁶ Elam 2019.

subordination of women in place, with one concrete outcome of this being women's low political representation.

African feminism, on the other hand, alludes to feminist epistemology and rhetoric whose arguments affirm and validate African women's experiences.²⁷ It is also a social movement committed to raising global awareness and understanding of the histories, current challenges, and future expectations of African women.²⁸ Essentially, African feminism acknowledges the history and variety of Africa, and the reality of the challenges that African women are faced with in their everyday lives, some of which are traceable to historical injustices.²⁹ African history, diversity and colonialism are, therefore, all important considerations for African feminists.³⁰

African feminism's affirmation of African women's experiences then "...give[s] the woman a sense of herself as a worthy, effectual, and contributing being, while it rejects stereotypes of woman that deny her a positive identity,"³¹ with the expected outcome of the establishment of "... a new, liberal, productive and self-reliant African woman within the heterogeneous cultures of Africa."³²

Womanism, nego-feminism and motherism make up the many forms of African feminism. I do not, however, focus on either of them particularly in this thesis, but rather focus on the commonalities that they all share between them. These commonalities include calling into question how Western feminism excluded and still excludes the experiences of African women. Secondly, they are also jointly inspired by the history and traditions of African people, for purposes of developing the tools deemed necessary for the empowerment of women and the education of men. Thirdly, they all agree on the importance of including men in the development of women's lives.

²⁷ Goredema 2010:34.

²⁸ Goredema 2010:34.

²⁹ Stuhlhofer 2022:1.

³⁰ Stuhlhofer 2022:1.

³¹ Ekpa 2000:29.

³² Nkealah 2006:139.

African feminism underpins my argument in this thesis regarding customary law's perpetuation of the subordination of Basotho women, as well as how this manifests itself in their daily lives and experiences. Its value to my argument pertains its centralisation of African customs and ways of life in the debate concerning women's subordination. Consequently, African feminism is proven an apt theoretical framework concerning making sense of the connection between African history and the influence it presently yields women's social status and political participation.

1.6 Overview of chapters

Chapter two

Following the current chapter, in chapter two I map out the key concepts and theoretical frameworks that form a basis for the investigation and analysis I undertake in this thesis, concerning the role that the customary laws of Lesotho, as well as the Constitutional protection of customary laws, play towards women's subordinate social status and low political participation in Lesotho. The key concepts that inform my analysis are patriarchy, sex and gender, stereotyping, sameness/difference, public/private divide, power, politics, customary law, representation and citizenship. The two theoretical frameworks I engage are Postcolonial theory and African feminism.

I begin with engaging patriarchy. In understanding how deeply entrenched in different spheres of society patriarchy is, I better grasp how society is shaped in such a way as to keep women subordinated to men and placed on the periphery of key social institutions. It then becomes clearer why strategies such as the public/private divide and the seclusion of women to the private sphere on the basis of their sex and gender constructed on such sex were key in upholding patriarchy in society. These strategies also help me navigate understandings and approaches to the concept of power and where it is found as well as how it operates in society, in order to undergird my analysis of women's denial of not only power in society, but more specifically political power.

I also find in this chapter that customary law, as a system, plays a role in the formulation of hegemony and episteme, in a manner that significantly facilitates the marginalisation of women from power relations, political participation and citizenship, all which are key for women's political participation. This I find that it does through forming social perception between the sexes in a stereotypical manner, oftentimes in such a way as to place men as the main and ideal sex, and women as the lesser 'other'. There is then a deliberate undertaking of knowledge-production that is undertaken, with the main goal of securing the desired hegemony and thus keeping women in a subordinate social position.

Centring Basotho women in my exploration and analysis of colonial Lesotho also affords me a better understanding of the ideologies and objectives that served to silence and subordinate women under men, as well as the different systems engaged to establish and maintain the hegemony.

Chapter three

Chapter three contains my exploration of the link between the customary laws of Lesotho (the Laws of Lerotholi), the Constitution of Lesotho and women's social status in Lesotho. In this chapter I begin with tracing Lesotho's customs, customary laws, and Constitution from their inception to the present-day state in order to illustrate how the law operated and continues to operate not only to enable but also to perpetuate Basotho women's subordinate social status.

I consider the pre-colonial origin of customs in Lesotho and the process of the codification of Basotho's customary laws into the Laws of Lerotholi during colonial times and highlight the discriminatory nature of the pre-colonial customs as well as critique women's absence from the codification process. The manner in which women were erased from historical narrations, except when depicted in stereotypical roles that served to affirm and perpetuate the hegemony and episteme, is seen to rear its head again in women's exclusion from the codification process of the Laws of Lerotholi. Both the erasure and exclusion served a specific purpose - establishing male

dominance over women and, second, condemning women to a social status of perpetual subordination. This use of law as an instrument of dominance falls into Gramsci's argument concerning law's operation as a channel for the provision or denial of power in society, thus establishing law as instrumental in the formation and maintenance of any given episteme and hegemony.³³ In the case of Lesotho specifically, I find that customary law was indeed used to establish women's subordination, as customary laws were found to have been "... the means for, rather than the cause of, Basotho women's subordination".³⁴

I do not find the Constitution to be an exception. For one, the Constitution retains colonial ideologies that perpetuate women's subordinate social status and exclusion from the political sphere. The dual-legal system operating in Lesotho and the umbrella protection afforded customary law under the Constitution, for example, protect and empower customary law and ensure the survival of its discrimination against women even in present day society. Second, although the Constitution possesses a Bill of Rights that provides for equality of citizens and non-discrimination, it is equally heavy-laden with claw-back clauses that essentially negate these rights said to be provided for citizens. The retention of colonial ideologies, dual legal system, umbrella protection afforded customary law and the claw-back clauses in the Constitution indicate a reluctance on the side of the Constitution to protect Basotho women truly and fully from inequality and discrimination. This, then, demonstrates the absence of a legitimate Constitutional will to protect women and ensure their social equality with men.

I also draw attention to how the Laws of Lerotholi and the Constitution jointly initiate and maintain Basotho women's subordinate social status. Customarily this is partially facilitated through women's relegation to the private sphere where they carry the burden of homecare and exclusion from inheritance and the ownership of land and cattle in order to keep them economically dependent on men and marginalization from

³³ Gramsci 1999:246-247.

³⁴ Eldredge 1991:728.

governance platforms such as the *khotla* institution in order to keep them on the periphery of politics. Constitutional protection of customary law cements this subordinate position and thus supports the economic underdevelopment and oppression of women, male dominance in society, women's unpaid labour in the private sphere as well as a silencing of women's voice in both the private and public spheres. Consequently, I argue that these two pieces of legislation have a negative impact on Basotho women's social status and place them in subordinated socio-economic, civil, and political positions.

Chapter four

In chapter four I explore the relationship between the customary laws of Lesotho, the Constitutional protection enjoyed by such customary laws and women's political participation in Lesotho. More specifically, I investigate the myriad ways in which Basotho women's political participation is negatively impacted by the customs, customary law and Constitution of Lesotho. I begin my investigation with reiterating Foucault's argument that people's lives have become the very focal point of politics, thus making it unwise to focus only on what happens in and around legislative chambers or voting booths when undertaking political analysis.³⁵ In the same light, I argue that because politics drift towards power, strategies adopted to deny women any form of power should be seen as they are – political moves meant to keep power away from women, thereby allowing men to maintain their political dominance over women.

I commence part one with an analysis of custom. I specifically look into the intricate relationship between the socialization of society and the acquisition and cementing of custom. I also analyse the inter-generational nature of custom, the value that people ascribe to it and consequently the authority it is able to effect over people. I undertake this analysis with the goal to create foundational understanding of the position custom

³⁵ Foucault 2008:2, see also Foucault 2007:108-109.

holds in society and people's lives, in order to substantiate my argument that custom does indeed wield some form of influence over women's political participation. To this end, I argue that because custom possesses a macro-concept nature, it is able to seep into all the spheres of a person's life, enabling it to have a say in all of these spheres, dictating elements of people's lives such as what beliefs and convictions they are to hold. This, in turn, signals how custom forms people. This analytical undertaking I embark on here is key in drawing and emphasizing the link between the customs a person grows and lives within, and who they will see as fitting the role and candidacy of political participant.

I go on to discuss the institutions that make up Lesotho's customary governance system – the chieftainship, *pitso* and *khotla*. My goal for this discussion is to detail women's exclusion from within them. I detail how women were either expressly excluded from membership within them, were not allowed to participate if allowed membership and how even if they were at times allowed participation or presence, it was not in their personal capacity but only to keep the seat occupied until a man could occupy it in his own right. I then draw attention to how these exclusions were strategic moves intended to paint a stereotypical image of an absence of association between women and governance. I posit also that this was a step in retaining political power among men, simultaneously denying women access to power, social influence, and the exercise of their citizenship through participation in the decision-making processes of their society.

Furthermore, I argue and present support for my claim that the same exclusionary qualities that I show customary political systems to have possessed and still exude to this day, can also be found in present - day politics and political systems in Lesotho. I pave way for my connection in part two of customary and modern political systems through first presenting and elaborating at this point how Lesotho's traditional leadership institutions legitimize and sustain the exclusion of women from decision-making processes, so I can show in part two how this is mirrored in modern-day politics and political systems.

Following these arguments and assertions, I find that custom does indeed possess the power to dictate people's political views, a power that stands strong even in the presence of contradicting views or realities. I observe that this is the case because some people have been so deeply socialised into customary ways and beliefs that the hold of custom over them is so profound that it leaves them even believing they stand the risk of being cursed if they go against customary dictates. Some people are also found to believe that a denial of customary ways is also a denial of their very history, origins and being as a people, hence the need to protect their customary ways. This, for me, demonstrates why it is that custom and customary law stand strong and retain a strong following even in the face of modernisation and progression that work to lead us away from traditional and patriarchal ways of life. This demonstrates, too, why it is that even post-independence and in the presence of numerous international instruments and regional and national pieces of legislation, the present-day systemic setup of the political sphere still greatly reflects the patriarchal nature observed in the customary setup. This 'customary setup' I refer to is the same customary setup that denied women membership, attendance and or participation, in order to deny them access to social and political power, so that the episteme of the times, which depicted women as only valuable in the domestic sphere, would hold. Of note is how this in turn impacted women's confidence pertaining political participation, in how it left them believing the established episteme that presented them as inadequate for public sphere activities and engagements. Consequently, the customary political system and the approach it took concerning women's place in governance and leadership of any kind, is seen to still hold strong and rear its head even in the present-day political system's relationship with women and their place in governance and leadership.

In part two, I investigate the constitutional facilitation of women's low political participation. I focus first on how the umbrella protection the Constitution provides customary law essentially enables the incorporation of traditional patriarchal values into the Constitution and simultaneously modern governance. I then look into how this umbrella protection resultantly subordinates constitutional provisions concerning women, under customary provisions dealing with women. I argue that the result is a constitution which from its inception, was already patriarchal and not meant to benefit

women. I demonstrate this through first looking into the Constitutional adoption of a dual legal system, which effectively led to Lesotho's post-independence political system incorporating the traditional governance structures, and secondly through unpacking the Constitutional give-and-take attitude pertaining women's rights and how this prevents women from enjoying the rights that they are afforded in the Constitution. As I undertake this analysis, I argue that the Constitution possesses an innately anti-women nature, which in turn negatively impacts women's political participation and, in some cases, even expressly provides for their exclusion from governance structures. I also find that the Constitution created a legally conducive environment for patriarchal customary laws and systems to exist and thrive, enabled through the adoption of a dual legal system and claw back clauses that served to deny women any liberation from patriarchal and discriminatory provisions or systems. This, then, sentenced women to labouring under the same patriarchal system that subordinated them to men and enabled men's domination over them. I discover that one of the consequences of this status quo is modern political structures that are so vividly reflective of the same structure, content, and power dynamics that existed prior to independence. This, I argue, explains why modern politics cannot be expected to not be as exclusionary and as discriminatory as those established post-independence, which they have incorporated and protect jealously.

Chapter five

In chapter five I provide a summary of the conclusions from the analysis and critique I undertake in the chapters of this thesis regarding the impact that the customary laws of Lesotho and the constitutional protection they enjoy has on women's social status and political participation in Lesotho. I also include recommendations and conclusions that I come to, following my study.

Chapter Two

Key concepts and theoretical frameworks informing the study

2.1 Introduction

The main research problem of the study is the extent to which the Constitution protects the Laws of Lerotholi and how they together keep social subordination of women in place, with one concrete outcome of this being Basotho women's low political participation. In this chapter I specifically explore the key concepts and theoretical frameworks that inform the investigation and analysis of the subordinate social status of women in Lesotho's society and their consequent low participation in politics. I present this chapter in two parts.

In part one, I explore the key concepts underlying the issues of women's subordinate position in society as well as those that speak to women's low political participation. These concepts assist me in unpacking and exposing the main concerns in this thesis - that women have been assigned and occupy a subordinate social status and this negatively impacts their political participation. I therefore problematise the customary denial of women's autonomy, through relegation to the private sphere, facilitated and maintained through biological determinism, as well as how customary law has been a basis for women's exclusion from citizenship, representation, and power. I engage the concept of stereotyping in order to expose how women, and society as a whole, have been moulded to see women as weak and less than, in order to justify and perpetuate the 'othering' of women and their denial of political participation and power. I also unpack power as a concept, so as to uncover how, for example, even the language of the day is a system facilitating the control of power relations and epistemes. It is, essentially, in exploring and understanding these concepts that I better understand underlying issues, ideals and ideologies of the Basotho society that I study, and how these in turn impact women's social status and political participation.

In part two, I speak on Postcolonial theory and African feminism as theoretical frameworks that assist me in exposing the problem of women's subordinate position in society and their low political participation. I engage postcolonial theory in the

exploration and analysis of the social, political, cultural, and economic changes brought about by colonialism's impact on colonized nations and people, as it is near impossible to comprehend the world as it is today unless we understand its relationship to imperialism and colonialism. African feminism enables me to centre women and their historic experiences in the analysis, in order to get "... to the bottom of African gender relations and the problems of African women - illuminating their causes and consequences – and criticis[ing] them."³⁶ I explore too how both the customary laws of Lesotho and the Constitution decentre women, from their inception to their contents, and how this facilitates the socio-legal subordination of women. The history and contents of laws are key, as Gramsci centres law as one of the instruments through which power is exercised and power relations built and sustained, through law's ability to create new civilisations and spread specific attitudes and mindsets.³⁷ I also draw from postcolonial theory's exploration of the denial of voice and identity to the marginalised in order to explore colonialism's role in the silencing of Basotho women both socially and politically through, among other means, the weaponization of language against women, in order to erase them and their experiences from various platforms. I again draw from African feminism in order to centralize, historicize, and deconstruct knowledge production, identity construction, and agency and thus reclaim women's agency.

I also engage the frameworks in my analysis of the manner in which colonialists distorted not only the customs of Lesotho, but also how they played a crucial role in the distortion of laws and the 'othering' of women in Lesotho's socio-political space. My argument in this thesis, concerning how customary subordination has negatively affected women, denying them full identity, citizenship, and both a role and a voice in Lesotho's political sphere, is also informed by the frameworks' exploration of the denial of voice and identity to the marginalised. I draw from these frameworks with the hope of giving "... the woman a sense of herself as a worthy, effectual, and contributing

³⁶ Arndt 2002:32.

³⁷ Gramsci 1980:246-247.

being...”,³⁸ thus birthing “... a new, liberal, productive and self-reliant African woman within the heterogeneous cultures of Africa.”³⁹

2.2 Key Concepts

2.2.1 Patriarchy

Patriarchy is a system in which social structures and practices are constructed in such a manner as to enable and perpetuate the domination, oppression, and exploitation of women by men.⁴⁰ Facio defines it as follows:⁴¹

Patriarchy is a form of mental, social, spiritual, economic and political organization/structuring of society produced by the gradual institutionalization of sex-based political relations created, maintained and reinforced by different institutions linked closely together to achieve consensus on the lesser value of women and their roles. These institutions interconnect not only with each other to strengthen the structures of domination of men over women, but also with other systems of exclusion, oppression and/or domination based on real or perceived differences between humans, creating States that respond only to the needs and interests of a few powerful men.

Patriarchy stands as the principal obstacle to the advancement and development of women.⁴² It operates in such a manner as to project women as inferior to men and incapable of any true contribution to society, more so in the public sphere, hence

³⁸ Ekpa 2000:29.

³⁹ Nkealah 2006:139.

⁴⁰ Walby 1990:20.

⁴¹ Facio “What is Patriarchy?”, <http://www.learnwhr.org/wp-content/uploads/D-Facio-What-is-Patriarchy.pdf> (accessed on 15 November 2022).

⁴² Sultana 2012:1.

necessitating their relegation to the private sphere. Though women experience patriarchy in different forms and levels of domination, the control it affords men over them remains fixed.⁴³ This control stands undefeated even despite the progress that has been made in advancing women's rights and advancing the use of merit over sex in appointments and promotions.⁴⁴ This is because the patriarchal system still creates and enables obstacles that prevent women's advancement, even where they possess the necessary merit.⁴⁵ These obstacles are experienced by women both in the private and public spheres, and manifest themselves through subordinating women in a myriad of ways.⁴⁶ For example, boys are groomed from birth to see and approach life through a patriarchal lens, where women are projected as less powerful and of less value than men.⁴⁷ Through the grooming, men and women are socialised into patriarchal norms, seeing them as the order of day.⁴⁸

While traditionalists believe patriarchy is natural and therefore unchangeable, others argue that patriarchy is a man-made concept and therefore susceptible to change.⁴⁹ The latter approach holds true when coupled with advancements made in understanding concepts such as the implied differences between people based on their sex.

Patriarchy is argued to be made up of several structures, one of which is patriarchal relations in the state, reflected through policies and actions that possess a systemic bias towards patriarchal interests,⁵⁰ meaning patriarchy contributes to women's exclusion from and subordination in politics. Walby argues that the state is very gendered, and this is reflected through "... gendered political forces, ... actions [that] have gender-differentiated effects, and ... [a] structure [that] is highly gendered."⁵¹ Amongst the implications lies the possibility of state compositions and policies having

⁴³ Sultana 2012:1.

⁴⁴ Sultana 2012:1.

⁴⁵ Sultana 2012:1.

⁴⁶ Bhasin 2006:3.

⁴⁷ Morojele 2011:680.

⁴⁸ Morojele 2011:682.

⁴⁹ Sultana 2012:3.

⁵⁰ Walby 1990:20-21.

⁵¹ Walby 1990:150.

patriarchal undertones that protect and perpetuate patriarchy in different social spheres, even when seemingly being pro-women. An example would be the composition of Lesotho's Senate. Lesotho's Constitution states that women have a right to political representation, but two thirds of the Senate's composition is legally reserved for chiefs, the majority of whom are always male.⁵² While the Constitutional provision gives the idea that women's presence in governance and politics is desired and advocated for, the legal reservation essentially ensures men will almost always outnumber women in the Senate.

Patriarchy also plays a role as gatekeeper to the political sphere, ensuring that either women are seen as subordinate and thus incapable of functioning in political roles - therefore not allowed into the sphere, or that if they penetrate politics, they face almost insurmountable obstacles that greatly impede their success therein. The patriarchal culture of societies influences positions that are deemed befitting for women, and thus appropriate to assign to them. These are often positions both within the private sphere, as well as below positions assigned to men.⁵³ This approach spills over even into politics. Wayan & Nyoman argue that:⁵⁴

A patriarchal political culture builds the perception that women are inappropriate, inappropriate and not fit into the political world, because:

- a. women are more suitable to be in the domestic area (home);
- b. politics is identical with things that are masculine (hard, dirty, cunning, evil, etc.) and certainly only suitable for men, and women who are identical with feminism (gentle, gentle, etc.) certainly not fit into that world;

⁵² In both 2017 and presently in 2023, only 25 percent of the membership is women. See Lesotho Senate "General information about the parliamentary chamber", http://archive.ipu.org/parline-e/reports/2182_a.htm (accessed on 23 July 2022) and <https://senate.parliament.ls/members/> (accessed 4 February 2023) respectively.

⁵³ Wayan & Nyoman 2020:2160.

⁵⁴ Wayan & Nyoman 2020:2160-2161.

- c. women are creatures number two (inferior) and weak in their minds and;
- d. men are the leaders of women, and not vice versa.

These highlight the direct link between patriarchy and how women fare in society and the political sphere, that is, their low political participation, as a result of the perception that patriarchy builds concerning women. This is a perception of women as secondary in status and value and incapable of surviving and thriving in the political sphere. As a result of patriarchal influence, then, women's political participation continues to face great challenges and obstacles.

2.2.2 Sex and gender

Sex and gender are used to denote the "biological" and "natural" differences between males and females. The distinction between the two became key in order to, amongst other reasons, dispute arguments in favour for biological determinism.⁵⁵ The problem with phrasing biological determinism as an argument will be discussed below immediately following the description of sex.

Sex refers to one's biological characteristics, determined through their genitalia, hormones, gonads and or chromosomal composition.⁵⁶ The presence or absence of these biological characteristics has also been used to point to "naturally" occurring differences between males and females. It has, however, recently become problematic to use these biological characteristics as determinants of one's sex and the supposedly "naturally" occurring differences between males and females. This is due to developments that have been made in understanding the genetic makeup of

⁵⁵ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022):1.1.

⁵⁶ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022):1.1.

humans, leading to discoveries including humans born with both genitalia as well as males with XX chromosomal configurations and females with XY chromosomal configurations.⁵⁷ These developments and discoveries highlighted the error in previously held beliefs, such as that the X and Y chromosomes implied naturally and biologically occurring differences between males and females. This led some scholars to conclude that "... sex is not a single, unitary, easily-determined feature."⁵⁸

Gender, on the other hand, is a social construct used to refer to roles deemed "naturally" suited to males and females, as a result of their biological differences. It "... builds on biological sex to give meaning to sex differences, categorizing individuals with labels such as woman, man, transsexual, and hijra..."⁵⁹ Roles, responsibilities and expectations are produced under different institutions, such as culture and custom, and then assigned to different sex groups. Repetition of these roles, responsibilities and expectations over time eventually creates a gendered identity in the groups. Judith Butler termed this process gender performativity. She argues that gender is formed performatively, through a reiteration and repeating of the norms expected of us, the end result of which constitutes an identity.⁶⁰ She highlights a key issue – the actions we repeat, and which make up our gender, are not personally chosen, such that one can freely choose their gender, but are rather actions that are taught to us and enforced on us. In the same vein De Beauvoir highlights that "one is not born, but rather becomes, a woman."⁶¹ This, she posits, is because girls do not have womanhood, femininity and the maternal instinct naturally occurring, but rather have these taught and imposed upon them.⁶² It is therefore behaviour that creates gender.

⁵⁷ Johnson & Repta 2012:19.

⁵⁸ Bettcher "Feminist perspectives on trans issues", <https://plato.stanford.edu/entries/feminist-philosophy/> (accessed on 17 November 2022).

⁵⁹ Johnson & Repta 2012:21.

⁶⁰ Butler 1999:179.

⁶¹ De Beauvoir 2009:330.

⁶² De Beauvoir 2009:342-343.

It has been posited that both sex and gender are social constructs.⁶³ This argument hinges on, amongst other justifications, the fact that both sex and gender's explanation and understanding are relative to place and time, affected by advancements in research and understandings of the issues.⁶⁴ Approaches to both sex and gender, from assignment of different sexes to children at birth and roles deemed "naturally" suitable to men and women, have evolved overtime, changing with almost each society and advancements made.

Culture has also been found to have a say in the conceptualisation of sex and the creation, definition and assignment of gender.⁶⁵ Millet sees gender as "... the sum total of... culture's notions of what is appropriate to each gender by way of temperament, character, interests, status, worth, gesture, and expression."⁶⁶ Cultural normative expectations are modelled to and instilled into children from childhood, until they are branded into their psyche and become the standard, even where they observe exceptions.⁶⁷ The cultural normative expectations are cemented in the children's psyche through tools such as schooling and the use of language.⁶⁸ Mikkola does, however, highlight that since gender roles are taught and learned, they may also be unlearned, thereby creating more equal societies.⁶⁹

Definitions of sex and gender have played a role in women's political participation. Geddes and Thompson argue that the metabolic states of males (katabolic) and females (anabolic), determine their social, psychological and behavioural traits.⁷⁰ They argue that men's katabolic states make them inclined to being '...leaders in evolutionary progress...', while women's anabolic state incline them more to '...preserve the constancy and integrity of the species....'⁷¹ These beliefs were then used

⁶³ Butler 1999:10-11.

⁶⁴ Johnson & Repta 2012:20.

⁶⁵ Johnson & Repta 2012:20-21.

⁶⁶ Millett 1971:31.

⁶⁷ Diamond 2000:46.

⁶⁸ Diamond 2000:46-47.

⁶⁹ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022).

⁷⁰ Geddes & Thomson 1889:232.

⁷¹ Geddes & Thomson 1889:270.

as a basis for the construction of social and political arrangements, such as women's exclusion from politics.⁷² Mikkola highlights that although Geddes & Thomson's version of biological determinism is strongly criticised, "... the idea that behavioural and psychological differences between women and men have biological causes has not disappeared."⁷³ This points towards sex and gender's prevailing impact on women's social status as well as their political participation. The two concepts have been used from time immemorial to justify women's subordination and exclusion from the public sphere. They have played key roles in men's arguments against women's capabilities to not only 'be' outside of men, but also their ability to participate meaningfully in leadership roles. Sex and gender were, for example, part of the founding basis why women are not even allowed to step on the ground where the *khotla* gatherings are held in Lesotho, as they are deemed unworthy of even stepping on the ground where governance issues are discussed by males. The two concepts are therefore part of the bedrock of the arguments that underpin this thesis.

2.2.3 Stereotyping

Stereotyping is expecting people to adhere to roles assigned to a particular social group they belong to, while discarding existing factual variations within that group's membership.⁷⁴ Specifically on the basis of sex and gender, it is expecting people to adhere to roles assigned to their sex and gender.⁷⁵ Stereotyping is problematic for women in that, amongst other reasons, it hinders women's progression in different spheres of society, such as politics, due to the biases it promotes.⁷⁶ For example, voters tend to perceive women as incapable of managing national affairs such as

⁷² Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022).

⁷³ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022).

⁷⁴ Hayes 2011:135.

⁷⁵ Cunningham & Macrae 2011:599.

⁷⁶ Cunningham & Macrae 2011:599.

security and policy, because stereotyping has confined women to being seen in such light.⁷⁷

López-Sáez and Lisbona posit that stereotyping occurs through two means: trait stereotyping and role stereotyping. Trait stereotyping refers to socially assigned psychological and behavioural characteristic while role stereotyping speaks to beliefs about the activities considered more appropriate for men and for women.⁷⁸ They argue that trait and role stereotyping prompt women and men to conform to and act according to gender stereotypes, to an extent that a change in role stereotyping does not do much to change trait stereotyping, as trait stereotyping is the starting ground for creating and dismantling stereotypes.⁷⁹ This implies that in order for substantive change to be seen regarding stereotyping, the focus should first be on transforming the system of values that anchor the stereotyping.⁸⁰ This is an imperative step, more so when legal interventions have been found to fall short in ending the social influences and practices that continue to promote stereotyping.⁸¹ The law has actually been found to lean more towards reproducing prevailing social power relations than changing them.⁸² It has also been found to police people's actions and interactions, through projecting acceptable forms of being and judging those who deviate from them or wish to reinvent themselves outside these forms.⁸³

In ending stereotypes, social transformation has been found an important tool. Amongst the reasons lies the realisation that ending stereotype-related cues causes members of society to question their stereotypical behaviour and restructure the same.⁸⁴ It stands to argue then, that members of society seeing more women in government may lead to a dismantling of the stereotypical beliefs they hold regarding women and leadership. Dasgupta and Asgari argue for this belief. They found that

⁷⁷ Hayes 2011:133-134.

⁷⁸ López-Sáez & Lisbona 2009:363-379.

⁷⁹ López-Sáez & Lisbona 2009:364.

⁸⁰ López-Sáez & Lisbona 2009:364.

⁸¹ Cunningham & Macrae 2011:598.

⁸² Marius 2014:362.

⁸³ Marius 2014:362.

⁸⁴ Cunningham & Macrae 2011:599.

people who have been exposed to women in leadership struggled less to associate women with leadership positions.⁸⁵ This further highlights how people are inclined towards viewing and thinking of others on the basis of their social group memberships.⁸⁶ This is because social group memberships impact one's social-cognitive information processing, in a manner that then dictates the person's information processing and response generation.⁸⁷ The visibility of more women in political leadership positions could therefore arguably be instrumental in breaking stereotypes and biases towards women's political participation.

Stereotyping underscores the impact that society and societal norms have on dictating to women and society as a whole what identities (trait stereotyping) and conduct (role stereotyping) are appropriate for women and which are not. It also highlights how customary norms dictate what societies are to think about their members - that women are only good enough for the home and only men are capable of handling governance issues. These customary norms build stereotypes that place women at odds with what voters expect from their leaders. Women are stereotypically characterised as "... sensitive, emotional and weak...", the very attributes that voters do not relate with leadership, more so political leadership.⁸⁸ Men, on the other hand, are characterised as "... tough, ambitious and strategic...", being the very attributes voters traditionally relate with leaders and leadership.⁸⁹ The result is voters either not voting for female candidates, or voting against them.⁹⁰ Finally, stereotyping also zeros in on how legal reform may not be the answer to undoing and ending stereotyping, and how social transformation may be the answer.

⁸⁵ Dasgupta & Asgari 2004:647.

⁸⁶ Cunningham & Macrae 2011:599.

⁸⁷ Cunningham & Macrae 2011:599.

⁸⁸ Bauer "Gender stereotyping in political decision making", <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-772?rskey=OruyZV&result=1> (accessed on 17 November 2022).

⁸⁹ Huddy & Capelos 2002:29.

⁹⁰ Huddy & Capelos 2002:29.

2.2.4 Sameness/Difference

Sameness emphasises the similarities between men and women, on the basis of which it demands that similar treatment be afforded men and women.⁹¹ Sameness stems from men being seen as the standard for gender equality, making it measurable according to women's sameness to men.⁹² Difference emphasises the differences between men and women, and the difficulties of the male bias that women labour under as a result of these differences.⁹³ Though sharing the same goal – attainment of equality between women and men – the approaches have a clear difference in the strategies adopted to reach this goal.⁹⁴

Sameness approach's focus on gender neutrality has been posited to run the risk of failing to enhance the lives of women, since it ignores the differences between men and women's overall situations and the masculine norms enabling the present systems.⁹⁵ There is also evidence of failure to "... take account of the very real gender differences...and how these differences influence the ways in which men and women struggle for and claim benefits...."⁹⁶ Using community as a depiction of the sameness approach, Young argues that sameness denies difference amongst people, and advocates for a social ideal in which integration and unity trample division and difference – often leading to the exclusion of the different.⁹⁷

The difference approach draws attention to the need for and importance of an acceptance of difference in society and specifically politics, in order to create a platform where all groups have access, may raise issues and are afforded representation.⁹⁸ Awareness and appreciation of the differences between the sexes is proposed to enable an argument for differential treatment between the sexes, in order

⁹¹ Capps 1996:65.

⁹² MacKinnon 1991:381-382.

⁹³ Capps 1996:65.

⁹⁴ Capps 1996:65.

⁹⁵ Longo 2001:269-270.

⁹⁶ Longo 2001:269.

⁹⁷ Young 1990:252-254.

⁹⁸ Young 1990:267-268.

to level out the unequal playing field created by the male bias.⁹⁹ City life, representing the difference approach, is used to depict a celebration of difference, where interaction with different groups and spaces neither necessitates nor requires a fusion into the whole.¹⁰⁰ However, caution should be taken in the affirmation of the differences between the sexes, that this not lead to an affirmation of the dominance over women that men enjoy, enabled by the qualities and characteristics assigned to women, as a result of their differences from men.¹⁰¹ Difference should, thus, be adopted without attaching an element of hierarchy to it, hence disadvantaging women and advantaging men, more so in spaces where hierarchy is of value, like leadership and politics.

I adopt the difference approach in this thesis, advocating for the acceptance of women's differences from men in a manner that does not disadvantage women from pursuing and attaining political leadership. The present status quo covertly presents sameness as an obligatory ground for belonging, and yet this greatly disadvantages women and fails to have their specific needs addressed and met. There is, consequently, need to re-emphasise the centrality of the need to acknowledge and engage difference, to the extent of bringing about even societal transformation in its light.

2.2.5 Public/Private divide

The public/private divide is a result of the patriarchal drawing of an artificial line separating the public and private spheres.¹⁰² As per the artificial line the public sphere, which is home to highly esteemed endeavours such as politics and business, is reserved for men.¹⁰³ The private sphere, to which women are confined, is home to activities like home care and child rearing.¹⁰⁴ As Ford puts it "... 'private' was code for

⁹⁹ Capps 1996:65.

¹⁰⁰ Young 1990:265-266.

¹⁰¹ MacKinnon 1991:387.

¹⁰² Tamale 2004:52.

¹⁰³ Tamale 2004:52.

¹⁰⁴ Tamale 2004:52.

the home, personal, and non-professional contexts; 'public', on the other hand, stood for the professional world outside the home."¹⁰⁵ Women were exclusively identified with the private sphere, which simultaneously translated to the exclusion of all that was domestic, sexual and personal from the public and political sphere.¹⁰⁶ Issues rising from the private sphere were considered private matters which were only to be discussed privately, with politics and the law also containing non-interference policies concerning the sphere.¹⁰⁷

The private sphere is also depicted as consisting of "... natural inequality between master and slave, parent and child, husband and wife."¹⁰⁸ Liberal tradition approaches the divide as a distinction between market and state. The focus is the separation of "... the sphere of the 'public' authority of the state from the sphere of voluntary relations between 'private' individuals in the market."¹⁰⁹ The classical tradition approaches the divide as oppositions between the *oikos* (the private sphere occupied by women and slaves, wherein production and reproduction take place) and the *polis* (wherein the public and political are linked and discussions, deliberation, collective decision making and action take place).¹¹⁰ Squires argues that adoption of a liberal conception to the private sphere works to shield the abuses and domination found within it, thereby benefitting patriarchal norms and women.¹¹¹ The adoption of classical tradition's approach is argued to lead to justification and perpetuation of these abuses and domination women are subjected to.¹¹²

The justification behind the separation of these spheres was and in some case is still that women are "naturally" inclined to activities reserved for the private sphere because of their reproductive roles.¹¹³ Biology is therefore used as a natural

¹⁰⁵ Ford 2011:550.

¹⁰⁶ Okin 2013:314.

¹⁰⁷ Tamale 2004:54.

¹⁰⁸ Squires 2018:133.

¹⁰⁹ Squires 2018:131.

¹¹⁰ Squires 2018:131-132.

¹¹¹ Squires 2018:133.

¹¹² Squires 2018:133.

¹¹³ Tamale 2004:52.

determinant of who belongs to which sphere.¹¹⁴ It was, however, also argued that sharply polarizing the two spheres was not justifiable, as they are intricately connected. This led to early radical feminists' challenge of this approach, resulting in the famous slogan "the personal is political",¹¹⁵ which pointed to the fact that women's experiences were a result of a broader issue – that of gender inequality and distorted power relations, thus the state was inclined to intervene. Under the concept 'the personal is political', radical feminists advocated for consciousness-raising,¹¹⁶ and for governments to identify laws and practices that had been embedded within institutions which perpetuated the restriction of women to private relationships.¹¹⁷ The slogan "the personal is political", although being a Western feminist claim, has a relation and link to African feminism, and thus African women's experiences. As I detail in more depth below, "... African feminism gets to the bottom of African gender relations and the problems of African women - illuminating their causes and consequences – and criticises them."¹¹⁸ Thus, in the same way that Western women were subordinated and restricted to the private sphere, so were African women, on the basis of culture and custom, which perpetuated gender inequality and skewed power relations to be in men's favour and domain. Both the Western feminists and African feminists also advocate for an investigation of laws, practices and social norms that have perpetuated and been instrumental in women's subordination. It is therefore fitting to engage the slogan and what it contributed to feminist work.

As a consequence of the private/public divide, men are tasked with representing the women in their lives in the public sphere, hinging women's access to the public sphere to men.¹¹⁹ The divide privileges men and the institutions under their control, while disadvantaging women and institutions associated with them.¹²⁰ The private sphere is

¹¹⁴ Tamale 2004:52.

¹¹⁵ Okin 2013:314.

¹¹⁶ Bartlett defines consciousness-raising as an 'interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences.' (Bartlett 1990:863-864.) MacKinnon, on the other hand, defines it as 'the collective critical reconstitution of the meaning of women's social experience, as women live through it.' (MacKinnon 1989:83.)

¹¹⁷ McCann & Kim 2017:17-19.

¹¹⁸ Arndt 2002:32.

¹¹⁹ Tamale 2004:52.

¹²⁰ Cohen & O'Byrne 2013:45-46.

therefore seen as a "... source of women's oppression, not only because the private realm is exempt from liberal principles and political accountability, but also because activity and work in the private realm are not valued like that in civil society."¹²¹ Women's isolation to the private sphere thus exposes them to dangers such as subjection to male control, the stifling of their voices in public discourse and legitimising their discrimination.¹²²

Society is shaped from early life, through the public/private divide amongst other means, to view men as legitimate occupants of the public sphere, and women's presence and voices only being legitimised by man's approval. This is a pattern seen in the Laws of Lerotholi and customs of Basotho, where women are not allowed to speak during the discussion of national and governance issues, with their views only being heard if spoken by men on their behalf. The Laws of Lerotholi also keep women out of public sphere engagements such as the offices of king and chief, as well as economic empowerment means, such as inheritance. It is therefore imperative that the public/private divide and its bearing on Basotho women's absence from Lesotho's political sphere be analysed.

2.2.6 Power

The standard theory of power defines power as the ability to influence others, conferred by the control of resources that others desire, value or need, thus making such others dependent on the influencer for the meeting of their desires, value or needs.¹²³ The standard theory of power also advances that with different kinds of resources, comes different forms of power and influence.¹²⁴ Power also refers to a relationship between people, wherein one person (A) has the ability to cause another person (B) to perform (positive power), or seize from performing (negative power),

¹²¹ Cohen & O'Byrne 2013:39.

¹²² Cohen & O'Byrne 2013:40.

¹²³ Turner 2005:2.

¹²⁴ Turner 2005:2.

certain acts.¹²⁵ For A to have such power over B, A must be relying on four things – a source or base of such power, the means to exert power over B, the extent of the power A can exert over B and the scope of such power over B.¹²⁶

According to Turner's three-process theory of power, influence is produced through a psychological group formation.¹²⁷ This influence then produces power, and the presence of power then leads to the control of resources.¹²⁸ In other words, when people with a shared social identity come together there rises some influence amongst them as a group. This shared influence then becomes the basis of power ("the capacity to persuade and/or control others to carry out one's will"), which power then enables people to gain and exert control over resources. Turner's definition of power differs from the traditional understanding of power as influence originating from a control of resources that others need, desire or value, thus causing a dependence of those in need to those in possession. For Turner, a control of resources is the end result and not the starting point for the exertion of power. He also argues that the amount of power one can exert over a group is determined by the identity, norms, goals, beliefs and existing situation of the specific group. This means that should any of the above factors change, the power exerted over the group is also affected, whether to increase or decrease such power. This implies, for purposes of this thesis' analysis, that addressing the patriarchal portions of Basotho's customary laws would cause a shift in the power relationships between Basotho men and women.

While power was traditionally understood as repressive, through the exercising (or threat of exercising) of force from A to B, Foucault is of the view that there was more to power.¹²⁹ He states that "[w]hat makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it

¹²⁵ Dahl 2007:202-203.

¹²⁶ Dahl 2007:203.

¹²⁷ Turner 2005:10.

¹²⁸ Turner 2005:10.

¹²⁹ Foucault 1980:119.

traverses and produces things, it induces pleasure, forms of knowledge, produces discourse.”¹³⁰

He also believed that true power, though subtle and less visible, was normalising power. Normalising power, according to Foucault, is the power that conforms people to social behaviour expectations by causing them to internalise power structures, such as how a school trains students to obey the ringing of a bell and sit in classrooms in an orderly manner.¹³¹ It is the power that dictates what we see as ‘normal’. It shapes our perceptions of the world and of ourselves, as well as our beliefs, desires and decisions, while leaving us believing these are all personal and uninfluenced perceptions and choices¹³² – so society builds us into people who want to do what it wants us to do.¹³³ He also believes that the power of normalising power also lies in how it is found everywhere, and not only in select places, as well as how everyone is subjected to it.¹³⁴ He therefore focuses not on the ruler, but the ruled. Foucault also holds that there is a link between power and knowledge, in how it is those in power who dictate what is known and deemed true, and by who.¹³⁵ An example would be legal and socio-legal knowledge’s disqualification of other forms of knowledge, specifically knowledge of women’s experiences, which in turn enables law’s exercise of power over women.¹³⁶ Foucault asserts:¹³⁷

Power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another: that there is no power relation without the correlation constituting of field of

¹³⁰ Foucault 1980:119.

¹³¹ Foucault 1995:182-183.

¹³² Foucault 1995:136-138.

¹³³ Foucault 1995:242-243.

¹³⁴ Foucault 1978:82.

¹³⁵ Foucault 1995:27-28.

¹³⁶ Van Marle 2012:152-153.

¹³⁷ Foucault 1977:27.

knowledge nor knowledge that does not presuppose and constituted as the same time power.

On bioethics as biopolitics, Foucault focuses on how the very life of people has become a focal point for politics, bringing about the development of strategies and mechanisms aimed towards the management and control of peoples' lives.¹³⁸ This was first carried out through a focus on techniques that disciplined and tamed people on an individual level, in order to make them docile and useful.¹³⁹ Examples include the creation of systems of hierarchy and surveillance. The second phase came through the control of people on a mass scale, or as Foucault puts it, a "... seizure of power that is not individualizing but, if you like, massifying, that is directed not at man-as-body but at man-as-species."¹⁴⁰ Examples include the control of the birth, reproduction and mortality rates. While Foucault does not believe that one may radically free themselves from the way in which society has shaped them, he does believe that being aware of the many ways in which we are subjected to power, one is able to retain a fragment of autonomy. Turner and Foucault's depiction of power as discussed above are those most relevant to the purpose of this thesis, given their focus on the connection between power and the human psyche. Their focus on the role this link plays in controlling even what people believe and do are central to this work.

Van Marle draws attention to the nihilism we are left with in law becoming socio-legal, which also leads to the disqualification of all other forms of knowledge. She questions "[w]ouldn't more conceptual engagements by feminists, even if these entailed (or maybe because they entailed) an engagement with a feminist jurisprudence, possibly have been able to counter the power of law by drawing also on the humanities?"¹⁴¹

¹³⁸ Foucault 2008:2.

¹³⁹ Foucault 1976:242.

¹⁴⁰ Foucault 1976:242-243.

¹⁴¹ Van Marle 2012:152.

I adopt the same approach as Van Marle and avoid the use of socio-legal knowledge in my analysis of the legal impact that the Laws of Lerotholi and the Constitution have on Basotho women's everyday life and how they facilitate the subordination of women as well as the perpetuation of this subordination in different spheres of life. This enables me to explore, analyse and understand how the customary, historical, social, and political contexts of Lesotho influence(d) the laws and legal institutions of Lesotho and consequently women's status and political participation.

2.2.7 Customary law: living vs. codified

Custom is a creation of the people in a particular society or setting, meant to maintain conduct and order, which then gains authority amongst such people through continual observance.¹⁴² It is a spontaneous and voluntary adoption of particular norms by a society.¹⁴³ Forces which prompt the creation of customs within a society include those '... partly of reason and necessity and partly of suggestion and limitation.'¹⁴⁴ Once these adopted norms are observed and performed over a period of time, they become a custom of those observing and performing them.¹⁴⁵ Custom is, therefore, a summary of created norms and standards, created in response to the needs and aspirations of a particular society and which gain authority through repeated observance and performance. It also speaks to the adoption of particular patterns, norms, and beliefs by a society, which are particular to them as a group, set them apart from other groups and are passed down from generation to generation fairly unchanged. When custom becomes a creation of a legal or political authority, it is then termed customary law.

Customary law, therefore, refers to norms that evolved from practice and later became endowed with binding authority.¹⁴⁶ Customary laws were first passed down

¹⁴² The case of Tanistry (1608) Davis 28, 80 E.R. 516.

¹⁴³ Nwabueze 2002:158.

¹⁴⁴ Allen 1964:112.

¹⁴⁵ Nwabueze 2002:158.

¹⁴⁶ Hamnett 1975:14.

generations orally and through practices.¹⁴⁷ Following colonialism, some customary laws began being codified. As a result, there no longer existed only one form of customary law - living customary law - there was also a new form – codified customary law.

Living customary law is famously defined by Hamnett as law that “...emerges from what people do, or - more accurately - from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe.”¹⁴⁸ It is also defined as the *actual* law that the people live,¹⁴⁹ as per the people’s adaptation of their customs to the prevailing socio-economic status.¹⁵⁰ These adaptative or emerging practices then spread, acquiring a sense of obligation that later afforded them a legal character. Under this form of customary law, members of a society constantly critically reflect on their practices in order to determine the suitability of a practice to their current circumstances.¹⁵¹ Practices that are still found useful are kept, and those no longer found useful are amended to suit the society’s prevailing socio-economic status.¹⁵² It is, therefore, existing customary law’s interaction with, and adaptation to, changes in the socio-economic landscape that then produce what becomes known as living customary law. This is why customary law is known to not be static, but adaptable to and reflective of societal changes and needs.¹⁵³ It was held in *Pilane and Another v Pilane and Another* that “[t]he true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.”¹⁵⁴

In the evolution of living law, Cornell proposes a two-step verification process.¹⁵⁵ First, there should be a verification of the foundational custom that was practiced.¹⁵⁶

¹⁴⁷ Osman 2019:101.

¹⁴⁸ Hamnett 1975:10.

¹⁴⁹ Diala 2017:152.

¹⁵⁰ Diala 2017:151.

¹⁵¹ Diala 2017:151.

¹⁵² Diala 2017:151.

¹⁵³ *Pilane and Another v Pilane and Another* 2013 4 BCLR 431 (CC): para 34.

¹⁵⁴ *Pilane and Another v Pilane and Another*: para 34.

¹⁵⁵ Cornell 2009:401.

¹⁵⁶ Cornell 2009:401.

Second, evidence as to what the present version of the original custom is, as well as the reasons behind the transformation of the foundational custom to the present one is to be presented.¹⁵⁷ Cornell goes on to highlight the need to cater to people's expectations during adaptation, such that living customary law's flexibility is balanced against other prevailing factors such as the need for legal certainty as well as vested rights and constitutional rights.¹⁵⁸ Diala emphasises that for the emerging adaptive customary law practices to be recognised as living customary law, they need to hinge on foundational values on which the existing customary laws are anchored, such as humaneness and the communal nature of marriage.¹⁵⁹ This is perhaps why Osman cautions that living customary law, even in its constant evolution, retains patriarchal attributes found in customary norms and laws. This is because it "... often replicates existing power dynamics and favours the interests of men and chiefs at the expense of marginalised groups such as women and children."¹⁶⁰ This draws attention to the fact that living customary law remains subjected to patriarchal attributes, even when given the opportunity to evolve out of such attributes. Osman, in light of this, cautions against an idealisation of living customary law as a possible ally in the fight for human rights, more so women's rights.¹⁶¹

Codified customary law, on the other hand, refers to customary laws that have been fixed and are found in by-laws, judicial decisions, administrative orders, and statutes.¹⁶² Codification provided an ascertainment of customary law and did away with a lack of order, uniformity and certainty concerning it.¹⁶³ It also enabled the unification, simplification, and modernization of customary law.¹⁶⁴

Codification is argued to have come about as a result of colonial and postcolonial attempts to 'pigeon-hole' customary law into Western legal systems.¹⁶⁵ Codified

¹⁵⁷ Cornell 2009:401.

¹⁵⁸ Cornell 2009:401.

¹⁵⁹ Diala 2017:158.

¹⁶⁰ Osman 2019:101.

¹⁶¹ Osman 2019:101.

¹⁶² Juma 2007:94.

¹⁶³ Ubink 2011:3.

¹⁶⁴ Ubink 2011:3.

¹⁶⁵ Diala 2017:146.

customary law is therefore also known to be invented law, constructed on the basis of versions of customary law that self-serving interpreters and community representatives such as chiefs and elders provided the colonialists. Amongst the reasons provided for codification was the reduction of customary principles into conclusive legal principles, for ease of local disputes' adjudication.¹⁶⁶ Juma advances that the main underlying reason for codification on the side of the colonial authorities was to enable a re-modelling of African law's principles. This would enable the colonialists to supervise the content and utility of African law.¹⁶⁷ The result was a distortion and ossification of customary law principles and provisions.¹⁶⁸ Distortions included ignorance of communitarian features in customary law, placing of male heads in households as the only ones vested with property ownership authority and placing women as perpetual minors.¹⁶⁹ These distortions are argued to have gravely disadvantaged women and children, as they exaggerated and entrenched patriarchal bias and removed checks and balances that had been placed in customary law to protect women and children.¹⁷⁰ These distortions and their results are argued to still be in play to this day, even going into women's political participation, as is argued throughout this thesis.

For codification to be said to have been carried out well, Ubink points to the importance of modification in the codification process, where laws having undesirable effects such as gender inequality are modified and adapted to the needs of a modern society.¹⁷¹ She continues '... the development of a codification involves painstaking research, sifting and recording. It involves legal drafting and definite and positive overruling of contrary customary laws.'¹⁷² This arguably did not happen during codification of most African customary laws. Again, while codification provided positive aspects such as certainty of law, it also 'froze' the laws, thus crippling their fluidity and ability to

¹⁶⁶ Juma 2007:96.

¹⁶⁷ Juma 2007:96.

¹⁶⁸ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 1 SA 580 (CC): para 86.

¹⁶⁹ *Bhe and Others v Khayelitsha Magistrate and Others*: para 89.

¹⁷⁰ *Bhe and Others v Khayelitsha Magistrate and Others*: para 89.

¹⁷¹ Ubink 2011:3-4.

¹⁷² Ubink 2011:4.

evolve.¹⁷³ Codification also relied on 'local experts' whose credibility was often in question, thereby jeopardising the content and validity of the codified laws.¹⁷⁴

Understanding the origin of customary laws' codification is instrumental in arguing concerning how customary laws in Lesotho are not only distorted shadows of what was once the true laws of the Basotho people but are greatly biased against women. This understanding also provides a background to appreciating the sense of ownership that people feel over custom, hence the influence it has over their lives as a whole. This is, amongst other reasons, key towards my argument that custom, and thus customary law, has a significant influence on the psyche of the people observing it – thus allowing it substantial influence in their thoughts, beliefs and actions. The Constitutional protection of customary law then comes into play as a momentous problem – in how it protects laws that are not only this greatly influential on the psyche and lives of people, but which laws are also biased against women, meaning the Constitution reflects its own underlying bias against women. This understanding also provides a basis for the argument towards a review of the laws and removal of discriminatory provisions that disadvantage women daily. Understanding the differences between living and codified customary laws is also important for appreciating why Lesotho's codified customary laws have failed to evolve with society and change in order to adapt to present social standards.

2.2.8 Politics

Politics refer to the relationship between people and groups, structured and arranged around power and the control it affords one group over another.¹⁷⁵ They are also seen as a 'set of practices and institutions through which an order is created, organizing human coexistence in the context of conflictuality provided by the political.'¹⁷⁶ The

¹⁷³ Ubink 2011:4.

¹⁷⁴ Ubink 2011:5.

¹⁷⁵ Millet 2016:23.

¹⁷⁶ Mouffe 2005:9.

essence of politics has been advanced as a collectivization of friendship and enmity (a belief in 'us' versus 'them'), and assigning power along these identity lines.¹⁷⁷ Politics are therefore, in essence, an exercise concerning who is allowed to have power over themselves and who is not.¹⁷⁸ The result is often males dominating females and older males dominating younger males.¹⁷⁹

A number of factors determine where power lies in society and who is subjected to whom, such as sex and birth right.¹⁸⁰ Family, as a patriarchal unit within a patriarchal whole, is highlighted as one of the operational grounds for patriarchy and the domination of women.¹⁸¹ This is key because the essence of politics is power, so patriarchal control of men over women also affords men political authority over women.¹⁸² Brown asserts that it is not to women's detriment to be aware of their historic/current identity, as long as this realisation does not simply end with fetishizing the suffering and recrimination but rather leads to an emancipatory democratic project.¹⁸³ The emancipatory democratic project is recommended to not focus too much on where we come from and where we are, but rather place greater focus on where we wish to find ourselves.¹⁸⁴

Politics are revealed to rely on and engage with the presence and distribution of power in society. Politics drift towards power, translating to the realisation that political presence and power are most widely open and available to those who possess power. This highlights why men dominate in politics and women do not, thus providing a focal point when analysing and fighting against women's low political participation. This realisation also mandates and calls on a redistribution of power along all group lines,

¹⁷⁷ Schmitt 2008:35.

¹⁷⁸ Schmitt 2008:xx.

¹⁷⁹ Millet 2016:25.

¹⁸⁰ Millet 2016:22-25.

¹⁸¹ Millet 2016:24-26.

¹⁸² Millet 2016:25.

¹⁸³ Brown 1993:390-391.

¹⁸⁴ Brown 1993:404-406.

so that each group may also possess political power and the ability to exercise power over themselves.

2.2.9 Representation

Representation, according to Pitkin, is the re-presentation and making present of what was formerly absent.¹⁸⁵ In a political and women-centred context, representation takes two forms – descriptive and substantive. Descriptive representation speaks to the number of women elected to politics. Substantive representation alludes to “... acting in the interests of the represented in a manner responsive to them.”¹⁸⁶ Descriptive representation focuses on the number of women elected to politics while substantive representation addresses the effects of having women represented in politics.¹⁸⁷

Factors affecting women’s descriptive representation include public support for an increase in women’s representation, and knowledge concerning prevailing levels of women’s representation.¹⁸⁸ Substantive representation’s operation is affected by factors such as a political system that favours men and women’s exclusion from decision-making positions.¹⁸⁹ Both forms of representation are crucial. Women’s representation in politics leads to a greater representation of women’s interests in the political space.¹⁹⁰ Descriptive representation also specifically addresses the historic exclusion of women and how this exclusion presented them as incapable of leadership.¹⁹¹ Governments are also found to be more responsive to policy concerns relating to women when women’s representation in politics is high.¹⁹²

¹⁸⁵ Pitkin 1972:8.

¹⁸⁶ Pitkin 1967:209.

¹⁸⁷ Wängnerud 2009:52.

¹⁸⁸ Sanbonmatsu 2003:368.

¹⁸⁹ Damilola 2010:76.

¹⁹⁰ Sanbonmatsu 2003:368.

¹⁹¹ Phillips 1995:40.

¹⁹² Angevine 2016:99.

Understanding and engaging both forms of representation is essential to the work of this thesis, in addressing the forms of representation sought for women, as well as in highlighting the negative impact that custom and customary laws have had and still have on the attainment of women's political representation and participation. As Kivoi posits, traditional beliefs and cultural barriers and stereotypes are active contributors in perpetuating women's underrepresentation in the political sphere.¹⁹³ It is therefore imperative to understand representation and factors that promote and hinder it, in order to inform this thesis. Knowledge about women's representation in parliament is also key, as it plays a role in increasing women's support for women's election to office when they are knowledgeable about women's underrepresentation.¹⁹⁴

2.2.10 Citizenship

Marshall defines citizenship as "... a status bestowed on those who are *full* members of a community ...[and]... are *equal* with respect to the rights and duties with which the status is endowed... [thus making citizenship] a principle of equality."¹⁹⁵ (emphasis supplied) Citizenship is also seen as a form of political identity that exists as a result of one's identification with modern pluralistic democracy's political principles.¹⁹⁶ Citizenship is sometimes seen as a gendered construct, based on its alignment to men and men's work, and the lack of inscribing into its construction women's labour in the private sphere.¹⁹⁷ Citizenship is also associated with the ability to take part in activities such as legislation, voting, decision-making and paying taxes.¹⁹⁸ Nyamu-Musembi approaches the description of citizenship through looking at what citizenship entails both from a formal and substantive perspective. She states:¹⁹⁹

¹⁹³ Kivoi 2014.

¹⁹⁴ Sanbonmatsu 2003:367.

¹⁹⁵ Marshall 2009:149-150.

¹⁹⁶ Mouffe 1992:30.

¹⁹⁷ Tamale 2004:54.

¹⁹⁸ Tamale 2004:54.

¹⁹⁹ Nyamu-Musembi 2007:177.

Formal citizenship is about rights and obligations between state and citizen. Ideally, it would entail having one's personhood recognised fully through the according of rights on an equal basis with other citizens. Substantive citizenship goes beyond the confines of formal politics and law to encompass 'the economic, social and political relationship between social groups and structures of power that mediate the standing of individuals in the polity... It entails the absence of constraints imposed by lack of action on the part of state institutions, or constraints imposed by norms, relationships or institutions at the sub-national or informal level that mediate one's experience of formal citizenship, regardless of gender.

Citizenship, then, may be defined as entailing three elements; the full recognition of a person, bestowing on them rights equal with those of other citizens and creating an environment that enables their full and uninterrupted enjoyment of such rights.

Marshall divides citizenship into three parts – civil, political and social.²⁰⁰ Civil citizenship comprises rights he deems necessary for individual freedom, such as personal liberty, freedom of speech, right to own property and the right to justice.²⁰¹ Political citizenship speaks to the right to take part in the exercise of political power, whether as a member of a body vested with political power or as one who can elect members of this body.²⁰² Social citizenship addresses rights such as economic welfare and security and the right to "... live the life of a civilised being according to the standards prevailing in the society."²⁰³ It is my view that all three forms of citizenship are jointly important in ensuring that a person enjoys full citizenship as well as all benefits and duties rising from it. I therefore argue that a lack or limited enjoyment of

²⁰⁰ Marshall 2009:148.

²⁰¹ Marshall 2009:148.

²⁰² Marshall 2009:148-149.

²⁰³ Marshall 2009:149.

either of these three forms of citizenship, negatively affects the enjoyment and access to the rest of the forms of citizenship.

Tamale argues that women's relegation to the private sphere has also denied them participation in the activities of citizenship, thereby leading to the subordination of their citizenship,²⁰⁴ and a denial of the practice of their citizenship.²⁰⁵ This brings to the fore the link between the public/private divide and citizenship. Women's seclusion to the private sphere served to domesticate them and in effect relegate them to second-class citizenship.²⁰⁶ This is evidenced through the "... absence of protection for women's rights in crucial areas, systemic failure to implement the rights they do possess as citizens, and failure to recognize their contribution (for instance, to the national economy).²⁰⁷ Women therefore do not enjoy full citizenship, nor are they able to fully enjoy benefits accruing from citizenship, such as Basotho women's exclusion from leadership roles and, personal liberty, means of economic empowerment and security. In order for Basotho women to fully enjoy their political rights and participation, it is imperative that they enjoy full citizenship. More directly to the purpose of this thesis, I argue that women's low political participation can also be attributed to them being denied exercise of their political citizenship. Women's relegation to a secondary and subordinate social status denies them participation in political power, whether this is through political body membership or through possessing and exercising the power and ability to vote for those who are to form the membership of such political body. When women are not afforded, and thus cannot enjoy, rights due to them, this hampers their ability to, amongst other things, participate in politics.

²⁰⁴ Tamale 2004:54

²⁰⁵ Squires 2018:132.

²⁰⁶ Tamale 2004:54

²⁰⁷ Nyamu-Musembi 2007:176.

2.3 Theoretical Frameworks

2.3.1 Postcolonial Theory

My study of the extent to which the Constitution protects the Laws of Lerotholi and how they together keep women's social subordination and political exclusion in place is also informed by postcolonial theory. Postcolonial theory is an umbrella term describing an array of theories and practices primarily concerned with exploring and understanding the clear and persistent cultural, political, social and economic legacy of colonialism in the present day.²⁰⁸ It also encapsulates any scholarly or creative work that examines European colonisation of portions of the world, tracking not just what the colonisers did, but also the colonized people's reactions and struggles during and after colonialism. Postcolonialism is therefore a study of the sum total of all social, political, cultural, and economic changes resulting from colonialism's impact on the colonised nations and people. Though taking various shapes and interventions, postcolonial theory's fundamental claim is shared across all of them – that we cannot understand the world as it is now outside of its relationship with imperialism and colonisation.

Although postcolonial theory's prefix 'post' may suggest that colonialism is seen to have ended, this is not the case, as the very centre of postcolonial theory is how colonialism fashioned and continues to sculpt the world in fundamental ways. Some of these means of sculpting being the education system, through which it is argued the colonial powers targeted "... the body of the colonised as much as their minds."²⁰⁹ This was exemplified by the use of the coloniser's language in education, a foreign language to the colonised, and how it disadvantaged the colonised and instilled in them fundamental insecurity in themselves and their intelligence. Such realisations undergird arguments that colonialism only ended in theory, since former colonies continue to feel and live under its effects to this day.

²⁰⁸ Elam 2019.

²⁰⁹ Manjapra 2020:151.

2.3.1.1 *Origins of Postcolonial Theory*

Edward Said is credited with the emergence of the academic field of postcolonial studies, in his 1978 book *Orientalism*. In the book, Said describes the relationship between Western states and people, and the Orient (non-Western states and people).²¹⁰ He narrates the presentation of the orient as inferior, uncivilized, and strange, while the West is portrayed as superior, civilized, and all-around fantastic. Orientalism is depicted as a form of stereotyping through which the West presents distorted images of non-Western states and people in order to justify their occupation of the lands. Orientalism can then be said to be "... a Western style for dominating restructuring, and having authority over the Orient."²¹¹ Said, invoking Foucault's work, underlines that Orientalism was a process of knowledge production that gave the West domination of the orient,²¹² and even allowed the West to *produce* the orient.²¹³ Sajed highlights that the orient internalized this knowledge produced by the West, thus enabling the West to produce the orient and mould the orient into what the West desired the orient to be.²¹⁴ The West's production of knowledge concerning the orient was a strategic step in the process of hierarchical construction of power and domination. The goal was two-pronged – portray the orient in a negative light, and the West as the positive light to be aspired to, thus enabling the West control and domination over the orient.²¹⁵ Postcolonialism was therefore not an event, but a project. Wolfe brilliantly articulated this in her essay "Settler colonialism and the elimination of the native" thus:²¹⁶

When invasion is recognized as a structure rather than an event, its history does not stop - or, more to the point, become trivial - when it moves from the era of frontier homicide. Rather, narrating that history involves charting the continuities,

²¹⁰ Said 1978:15-16, 50.

²¹¹ Said 1978:11.

²¹² Said 1978:11.

²¹³ Said 1978:11.

²¹⁴ Sajed 2022:67.

²¹⁵ Sajed 2022:67.

²¹⁶ Wolfe 2006:402.

discontinuities, adjustments, and departures whereby a logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations as it undergirds the historical development and complexification of settler society.

Wolfe illuminates the structural nature and dynamism of colonial invasion, which contribute to its increase in complexity over time due to its "... continuities, discontinuities, adjustments and departures..."²¹⁷ Colonialism thus continues across time and space, and its effects cut across different spheres and spaces of life.

Frantz Fanon also falls among authors whose texts have been widely influential in postcolonial studies. Like Said, Fanon deals with colonialism not as an event, but a project that gave colonisers power over every aspect of the lives and realities of the colonised people.²¹⁸ He addresses the racism and dehumanisation that underpinned colonialism and the structural mechanisms adopted to project black people as an inferior 'other'. Some of these involved devaluing the cultures and traditions of the colonized and presenting Western culture as civilized, along with negatively juxtaposing blackness to whiteness so black people felt less than white people. Colonialism thus led to an internalized feeling of inferiority amongst the colonised, and psychological impacts that affected the colonised culturally, politically, socially, and psychologically.

In *Black Skin White Masks*, Fanon states "[t]he colonized is elevated above his jungle status in proportion to his adoption of the mother country's cultural standards."²¹⁹ This was not an 'elevation' motivated by a goal to see the colonised reach the same social status as that of the colonialists and hence be their peers, no. It was an elevation resulting from the stripping from the colonised all that set them apart as a people, leaving them only as former shells of themselves. As Fanon puts it, "[c]olonialism is

²¹⁷ Wolfe 2006:402.

²¹⁸ See generally Fanon 1952 & Fanon 1963.

²¹⁹ Fanon 1967:18

not satisfied merely with holding a people in its grip and emptying the native's brain of all form and content. By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures and destroys it."²²⁰ This process was one that had profound and lingering psychological effects on the colonised, epitomised by the battle between who the colonised knew themselves to be and who the colonisers labelled them as.

Following on this, Homi Bhabha looks into hybridity.²²¹ As a concept, hybridity does not simply focus on a person living in two cultures. It looks into what he calls the third space of enunciation, alluding to the creation of a space between a signifier and the signified. This third space, the in-between, is the very space of hybridity. It is within this space that the interaction and negotiation of cultural differences takes place, resulting in the creation of a revolutionary newness that is neither of the past nor of the present.²²² According to Bhabha "[s]uch art does not merely recall the past as social cause or aesthetic precedent; it renews the past, refiguring it as a contingent 'in-between' space, that innovates and interrupts the performance of the present. The past-present becomes part of necessity, not the nostalgia, of living."²²³

Bhabha acknowledges the workings of both the past and the present in the creation of the new cultural identity. He does not, however, see the third space as binary, but as liminal. He uses a stairwell as a symbol for his illustration. He advances:²²⁴

The stairwell as liminal space, in-between the designations of identity, becomes the process of symbolic interaction, the connective tissue that constructs the difference between upper and lower, black and white. The hither and thither of the stairwell, the temporal movement and passage that it allows, prevents identities at either end of it from settling into primordial polarities. This interstitial passage between fixed

²²⁰ Fanon 1963:210.

²²¹ See generally Bhabha 2007.

²²² Bhabha 2012:296.

²²³ Bhabha 1994:7.

²²⁴ Bhabha 1994:5.

identifications opens up the possibility of a cultural hybridity that entertains difference without an assumed or imposed hierarchy.

Bhabha posits that the third space is a positive space that fosters creativity, because it makes room for cultural diversity rather than cultural assimilation. Room is created for cultural differences that allow one to live with another while acknowledging that they are different, in ways that do not efface that difference. Bhabha also implies a subject's ability to move in between liminal spaces and cultural surroundings as and when they wish, transcending any binary antagonisms. This third space may, however, be a space of confusion, where one could be trapped between feelings of repulsion, desire and never fully reaching the 'new', yet continually moving between the two spaces.²²⁵ Boehmer defines this in-between as a "... creative, malleable indeterminacy involving feelings of simultaneously repulsion and desire that exist at the interface between self and other, or between the polarities of unequal world that we still inhabit, of what Bhabha calls the 'ongoing colonial present'."²²⁶ This draws attention to how one can arguably never truly say that they are free of colonial influence, when the colonial effects are so intrinsically intertwined even with their formation of self and how they step into the different spaces of everyday life.

Another influential author concerning both postcolonialism and feminism, is Gayatri Spivak. Although the term 'subaltern' was originally coined by Antonio Gramsci, Spivak also contributed to the term, through for example her infamous essay "Can the Subaltern Speak?", in which she centres the absence of accounts concerning the sati practice in her discussions of whether subalterns can even speak. In an interview with de Kork, Spivak argues that the term subaltern "... is not just a classy word for "oppressed", for Other, for somebody who's not getting a piece of the pie ... In post-

²²⁵ Bhabha 2012:296

²²⁶ Boehmer 2005:355. cited in Bhandari 2020:78-89.

colonial terms, everything that has limited or no access to the cultural imperialism is subaltern — a space of difference.”²²⁷

Subaltern is, then, not just a reference to the oppressed, as is sometimes argued. Antonio Gramsci, on the other hand, used the term to denote those subjected to the hegemony of a more powerful social group or class.²²⁸ He highlights how the subaltern is “...always subject to the activity of ruling groups...”²²⁹ For Louai, what the term fundamentally referred to was “... any “low rank” person or group of people in a particular society suffering under hegemonic domination of a ruling elite class that denies them the basic rights of participation in the making of local history and culture as active individuals of the same nation.”²³⁰ Spivak engages this concept further in her aforementioned essay, choosing to focus on issues of gender and Indian women in the midst of colonialism. She uses the sati practice, and how Hindu women were torn between the British desire for them to cease participation in the practice, and the Hindu native policy inviting them to participate. Spivak argues that in the midst of this battle between “tradition and modernization” and “patriarchy and imperialism” the woman was silenced, lost her voice, and disappeared.²³¹ She highlights that though colonialism erased the history of subalterns and silenced them, women were cast into a worse shadow and silenced even harder.²³² She therefore focuses on representation and formation of identity.

²²⁷ De Kock 1992:29–47.

²²⁸ His discussions of the subaltern are first found in “Notes on Italian History” and later found in his infamous book, “Prison Notebooks”.

²²⁹ Gramsci 1971:207.

²³⁰ Louai 2012:5.

²³¹ Spivak 1988:306,308.

²³² Spivak 1988:287.

2.3.2 Why Postcolonial Theory

A. Relevance to Lesotho

Lesotho is no stranger to colonisation and colonialism. Although officiated in the 1860s, some scholars argue that the colonisation of Lesotho began in 1833, with the arrival in Thaba Bosiu of the three French missionaries²³³ from the Paris Evangelical Missionary society.²³⁴ On the official front, however, the colonisation of the Basotho can be said to have begun in the 1840s, amidst troubles mostly with the Boers of South Africa taking land from the Basotho. These troubles with the Boers led Moshoeshe I to seek an alliance with the British on behalf of his nation in the early 1840s.²³⁵ The terms of this alliance were encapsulated in the Napier Treaty of 1843. According to the treaty, Moshoeshe was to be a friend and ally to the Cape Colony and arrest and return to the Cape Colony any fugitives.²³⁶ On their part, and in response, the British sternly warned the Boers²³⁷ against any encroachment into the territory of the Basotho.²³⁸ The Basotho-Boer tension did not cease, and in response Moshoeshe sought British protection, resulting in the Annexation Proclamation 14 of 1868. The Annexation Proclamation provided:

[w]ith a view to the restoration of peace and the future maintenance of tranquility and good government on the North Eastern Border of the Colony of the Cape of Good Hope, Her Majesty, the Queen, having been graciously pleased to comply with the request made by Moshesh, the Paramount Chief, and other Headmen of the Tribes of the Basutos, that the said tribe may be admitted into the allegiance of Her Majesty.

²³³ Thomas Arbousset, Eugene Casalis, and Constant Gossellin.

²³⁴ Juma 2011:102.

²³⁵ Benyera 2017:57-58.

²³⁶ Juma 2011:103.

²³⁷ According to Lye and Murray, however, the primary policy of the British centred on maintaining peace and avoiding antagonizing the Boers. (Lye & Murray 1980:82).

²³⁸ Juma 2011:103.

The Annexation Proclamation essentially made the Basotho British subjects and the land of the Basotho, British territory,²³⁹ and in 1884 Basutoland's²⁴⁰ common law also became based on Roman-Dutch law.²⁴¹ The three missionaries from the Paris Evangelical Missionary Society, as well as those who later followed them to Lesotho from the Roman Catholic church²⁴² and the Anglican Church,²⁴³ later established churches and schools in Lesotho. Of note is the impact that colonialism and the missionaries had on the lives of the Basotho. Colonisation was, for one, underpinned by a complex sexist logic,²⁴⁴ which was evidenced by their dealings with the Basotho and Lesotho's episteme and hegemony. The missionaries also had their own significant influence on the culture and trajectory of change in Lesotho.²⁴⁵ Their schools, for example, instilled in Basotho a perspective of their ways of life as being barbaric and abominable, while presenting the colonialists as heroes.²⁴⁶ Women, specifically, were educated in a manner that moulded them into wives and mothers who were passive and dependent,²⁴⁷ further supporting women's subordination to men and relegation to the private sphere. Mokotso submits that colonisation had goals that involved a replacement of local culture and a "... colonization of the mind..."²⁴⁸ He posits:²⁴⁹

... colonialism had some social implications of civilizing component which did not restrict it simply to the occupation of a territory, but extends it to cultural and religious transformation and this is type of colonialism is popularly referred to in the postcolonial studies as 'colonization of mind'.... Colonization of the mind according to Dascal

²³⁹ Nwafor 2013:49.

²⁴⁰ Prior to Independence, Lesotho was known as Basutoland.

²⁴¹ Section 12 of Proclamation 2B of 1884 provided that "[i]n all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope..."

²⁴² In 1862.

²⁴³ In 1876.

²⁴⁴ Mhlabane 2020:30.

²⁴⁵ Monyane 2009:71.

²⁴⁶ Phohlo 2011:78

²⁴⁷ Mhlabane 253.

²⁴⁸ Mokotso 2015:161.

²⁴⁹ Mokotso 2015:161.

(2006) is a process in which there is an intervention of an external source - the 'colonizer' in the mental sphere of the subjects - the 'colonized.' This intervention works upon central functioning of mind's structure, mode of operation, and contents and has long-lasting effects that are not easily removable. This intervention is marked by uneven of power relations between the parties involved. Dascal (2006) continues to show that the success of 'colonization of the mind' is achieved by inducing a set of beliefs in the colonized mind through a process that is cognitive by nature. When achieved, it is demonstrated by an implicit acceptance by the colonized to the superiority of the colonizer. In other words, colonization of the mind is achieved when the colonized admits to existence between a 'primitive' mind – that of himself – and a 'superior' or 'civilized' one – that of the colonizer. Ducker (2008) opines that missionary religious education was and is still colonizing because its intention is to replace rather than interacting with local culture and religion, it is a one-way, non-reciprocal process. It has both financial and political power that enables it to dominate or subjugate local alternatives.

Lesotho's colonisation by the British thus further shaped Basotho society in patriarchal beliefs and ways of life, thereby cementing and perpetuating women's subordinate social status. It also furthered the denial of power to women, through shaping power relations to favour the colonialists and Basotho men, against Basotho women.

B. Relevance to thesis

I find postcolonial theory an appropriate theoretical framework for this thesis because it also focuses on hegemonic discourses and psychoanalysis and how power and knowledge can be deconstructed within them. Postcolonial theory's exploration of the denial of voice and identity to the marginalised also falls into my argument in this thesis on how customary subordination has negatively affected women, denying them full identity, citizenship and both a role and a voice in Lesotho's political sphere.

Postcolonial theory offers me ideas and concepts which assist me as I explore and analyse the extent to which the Constitution protects the Laws of Leretholi and how

they together keep social subordination of women in place, with one concrete outcome of this being women's low political participation. In applying it to this thesis, I use three of the four characteristics of postcolonial criticism provided by Peter Barry.²⁵⁰ The first is an awareness of non-European people being portrayed as exotic or immoral 'other'. It cautions that when one uses postcolonial theory to analyse a cultural text, they should follow Said and Spivak's ideas and check for whether the cultural text in observation supports or challenges the assumption that the West is both central and standard, while the non-West is 'other'. For purposes of this thesis, I apply this first characteristic to analyse whether pieces of the Laws of Lerotholi place men as central and standard and women as the 'other', in a manner that subordinates and disadvantages women.

The second characteristic is an interest in the function of language in sustaining or undermining power dynamics. Language was part of the tools of colonisation, with many of the colonised nations forced to adopt their coloniser's language as their official language and use it for education and the codification of laws. As a result, this feature of postcolonial research compels us to analyse how language may support or challenge the colonial legacy. This characteristic is adopted specifically in this thesis to the language of education and how it is used to either erase women from history or perpetuate negative stereotypes about them, such as women only being fit for the private sphere.

Third amongst the characteristics is a focus on identity as a dual, hybrid, or unstable entity. This point is based on the theories of Homi Bhabha, who is interested in how colonialism may be regarded as a mingling of cultures, that of the coloniser and that of the indigenous people who lived there before and were later colonised. The focus of this point is what the repercussions of this type of hybrid identity, which many people in colonized countries have, might be on both individual and collective identity. This third characteristic is relevant for the battles women undergo as to the 'them' that they experience in their day to day lives as strong capable women, and the stereotypes

²⁵⁰ Barry 1995:193-195.

about them perpetrated by patriarchy and its instruments, which leaves women battling with their personal and projected identity.

2.3.3 African feminism

My study of the extent to which the Constitution protects the Laws of Leretholi and how they together keep women's social subordination in place and negatively impacts women's political participation is also informed by African feminism. African feminism refers to feminist epistemology and rhetoric that present arguments affirming and validating the experiences of African women, whether in Africa or the diaspora, contrary to feminist discourse in the mainstream.²⁵¹ It is also a social movement aimed at raising global awareness of African women's histories, current challenges, and future expectations.²⁵² In essence, African feminism recognizes Africa's history and variety, as well as the realities of the obstacles that African women face in their daily lives, some of which can be linked back to historical injustices.²⁵³ For African feminists then, African history and diversity, as well as colonialism, all fall into the considerations of African feminism.²⁵⁴

African feminism affirms the experiences of African women that "...give[s] the woman a sense of herself as a worthy, effectual, and contributing being, while it rejects stereotypes of woman that deny her a positive identity."²⁵⁵ The anticipated result is the establishment of "... a new, liberal, productive and self-reliant African woman within the heterogeneous cultures of Africa."²⁵⁶

African feminism has many forms, such as womanism, motherism, and nego-feminism. My focus in this thesis is not on a particular form of African feminism, but in

²⁵¹ Goredema 2010:34.

²⁵² Goredema 2010:34.

²⁵³ Stuhlhofer 2022:1.

²⁵⁴ Stuhlhofer 2022:1.

²⁵⁵ Ekpa 2000:29.

²⁵⁶ Nkealah 2006:139.

the overarching shared commonalities between all of them.²⁵⁷ These overarching shared commonalities include questioning Western feminism and its exclusion of African women and their experiences. They also jointly draw inspiration from African people's history and traditions in order to develop the tools needed to empower women and educate men. Thirdly, they commonly agree on men's inclusion in the enhancement of women's lives.

2.3.1 History of African feminism

The dynamics surrounding the origins of African feminism differed from those of Western feminism such as bourgeois individualism or female control over reproduction.²⁵⁸ African feminism was birthed in response to Western feminism's erasure of Africa and/or African women from feminist theory or advocacy.²⁵⁹ Although Western feminism, as a movement, is also concerned with male dominance and female subordination,²⁶⁰ African women found that Western feminism was not fully in touch with or responsive to African women's' specific and contextual struggles.²⁶¹ Branches of Western feminism were, for example, seen as "... anti-men and hence against values of marriage, childbearing, and preservation of the family."²⁶² It was also argued that with some branches of Western feminism, such as Radical Feminism, African women felt forcibly drawn into a movement whose characteristics included '...extreme individualism... militant opposition to patriarchy, and ultimately... a hostility to males.'²⁶³ This led to some African women openly dissociating themselves from feminism, even when their work was clearly feminist.²⁶⁴ Western feminism had also left black women, more so in relation to their white counterparts, feeling like "...the

²⁵⁷ Nkealah 2016.

²⁵⁸ Mikell 1997:4.

²⁵⁹ Acholonu 1995.

²⁶⁰ Stuhlhofer 2022:1.

²⁶¹ Atanga 2013.

²⁶² Stuhlhofer 2022:1.

²⁶³ Mikell 1995:405.

²⁶⁴ Examples include writers such as Bessie Head, Buchi Echemta and Flora Nwapa.

other woman, the silenced partner.”²⁶⁵ This was not to say that there were no shared broad goals, since there were,²⁶⁶ but African women needed a feminism that was closer to home and in which their narratives and experiences were relevant and given value. Ann Manicom defines a feminist framework as:²⁶⁷

... a worldview that takes as problematic the structural dependence of women on men. It is research and theorizing not *about* women but *for* women, and it is research which begins in the lived experience of women. Further, a feminist framework insists that to understand this lived experience, we must grasp the interlocking networks of social, economic, political and personal relations in which particular women are situated.

This highlights how problematic Western feminism’s erasure of African women’s lived experiences was. It did not speak of or for African women, raising the need for a feminism that did. Enter African feminism.

For early African women, their concerns distinctly centred around issues involving “bread, butter, culture and power”.²⁶⁸ Early African feminists were therefore concerned with maintaining traditional gender roles, motherhood and their families.²⁶⁹ Contemporary African feminists shifted their focus to the creation of spaces for women’s participation in their societies’ management as well as questioning the status quo.²⁷⁰ They also focus on highlighting how contemporary patriarchies in Africa limit women and hinder them from reaching their potential beyond their conventional roles as hardworking income generating wives and mothers.²⁷¹ These concerns are argued to have been inspired by “... the failure of male-dominated multi-party politics and the

²⁶⁵ Showalter 1997:214.

²⁶⁶ Atanga 2013:302.

²⁶⁷ Manicom 1984:77-78.

²⁶⁸ Mikell 1997:4.

²⁶⁹ Atanga 2013:308.

²⁷⁰ Atanga 2013:308.

²⁷¹ Atanga 2013:308.

collapse of national economies orchestrated by western SAPs (Structural Adjustment Plans) which greatly affected women.”²⁷² This led women to step on to the socio-political stage and establish their presence therein, as well as clarify the vision they have of their roles in the future of the socio-political sphere.²⁷³

Although Mikell was criticised for centring culture in African feminism and using it as justification for women’s oppression and discrimination,²⁷⁴ she was right to emphasise the key role played by culture in African women’s everyday experiences. This is because when it comes to navigating Africa's feminism, culture is crucial,²⁷⁵ due to how heavily it impacts women.²⁷⁶ As Mikell highlights:²⁷⁷

Gender hierarchy and female subordination, evident in traditional African culture, became more pronounced... [c]onsequently, hierarchical gender roles and relationships in politics, economics and culture in general have tended to be continual but increasing in intensity.... This means that control over women’s roles has become intricately interwoven with the social structures of these societies.... African women’s struggle with gender asymmetry and inequality is often described in terms of the relationship between public and private spheres... distinctions in gender roles in Africa.... In Africa, female subordination takes intricate forms grounded in traditional African culture....

2.3.2 *Why African feminism*

As articulated by Arndt, “... African feminism gets to the bottom of African gender relations and the problems of African women - illuminating their causes and consequences – and criticises them.”²⁷⁸ African feminism, therefore, undergirds my arguments in this thesis concerning Basotho women’s subordination, one of the

²⁷² Atanga 2013:308.

²⁷³ Mikell 1997:4.

²⁷⁴ Atanga 2013:308.

²⁷⁵ Stuhlhofer 2022:6.

²⁷⁶ Nkealah 2006:139.

²⁷⁷ Mikell 1997:3.

²⁷⁸ Arndt 2002:32.

perpetrators of which is culture and custom, and how this plays out in their everyday lives and experiences. It is valuable to my argument in how it centres African customs and ways of life in the debate concerning women's subordination. African feminism is thus an appropriate theoretical framework for understanding the link between African history, of which customs are key, and how instrumental it presently is in impacting women's social status and political participation.

In adopting African feminism in my exploration and analysis in this thesis, I apply three of the four criticisms Arndt argues African feminism applies to the present status quo.²⁷⁹ First, it questions the idea of complementarity between men and women, which though affirming the equal dignity of both men and women, posits that this dignity hinges on and manifests in physical, psychological, and ontological differences. Complementarity affirms gender stereotypes and even labels them as 'essential', a problematic belief for women and women's social status and political participation.

Secondly, the criticisms look into ways in which patriarchy manifests itself in African societies. Traditional institutions are examined, in order to find those in favour of women and impact them positively and those which are anti-women and impact them negatively.

Third, African feminism compares and contrasts gender roles within the context of other repressive systems such as colonialism, neo colonialism and socio-economic exclusion. For purposes of this thesis, I engage this critique as far as it addresses women's socio-economic exclusion and how this exclusion impacts their political participation.

2.4 Conclusion

In this chapter I reflect on key concepts and theoretical frameworks that inform my investigation, analysis and arguments regarding women's subordinate social status

²⁷⁹ Case 2016:155-172.

and low political participation. I find that with patriarchy entrenched in the socio-legal space of every society, women find themselves having to battle patriarchal obstacles in all spheres of life. The patriarchal system through which social structures and practices are constructed so as to enable women's domination, oppression and exploitation by men has facilitated many of women's negative experiences.²⁸⁰ These negative experiences span across many and varying spheres, from the private sphere in which women are equated to slaves and men their masters,²⁸¹ to the public sphere in which women have to construct third identities in order to be able to navigate their presence and participation within it.²⁸² I also find that law, as a system enabling the shaping of hegemony and episteme, also greatly facilitates women's exclusion from power relations, political participation as well as citizenship through how it stereotypically shapes social perception of each of the sexes. The fact that normalising power is at play in all these spheres, with those in power continuously producing knowledge that secures the hegemony, poses an obstacle to women's emancipation from the subordinate status they occupy.

Locating Basotho women within colonial Lesotho and postcolonial theory has also enabled an understanding of the ideologies and objectives that undergirded their silencing and subordination under men and how various systems were engaged to set and perpetuate this hegemony. This then enables an African feminist centring of women in unpacking the impact that colonialism and women's historical experiences had in states and women's lives, through an exploration of how men were placed as central and standard and women as the 'other', in a manner that subordinates and disadvantages women. In exploring the frameworks, I was also able to identify and unpack the various means engaged to subordinate women, such as sex as justification for women's relegation to the private sphere and language's power in creating epistemes that dominate societies, thus also providing strategies for dismantling systems of women's subordination and political exclusion.

²⁸⁰ Walby 1990:20.

²⁸¹ Squires 2018:133.

²⁸² A navigation with significant challenges, as Bhabha 2012:296 depicts.

In the next chapter I turn to the Laws of Lerotholi and Lesotho's Constitution and explore their relationship with women's status in Lesotho's society. I argue that there is a direct link between the two pieces of legislation and the subordinate social status assigned to Basotho women.

Chapter Three

The relationship between the customary laws of Lesotho, Lesotho's Constitutional protection of the customary laws, and Basotho women's subordinate status in society.

3.1 Introduction

The main research problem of this study concerns how the customary law and Constitution of Lesotho, concerning the umbrella protection it provides customary law, jointly support and perpetuate the social subordination of Basotho women, one of the spill overs of which is women's low political participation. In the previous chapter I highlight the key concepts and theoretical frameworks that inform my investigation of the subordinate status of women in Lesotho's society and their consequent low participation in politics. In this chapter I tackle the specific research question on the relationship between the customary laws of Lesotho (codified into the Laws of Lerotholi), Lesotho's Constitutional protection of the customary laws, and Basotho women's subordinate status in society.

In tackling this research question, I historicise Basotho women's place in Lesotho's customary law and Constitution, with the intention to highlight how these laws were formulated along hegemonic lines that sought to cement and perpetuate the episteme of the times – a patriarchal dominance of women by men, relegating women to a subordinate social status. This supports my hypothesis that customary law and the Constitution are complicit in the perpetuation of women's subordinate social status. I also engage postcolonial theory and look into the colonial influence in the customs and laws of Lesotho (both customary and Constitutional), as analysing the identities of African women necessitates a thorough procedure that engages colonialism's legacies.²⁸³ By tracing the origin of custom, customary laws and the Constitution I

²⁸³ Bawa & Adeniyi Ogunyankin 2018:449.

tackle the *what*, that is, *what* facilitates women's relegation to subordinate status in Lesotho's society – which I argue is the customary laws and the Constitution of Lesotho, as far as the Constitution protects customary law and also provides lacklustre provisions regarding women's human rights and protection.

In drawing attention to the *how* of my argument, I draw on the concepts and theories I present in chapter two, with arguments from scholars such as Gramsci, Foucault and Bhabha concerning African feminism, Postcolonial theory, hegemony, power, and knowledge production. According to Gramsci, for example, the law falls within the main instruments through which states establish new kinds of civilisation and spread specific mindsets and attitudes - through being instrumental in the creation and sustenance of the episteme and hegemony of the time.²⁸⁴ It is one of the means through which the state dictates what we see and accept as normal, making it instrumental in the state's shaping of our perceptions of the world and of ourselves, including what we believe, desire and decide upon, while leaving us believing these are all personal and uninfluenced perceptions and choices²⁸⁵ – thus building us into people who want to do what the state/those in power want us to do.²⁸⁶ Following on this argument, I trace the customs, customary laws and Constitution of Lesotho from their inception to the present-day state, in order to bring out how the law operated and still operates not only to facilitate but also in perpetuating Basotho women's subordinate social status. I look through the state of customs in Lesotho prior to colonialism in Lesotho as well as the move to codification and independence. My intention is to highlight first, women's absence in the codification process; second, the goals that were set as key in the codification process, with which the intention was women's subordination; and third, the procedure followed in deciding which customary laws and norms were to form part of the codified laws.

To this end I delve into Basotho customs, the Laws of Leretholi and finally the Constitution of Lesotho and consider their impact on women's social status. I write this

²⁸⁴ Gramsci 1980:246-247.

²⁸⁵ Foucault 1995:136-138.

²⁸⁶ Foucault 1995:242-243.

chapter in three parts. In part one I focus on custom and the customary laws of Lesotho and women's social status in Lesotho. I start from their origin; work to their codification into the Laws of Lerotholi; and touch on their present-day legal status and then focus on the specific provisions of the Laws of Lerotholi which I argue are discriminatory. This discussion is important for demonstrating the innate discriminatory and patriarchal nature of the customary laws of Lesotho, and how they were promulgated and codified with the main intention of subordinating women and securing men's positions of dominance over women, such as the denial of inheritance rights under the Laws of Lerotholi. In part two I discuss the Constitution of Lesotho and its relationship with women's social status in Lesotho. I specifically explore its origin and the relevant sections within it that I engage with, concerning women. Through this discussion I argue that the Constitution does not possess true intentions towards women's attainment and enjoyment of non-discrimination, gender equality and all other relevant rights as afforded by the Constitution. I also argue in this section that the provision for non-discrimination under section 18(1), and the subsequent provision under section 18(4)(c) that discrimination is legal if carried out on the basis of customary law, does not signal a true intention to protect against discrimination.

The third and final part centres on women's present social status, and the impact that the custom, the Laws of Lerotholi and the Constitution have had on the present status. I go more in depth on provisions under custom, the Laws of Lerotholi and the Constitution that I argue are discriminatory against women and perpetuate their subordinate position in society. For example, under custom I posit that the exclusion of women from owning land and cattle is a strategic move to keep women on the periphery of economic development as well as social networks that these two assets afford men. I also highlight how the Laws of Lerotholi keep women from the public sphere through means such as excluding them from occupation of the office of King or succession to the chieftainship in their own right. Under the Constitution I argue that the umbrella protection that the Constitution affords customary law perpetuates and legalises discrimination against women, through its claw-back clauses and attachment to colonial ideologies. The content I cover in this chapter sets an essential foundation for chapter four, in which I demonstrate how this generally subordinate position of

women, caused by customary law and the Constitution, translates into women's low political representation in Lesotho.

3.2 Part one – Custom and Customary law and women’s social status in Lesotho

As I detail above, in this part I specifically look into the relationship between custom, customary law and women’s social status in Lesotho. I commence with a look into the origin of Basotho customs and how they came to be and form part of the society of the Basotho. I highlight how it was found that the power dynamics at play during the formation and curation of customs were not in favour of women, leading to the establishment of customs that favour men and subordinate women. I also bring to light how power was also seen to be at play through the erasure of women from historic narrations of custom, except in cases where the narrations showed them as active members of the private sphere, to establish and promote a perception and stereotype of women as belonging to and being fit for the private sphere.

I then move to the codification of the customary laws of Lesotho. I trace the codification process of the customary laws of Lesotho, in order to bring to the fore, the discriminatory nature underlying the whole process. I argue that this was evidenced through three points - the selection of the people who made up the council that would see to the codification of the laws, the decisions surrounding which laws would be codified and which would be left out, and what prompted the pursuit of the laws’ legalisation. I then undertake an in-depth narration of first how women were excluded from the codification process, and only colonialists and male elites included. I argue and support how this already signalled the approach the codified laws would take concerning women, which is evidenced through discriminatory provisions in the law that, for example, exclude women from succession to chieftainship in their own right. Secondly, I then relate how the contents of the laws were determined through a focus on issues that were of concern to the colonialists, chiefs, and male elites. I posit that this also already pointed towards the laws not being intended to serve and benefit the nation as a whole but to serve the goals and desires of those who made up the council of codification. Finally, I recount how the legality of the laws became a great concern and prompted movement towards their legalisation when a loophole was found which

enabled a woman to succeed to chieftainship on the death of her husband – making clear how the laws were indeed intended to exclude and subordinate women.

I find this detailed exploration is important to demonstrate how the very foundation of the codified customary laws is patriarchal and discriminatory, and how their codification was mainly intended towards facilitating and securing men's domination over women and society and women's subordination to men.

3.2.1 Origin and status of Basotho custom

Custom refers to general practices that have been accepted as law.²⁸⁷ These customs set a particular group apart from other groups and are passed down from generation to generation fairly unchanged.²⁸⁸ Research has shown that the power dynamics at play within customs are not in favour of women in most, if not all, societies.²⁸⁹ One of the results has arguably been the creation of norms that serve and benefit men, often to the exclusion and subordination of women.²⁹⁰

Accounts of early Basotho customs can be found in Basotho's rich oral traditions. These oral traditions can be found deeply rooted in their totems or family odes (*liboko*), praise songs or poems (*lithoko*) and storytelling (*lits'omo*).²⁹¹ Within these oral traditions can be found narrations of the origins, lifestyles and beliefs of the different clans that make up the Basotho people, as well as the identity of the Basotho as a people.²⁹² Oral traditions also contain details regarding the formations of chiefdoms and branches of chiefdoms, different forms of practised marriages as well as the migration of the Basotho.²⁹³ Basotho's oral traditions also contain narrations of their

²⁸⁷ *Statute of the International Court of Justice* art. 38 para. 1(b), June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187.

²⁸⁸ Braybrooke 1951:72.

²⁸⁹ Ndulo 2011:92-94.

²⁹⁰ Ndulo 2011:92-94.

²⁹¹ Johnson "Lesotho. World Biographical Series", <https://www.everyculture.com/Ja-Ma/Lesotho.html#ixzz6F5Cy4XEa> (accessed on 12 December 2019).

²⁹² Gill 2016:18.

²⁹³ Eldredge 2002:28-29,128.

political lives – these include reflections of the structure and make-up of the Basotho political life as well as social hierarchies and roles that were in place before and after the arrival of the colonialists in Basutoland. With each generation these oral traditions are passed on, cementing identities, attitudes, beliefs, and ways of life.²⁹⁴ Each generation incorporates within the received oral traditions their own experiences, beliefs, and ways of life, thus keeping the oral traditions' identity, yet simultaneously making them adaptative to their own lived realities.²⁹⁵ These adaptations often result in the evolution of some aspects of custom. Notably, most historical narrations of Basotho's customs and ways of life either erase women or depict them in stereotypical roles of either reproduction or production.²⁹⁶ As I show throughout the chapter, this was strategic, in that the power relations of any particular era have a significant impact on the knowledge that exists at any given moment, the truths that are judged indisputable, and the discoveries that are deemed feasible.²⁹⁷ Thus, the erasure or stereotyping of women in historic narrations of the Basotho already pointed towards where power lay in that era, or at the very last, where power did *not* lie. This erasure or stereotyping also served to promote a carefully curated narrative of who women were, what they liked (read 'ought to like as dictated by the powers that be') and what they could and could not do.

3.2.2 Codification of Basotho customs and laws

I posit that the history behind the codification process of Basotho's customary laws as well as the social, legal and political circumstances of the times played a key role in the nature and content of the laws as well as how these laws in turn impacted and still impact women's social status. According to Gramsci law falls within the main instruments through which states establish new kinds of civilisation and spread

²⁹⁴ Gill 2016:18.

²⁹⁵ Gill 2016:18.

²⁹⁶ Mohlabane 2020:25.

²⁹⁷ Foucault 1991:27.

specific mindsets and attitudes.²⁹⁸ It is one of the means through which the state dictates what we see and accept as normal. As I highlight in chapter two above, the law is instrumental in how the state shapes our perceptions of the world and of ourselves, including what we believe, desire and decide upon, while leaving us believing these are all perceptions and choices that are both personal and uninfluenced²⁹⁹ – thus building us into people who want to do what the state/those in power want us to do.³⁰⁰ Consequently, tracing the history and surrounding circumstances of the laws' codification enables an exploration of the driving forces and justifications behind their codification – who wanted them codified? What purpose(s) was the codification to serve? Which actors were part of the codification and why/why not? These questions and subsequent discussion reveal deeper realities – how power came into play through the laws to facilitate and enable women's exclusion from all stages of the laws' codification and the selection of the laws' content that was aimed at securing the male elites' social position and cement women as subordinate.

There have been and continue to exist several debates concerning the laws' content, validity, and legality. There are, as a result, several critiques concerning the Laws of Leretholi both around the time they were enacted and in later years. Lagden, for example, argues in favour of the laws, that the newly codified Laws are inclusive of all people, going as far as comparing them to the Magna Carta, in that he believes they simultaneously serve to protect the chiefs' prerogative as well as the common people's rights.³⁰¹ As I show in following paragraphs and below, this was not the case, as the codification was meant to serve and secure the interests of the male ruling elite as well as the colonial authorities, which interests supported men's domination of women and women's subordination to men. Other scholars hold differing views, with most not showing much regard for or official recognition of the content or validity of the laws. Judge Lansdown, for example, highlights in the infamous *Griffith v Seeiso* case that '...this code... is helpful, *though not conclusive* on any question as to the existence or

²⁹⁸ Daldal 2014:156.

²⁹⁹ Foucault 1995:136-138.

³⁰⁰ Foucault 1995:242-243.

³⁰¹ Lagden 1909:616.

extent of any customary practice amongst the Basuto ...' (emphasis supplied).³⁰² Herbert Sloley, Resident Commissioner in 1903, also writes in his annual report of '...the spontaneous resolution in favour of the consideration and regulation of *certain* native laws and customs' (emphasis supplied).³⁰³ Sloley, in his letter to the then High Commissioner, states that the suggestions that the Council had made were not, nor were they intended to be, a collection of the Basuto's laws in their entirety.³⁰⁴ Perhaps this was as a result of reasons including the laws having been compiled and codified by a body that lacked legislative drafting knowledge or authority; the intentional omission of some laws in the compilation; as well as the 'haphazard' manner in which their compilation and codification was carried out.³⁰⁵

The intention of the colonial authorities regarding the codification of the customary laws was clear - the codification was to produce a summary reference point for disputes concerning custom, focusing on issues that seemed pressing and or frequently occurring at the time.³⁰⁶ The intention was never to produce rigid and exclusionary laws that would remain 'untouchable' decades later.³⁰⁷ Judge Lansdown reiterates this in the *Griffith v Seeiso* case, highlighting that '... [n]o legislative authority or official recognition has been extended to this code....'³⁰⁸ This stance was further justified by the codifying body's failure to follow proper and essential legislative processes in the codification, as well as the omission of certain laws, leaving the codification incomplete and biased.³⁰⁹ The colonial authorities therefore stood by their original understanding of the idea behind the codification process, which never anticipated a legalisation of the codified customs which would confer upon them a status equal to their own pieces of legislation.³¹⁰

³⁰² *Bereng Griffith v Mantsebo Seeiso* 1926-53 HCTLR 50, 58-60.

³⁰³ Great Britain 1903.

³⁰⁴ Letter dated 31 August 1903 from Herbert Sloley (Resident Commissioner) to Lord Milner (High Commissioner).

³⁰⁵ *Ramaisa v Mpholenyane* 1977:149, see also *Moeti v Lefalatsa* 1999-2001 LLR 511 (D) at 513-14.

³⁰⁶ Poulter 1972:151-152.

³⁰⁷ Poulter 1972:151-152.

³⁰⁸ *Bereng Griffith v Mantsebo Seeiso*:58-60.

³⁰⁹ Poulter 1972:154-155.

³¹⁰ Juma 2011:120.

Basotho leaders, on the other hand, went into the process believing they were codifying laws that would be legally binding, yet failed to follow legislative procedures, which would have dictated even the body that collected and codified the customary laws.³¹¹ The laws they compiled and codified were also argued to be a shadow of the actual reality on the ground, and mainly served to secure colonial rule and the social standing of the male elders in authority.³¹² The lack of understanding between the colonial authorities and Basotho chiefs regarding the purpose of the laws' codification became clearer and clearer with time.³¹³

The main aim of the chiefs and other members in the codification process was the protection of their positions and benefits accruing from such positions. The interests of the whole nation were not genuinely on the table. Armstrong, for example, argues that even where it was stated that the interests of the community had been catered for or taken into consideration, it was common knowledge that in patriarchal societies, the 'interests of society' simply meant the interests of the ruling elite, who were almost always males.³¹⁴ Power relations within the society also played an influential role in which customs were chosen to become part of the customary laws.³¹⁵ This was a significant factor, more so in Basutoland where power dynamics were not in women's favour and saw them excluded from national platforms.³¹⁶ The result was a collective of chiefs and elected male leaders coming together to compile laws that served their personal desires, disregarding principles of representation, consultation, non-discrimination and other crucial foundations and considerations. It then becomes clear that women were denied both citizenship and representation during the codification process, at least in as far as participation in the monumental process of the codification of the nation's customary laws, which would dictate the nation's new social, legal and political shape. As Tamale highlights, citizenship entails the right to participate in

³¹¹ Poulter 1972:153.

³¹² Roberts 1984:3.

³¹³ Poulter 1972:156.

³¹⁴ Armstrong *et al* 1993:317.

³¹⁵ Armstrong *et al* 1993:321.

³¹⁶ Such as the *pitso*, *khotla* and chieftainship, as I discuss in greater detail in chapter four.

government, voting, decision-making, and other activities,³¹⁷ thus a denial of either of these rights is a denial of citizenship. The focus on the interests of the male elites also meant women were denied substantive representation, as their interests were clearly side-lined.³¹⁸

There is also no evidence of the laws sought to be codified having been taken through a process of vetting, with the purpose of ascertaining that they do not contain any provisions that discriminate against any member of society. This is a key element, since for codification to be said to have been carried out well, Ubink points to the importance of modification in the codification process, where laws having undesirable effects such as gender inequality are modified and adapted to the needs of a modern society.³¹⁹ She continues ‘... the development of a codification involves painstaking research, sifting and recording. It involves legal drafting and definite and positive overruling of contrary customary laws.’³²⁰ This arguably did not happen during codification of most African customary laws.

The above points, among others, led to questions concerning the content of the laws, more so as it was averred that the codification of the laws led to a distortion of the laws’ form and content.³²¹ There has thus been discontentment regarding the composition of the codified laws and the involvement or lack thereof of a representative portion of society. While some scholars argue more recently that the codification process was a process that involved the general population of Basutoland as a whole, therefore making the resulting laws adequately representative,³²² others disagree. It has been contended, for example, that the male elites presented distorted depictions of customary law which they had created in order to shape customary law into what they wanted it to be.³²³ Ranger also argues that men's control over women was expressed far more vividly in the colonially manufactured custom than it had ever

³¹⁷ Tamale 2004:54.

³¹⁸ Pitkin 1967:209.

³¹⁹ Ubink 2011:3-4.

³²⁰ Ubink 2011:4.

³²¹ Bennett & Vermeulen 1980 and Bennett 2006:2038.

³²² Juma 2011:96.

³²³ Rwezaura 1992:5.

been throughout Africa, as a result of customs that were derived from male informants and upheld by colonial courts.³²⁴ The result was the codification of laws that, although presented as portraying the true customs of Basutoland, are in actual fact reflections of the male elites' and colonial authorities' interests.³²⁵ Scholars like Costa argue that the codified laws constitute a version of customary law that is '...corrupted, inauthentic and lacking authority [and] is a foreign imposition, a stranger in Africa."³²⁶

Present day scholars also critique the Laws of Lerotholi. Phillips, for instance, argues that the codified laws constitute a version of customary law that is corrupted and lacking in authenticity, thereby affecting their legality.³²⁷ Juma is of the view that the codified customary laws fall short of being true reflections of Basotho customs, thereby negatively impacting their legal status. He underlines the 1993 Constitution's evasion of making mention of the Laws of Lerotholi, only mentioning 'customary law'; the absence of unity between the codified laws and practiced law in Lesotho's society; as well as the failure of the laws to remain in sync with Basotho's lived realities.³²⁸ He also highlights the fact that the codification process was incomplete, having failed to capture the customs of the Basuto in their entirety.³²⁹ As a result, the laws failed to receive affirmation from the colonial legislative authority or attain re-enactment to form a part of the Native Proclamation.³³⁰

The above critiques raise the question as to whose custom it is, then, that has been documented and codified - that of the Basotho people, the ruling elite or one desired by the colonialists. Evidence of the project of colonialism clearly rears its head here, in how the colonial powers used the codification of the laws to weave themselves into the codification (read 'creation') of the Basotho customary laws, through what they made seem like a partnership or support from their side. I highlight below Makoa's observation that the colonialists' seeming partnership and support were but a smoke

³²⁴ Ranger 1983:258.

³²⁵ Armstrong *et al* 1993:362. See also Fitzpatrick 1985:472, 479.

³²⁶ Costa 1998:534. See also Phillips 2007:43-45, 49.

³²⁷ Phillips 2007:43-45, 49.

³²⁸ Juma 2011:121.

³²⁹ Juma 2011:119.

³³⁰ Juma 2011:119.

screen to hide their true goals - weakening and reinventing African traditions so that they are more susceptible to colonial goals³³¹ and raising the elite to greater status yet denying them real political power.³³² As Fanon so aptly put it “[c]olonialism is not satisfied merely with holding a people in its grip and emptying the native’s brain of all form and content. By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures and destroys it.”³³³

The colonial facilitation of the distortion of the customary laws of the Basotho through and during codification was thus a turning to the past of the Basotho and distorting, disfiguring, and destroying of their past, as was the colonial goal in facilitating its dominance over the Basotho. This observation unfolds more as I go on in this chapter and the next.

3.2.3 *The Laws of Lerotholi*

As I highlight earlier in this chapter, Basotho customary laws remained uncoded prior to the arrival of the British in Lesotho. The codification of Basotho customary laws as the Laws of Lerotholi followed the enactment of the Proclamation. The Proclamation essentially established a dual legal system, which allowed the Cape Colonial laws to operate in Basutoland, alongside Basuto’s customary law as administered by the chiefs.³³⁴ In 1903, the Basutoland National Council (the Council) was appointed to advise the British colonial government on the best legal practices and laws to govern Basutoland.³³⁵ The Council was initially conceived as a body of chiefs and leaders among the Basotho that would meet once a year to “... consider any fresh laws submitted to it, in so far as they would affect the Basotho; address questions connected with local affairs; receive reports on hut tax expenditures; and deliberate

³³¹ Makoa 2004:79-94.

³³² Makoa 2004:79-94.

³³³ Fanon 1963:210.

³³⁴ Poulter 1969:128.

³³⁵ Juma 2011:115.

on serious national cases....”³³⁶ The colonial authorities sought to include customary laws in their dealings with the Basuto people, in an attempt to have the local authorities more involved in the governance process, albeit with limitations. According to the Proclamation, the role of the Council would be to ‘... enact their [Basuto] laws and lay down systems of governance based on their traditional legal system.’³³⁷ The establishment of the Council thus marked the beginning of the codification of Basotho customs and laws into what came to be known as the Laws of Lerotholi or *Melao ea Lerotholi*.³³⁸

Diala posits that one of the main reasons behind the codification of customary laws was to provide the colonial authorities with a formal source of customary laws and end reliance on people who oftentimes distorted customary law accounts in their favour.³³⁹ Chanock, on the other hand, suggests that the purpose behind the adoption and consequent application of customary laws during the colonial era was to serve the interests of the colonialists as well as protect and preserve the privileges of the male elite, mainly the chiefs.³⁴⁰ Makoa, along similar lines as Chanock, argues that the adoption of customary laws was part of the British system’s strategy of weakening African traditions to make them vulnerable to British colonial interests through a process known as reinventing tradition.³⁴¹ To Makoa, the inclusion of chiefs in the formal administrative and legal structures was simply a ‘corporatist and exclusivist administrative’ strategy, that is, a strategy that elevated the elite to positions of prominence but denied them actual political power.³⁴² Whatever the purpose or strategies behind the codification, the end result was the cementing of the patriarchal

³³⁶ Juma 2011:114.

³³⁷ Juma 2011:114.

³³⁸ Food and Agricultural Organization “Gender and Land Rights Database: Lesotho”, http://www.fao.org/gender-landrights-database/country-profiles/countries-list/customary-law/en/?country_iso3=LSO (accessed 22 September 2019).

³³⁹ Diala 2017:146.

³⁴⁰ Chanock 1989:72, 76.

³⁴¹ Makoa 2004:79-94.

³⁴² Makoa 2004:79-94.

status quo and episteme that existed at the time, more so in a manner that made them unyielding to any attempts at review or transformation.³⁴³

The confusion surrounding the purpose behind the codification of the customary laws as well as how the purported codification would impact the customary laws was one of the greatest hurdles preceding codification. It was the purpose of the codification that was to inform not only the parties to contribute to the process, but also what was to form part of the codified customary laws. This confusion became evident again as the content of the laws was decided upon, especially in the way the chiefs, who were all male, dominated the drafting and adoption of the laws, as I illustrate below.

3.2.3.1 *Content of the Laws of Lerotholi*

It was of importance what was to form the content of the laws, that is, what was to be presented as the customary laws of the time because, as I narrate above, law operates as an instrument through which the state establishes a new kind of society and spreads particular viewpoints.³⁴⁴ The law thus falls within the activities, both practical and theoretical, by which those in power not only justify and uphold their domination but also obtain the willing participation of those they dominate.³⁴⁵ The contents of the codified laws would thus affirm and or dictate the episteme of the time. The laws would also form the *raison d'être* of other institutions within the state, as these, though not directly falling within law's domain, are subject to the law's jurisdiction because it determines the nature and scope of their operations.³⁴⁶ It was thus in assessing what was to form the contents of the law that one could predict the society that such law would affirm or create, and which viewpoints it would spread.

In determining what was to form the content of the Laws of Lerotholi during the codification process, attention was directed towards main areas of concern for the

³⁴³ Bennett 2009:3-4.

³⁴⁴ Daldal 2014:156.

³⁴⁵ Carnoy 1986:65.

³⁴⁶ Daldal 2014:156.

colonialists, Basotho chiefs and male elites. The chosen areas of focus mainly revolved around the power and reach of chiefs, fuelled by their concerns at the possibility of the appointment of the Council being a strategic attempt to disempower the chieftainship.³⁴⁷ The adopted direction in the codification of the Laws of Lerotholi was thus meant to, among other goals, aid and strengthen the *Borena*, that is, the institute of the chieftainship which from time immemorial drew its legitimacy and *raison d'être* from the prevailing customary laws and traditions of Basutoland. The laws that the Council put together were consequently a combination of their own suggestions, respected chiefs' views as well as customs and judgments that had been passed down generations through oral tradition.³⁴⁸ The above resulted in effectively centralising the male elites and colonialists' interests and concerns, thus subordinating and disadvantaging women's needs and interests. The results were codified laws which placed men as central and standard and women as 'other'.

The laws which were codified by the Council initially entailed 21 laws, which were later reduced to 18 main areas addressing various aspects of society.³⁴⁹ Laws addressing the chieftainship and its benefits and responsibilities included succession to the chieftaincy; the supremacy of the Paramount Chief or the *Morena e Moholo*; appellate rights from the decisions made by the chiefs; chiefs' access to free labour; appeals from the decision of *Morena e Moholo* to the Resident Commissioner; and the procedure of and summons to chiefs courts. There were also laws on property rights such as application of due process to the custom of 'eating up';³⁵⁰ allocation of land; debtors' rights; forfeiture of land use; disposal of immovable property upon removal from a chief's jurisdiction and laws on theft. Laws governing the family addressed seduction and abduction of unmarried women; limits, duties, and responsibilities of heirs; and rights of widows and male children. Other laws covered areas such as

³⁴⁷ Machobane 1990:76.

³⁴⁸ Poulter 1972:151-152.

³⁴⁹ Juma 2011:116.

³⁵⁰ This refers to a process of seizing livestock or belongings from a person or family, previously carried out by chiefs but presently prohibited.

compensation for physical injury; jurisdiction of Assistant Commissioners; and Resident Commissioners Courts as well as the use of firearms.³⁵¹

3.2.3.2 *The place of the Laws of Lerotholi in Lesotho's legal system*

Customary law, more so living customary law, has not, in most African states, found a settling point concerning its reach in regulating or defining human relations as well as providing justice systems.³⁵² The nature of custom, being fluid, interactive, in constant flux, adapting and reforming, makes it difficult to ascertain most customary law attributes.³⁵³ This unsettled status of customary law has also meant difficulties in attempts at bridging the gap between traditional social structures and 'western legality'.³⁵⁴ This is despite custom's ability to change, be responsive and remain relevant to changing socio-economic and political circumstances.³⁵⁵ Lesotho's case is, however, different. The codification process in Lesotho provided a formal and concrete source of Basotho customary laws, which have remained the main source of customary law in Lesotho.³⁵⁶ On codification, the Laws of Lerotholi mainly occupied a 'reference point' position whenever custom was in dispute.³⁵⁷ The laws lacked legal authority and enforceability.

As important as codification was for ease of access and clarity on the provisions of the customary laws, it also had negative effects. For one, the codification of the customary laws into the Laws of Lerotholi created strict and rigid laws and cemented such as permanent features of Lesotho's legal system.³⁵⁸ The result of these rigid laws was an inability to constantly develop and reconcile the customary laws to the realities of the society they govern.³⁵⁹ The changes that Basotho people's lives and lifestyles

³⁵¹ Juma 2011, See also *Laws of Lerotholi* 65/1960.

³⁵² Juma 2011:92-93.

³⁵³ Tamale 2008:48.

³⁵⁴ Juma 2011:93.

³⁵⁵ Tamale 2008:49.

³⁵⁶ Juma 2011:95-96,100.

³⁵⁷ Poulter 1972:151-152.

³⁵⁸ Juma 2011:95.

³⁵⁹ Juma 2011:96.

underwent thus outpaced the laws and exposed the limitations inherent in them.³⁶⁰ The consequence has been the Laws of Lerotholi having power and influence over the Basotho people, yet being far from relevant to their realities. Despite the above, the contents and authority of the Laws of Lerotholi have not undergone significant review to remedy these concerns.³⁶¹

The codified laws' legal position did not seem to be a cause for concern amongst the authorities, until the court's decision in the famous *Bereng Griffith v 'Mantsebo Seeiso* case (Regency case) decided in 1953.³⁶² I discuss the details and judgement of this ground-breaking case below.

3.2.3.3 Road to legality

In the Regency case that arose in 1926, the chieftainship position was contested by 'Mantsebo Seeiso, wife of the late Chief Seeiso and his brother, Bereng Griffith. Bereng argued that Basotho custom and her status as a woman barred 'Mantsebo from succeeding to chieftainship, occupying the regency office or acting as a paramount chief.³⁶³ He also argued that the same reasons, as well as her customarily being regarded a minor, also deemed her incompetent to act as a child's guardian or administer any estate.³⁶⁴

While admitting that Basotho women historically lacked autonomy, Judge Lansdown noted the rising trend of women taking over administration of their properties when their spouses passed, although such administrative control was still subject to consent from the late husband's family.³⁶⁵ The norm in cases of the death of chiefs was also

³⁶⁰ Juma 2011:121,123.

³⁶¹ There was a failed attempt to pass an amendment of the laws in 2022, which amendment would allow widows to administer their estates without the need to consult the deceased husband's relatives. A compromise was reached in the form of the harmonisation of the rights of customary widows with the Legal Capacity of Married Person's Act, 2006, which was gazetted on the 12th of December 2022.

³⁶² *Bereng Griffith v Mantsebo Seeiso*.

³⁶³ Duncan 1960:4.

³⁶⁴ Duncan 1960:4.

³⁶⁵ Duncan 1960:5.

different.³⁶⁶ When a chief died, leaving behind a minor heir, the deceased's wife was given exclusive control of the chieftaindom, as well as a regency position until the heir came of age.³⁶⁷ Judge Lansdown also highlighted evidence pointing towards the large number of women who occupied positions of chiefs, whether as regents or in their own right,³⁶⁸ without being subject to any male authority.³⁶⁹ It was also highlighted that the Laws of Lerotholi were not valid law and therefore lacked the legal force to bar 'Mantsebo from succeeding her husband as chief, and hold such position free from any influence from her late husband's family.

Juma suggests that one of the reasons this holding was in 'Mantsebo's favour significantly hinged on the fact that at that time, the Laws of Lerotholi did not have legal capacity and only bore the same significance as '... any other unwritten law.'³⁷⁰ Poulter also highlights that the laws were not '... true legislation because legislative power was vested in the High Commissioner and had not been conferred upon nor delegated to the National Council, nor was it valid custom.'³⁷¹ This lack of establishment and force of law that the Laws of Lerotholi were burdened with led to their provisions not being applied in this case.

The realization of the limitations holding back the Laws of Lerotholi led to debates within the Council on how best to remedy the situation,³⁷² that is, the loophole in the legality of the laws, which had enabled a woman to become chief, contrary to the provisions in the Laws of Lerotholi.³⁷³ A Standing Committee of the Council (Standing Committee) was then created at the Council's 37th session, tasked with the drafting of

³⁶⁶ Duncan 1960:5.

³⁶⁷ Duncan 1960:5.

³⁶⁸ It is important to note this observation, as it further highlights the false provisions made in the Laws of Lerotholi that have been passed as the true custom of the Basotho. The presence of women who were chiefs in their own right prior to the codification of the laws indicates that the reservation of chieftainship – and possibly other avenues of Basotho life such as cattle ownership – for men was a customary distortion by the codifiers of Basotho custom. True Basotho custom does not seem to have discriminated against women occupying the chieftainship role, until the codification process.

³⁶⁹ Duncan 1960:5.

³⁷⁰ Juma 2011:120.

³⁷¹ Poulter 1972:155.

³⁷² Juma 2011:120.

³⁷³ The Council, in its goal concerning ensuring the legality of the Laws of Lerotholi, was evidently driven by the desire to keep women out of the chieftainship.

laws, which would be reviewed by the Council.³⁷⁴ In 1944, at the 38th session, the Standing Committee got to work, setting out to have Basotho's customary laws re-codified in their entirety and having them form part of the colonial Proclamation through re-enactment.³⁷⁵ The crux of the Standing Committee's suggestions concerning the new laws made it clear that their main aim was to counter the decision and resultant blow to the customary laws of the Regency case.³⁷⁶ The aim was to elevate Basotho customary laws to the same level as the colonial laws, a goal that was not well received by the colonial authorities.³⁷⁷ The Standing Committee's strategy was three-pronged, with the central aim being the undertaking of legislative action to add authority to the laws of Lerotholi.

The first step entailed the Paramount Chief's rules and orders being incorporated into the new version of the Laws of Lerotholi, along with the amendments that had been made to the original Laws of Lerotholi.³⁷⁸ This step was well received and executed. The second step targeted having decisions of the High Court that had dealt with customary law issues also being incorporated into the new version of the Laws of Lerotholi.³⁷⁹ This step never came to fruition. The third step, arguably heavily influenced by the decision in the *Griffith v Seeiso* case,³⁸⁰ involved having an authoritative element added to Part 1 of the Laws of Lerotholi. This would enable the contested Part 1 to also be an authoritative source of Basuto laws, with annual revisions to enable the incorporation of all amendments, new court decisions and or any other necessary additions.³⁸¹ This step was rejected by the Resident Commissioner and thus failed to see the light of day.³⁸²

It was decided that the first step in the three-pronged strategy, that of having a new revised version of the Laws, was still worth pursuing. After much work, these revisions

³⁷⁴ Poulter 1972:157.

³⁷⁵ Machobane & Karschay 1990:202.

³⁷⁶ Poulter 1972:157.

³⁷⁷ Juma 2011:120.

³⁷⁸ Poulter 1972:156.

³⁷⁹ Poulter 1972:156

³⁸⁰ Poulter 1972:157.

³⁸¹ Poulter 1972:156-157.

³⁸² Reports of Council Proceedings 1944:178, 182.

and adoptions suggested by the Standing Committee were accepted and subsequently published two years later, in 1946. At this point, it was still only parts two and three of the revised laws that had legal force, as a result of having been adopted after promulgation of the Native Administration Proclamation No. 61 of 1938. Sections eight and fifteen of the Proclamation authorised the Paramount Chief to issue rules and orders which would speak to the maintenance of peace, good order and welfare of the Basuto.³⁸³

Part one of the revised laws, which contains the Laws of Lerotholi as published in 1903, therefore remains without the legal force enjoyed by the second and third parts of the laws to this day, and so remain an area of contestation. As highlighted in the introductory section of the laws:

The first part is a "declaration of Basuto law and custom", a recording rather than a code, since it has never been given statutory authority. The second part has the force of statutory Rules under a Proclamation. So has the third part... which consists of rules of the Native Courts.

Part 1 of the Laws of Lerotholi thus remains without legal force in Lesotho's superior courts today, while the local courts deal with part 1 as fully authoritative and possessing legal force. This lack of legality suffered by part 1 does not, however, affect the legality of parts two and three, as these parts are still regarded by the superior courts of Lesotho in their decisions and are often used as a reference point for Basotho customary law in cases involving inheritance,³⁸⁴ marriage,³⁸⁵ succession to chieftainship³⁸⁶ and many other cases which involve women. The Laws of Lerotholi

³⁸³ Poulter 1972:154.

³⁸⁴ *Khadi v Mofelehetsi* (CIV/APN/476/12) [2020] LSHC 7 (30 April 2020).

³⁸⁵ *Letuka and another v Moiloa and Others* (CIV/APN/41/2011) LSHC 123. In this case the court relied on *Laws of Lerotholi*, Section 34(1) which deals with payment of cattle after 'chobeliso' (elopement).

³⁸⁶ See *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea and Others* (CC/5/2010) (Masupha case). In this case the court upheld section 10 of *Chieftainship Act*

thus remain partially legal and, with no indication of present-day efforts to having them fully legalised,³⁸⁷ will remain so for more years to come.

The 1993 Constitution does not make mention of the Laws of Lerotholi, only customary law. For example, sections 45(1) provides that “[t]he College of Chiefs may at any time designate, *in accordance with the customary law of Lesotho*, the person (or the persons, in order of prior right) who are entitled to succeed to the office of King...” (emphasis supplied)

Section 154(1) of the Constitution also states that “‘customary law’ means the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament...” With Lesotho’s customary laws having been codified into the Laws of Lerotholi, reference to customary law can be argued to essentially being to the Laws of Lerotholi, thereby giving the laws Constitutional recognition.

3.3 Part two – The Constitution of Lesotho and Basotho women’s social status

Under part two I focus on the relationship between the Constitution of Lesotho and women’s social status in Lesotho. I narrate the origin of the Constitution, following Lesotho’s attainment of independence from Britain. I highlight how the Constitution, though it was meant to usher in and reflect a new, democratic, and independent Lesotho, drew heavily from the systems and norms of the colonial power Lesotho was once subjected to. I argue that this resulted in a constitution that still reflected discrimination and inequality. I substantiate this argument with a look at the way the Constitution provides for rights that would do away with discrimination and inequality,

1968 in terms of which female children are excluded from succession to chieftainship as being part of Sesotho customary law as contained in the Laws of Lerotholi.

³⁸⁷ Makonese “Customary law and its implications on the enjoyment of human rights by women in Southern Africa: a focus on Botswana, Lesotho and South Africa”, <https://www.sadcla.org/content/customary-law.pdf> (accessed on 17 November 2022):10.

and immediately also negates them or does away with them in provisions that follow, through claw back clauses.

Following on this, I highlight how the Constitution further provided for and secured patriarchal and discriminatory provisions by adopting a dual legal system that gave discriminatory and patriarchal customary law provisions authority in the Constitution. This is an important observation to make, as it brings to the fore how the decision to adopt a dual legal system exposed the ideological inclinations of those in power at the time, as well as the power relations that those in power sought to either establish or secure. Thus, I argue that the decision to not abandon the dual legal system that the colonialists introduced into Lesotho was a strategic step in retaining discriminatory laws that would keep men in power and women subordinated under men.

This narration substantiates my assertion that the Constitution does not contain genuine intentions toward women achieving and enjoying non-discrimination, gender equality, and all other rights guaranteed by the Constitution.

3.3.1 Independence of Lesotho

Lesotho gained independence on the fourth of October 1966, as per the *United Kingdom's Lesotho Independence Act of 1966*.³⁸⁸ The *Lesotho Independence Order of 1966*³⁸⁹ also saw the entry into force of the country's first Constitution³⁹⁰ immediately before the fourth of October 1966.³⁹¹ In 1970 the 1966 Constitution was suspended,³⁹² and the new Constitution adopted in 1993. The 1993 Constitution (the Constitution) is

³⁸⁸ Section 1 provides "On 4th October 1966 (in this Act referred to as "the appointed day") the territory which immediately before that day constitutes the Colony of Basutoland shall cease to form part of Her Majesty's dominions and shall become an independent kingdom under the name of Lesotho."

³⁸⁹ Statutory Instruments 1966, No. 1172, HMSO (Supplement to Lesotho Gazelle 4 of 4 November 1966) <https://lawcat.berkeley.edu/record/367339?ln=en> (accessed 14 September 2022).

³⁹⁰ The Constitution was appended to The Lesotho Independence Order of 1966.

³⁹¹ O'Leary 1968:266.

³⁹² The details behind, and reasons for, this suspension fall outside the scope of this thesis and will thus not be delved into.

the Constitution in force presently.³⁹³ Section 2 of the Constitution stipulates that “[t]his Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.” The Constitution was amended in the years 1996, 1997, 1998, 2001, 2004 and again in 2011.

Under the Constitution, sections 4 to 24 form chapter two of the Constitution, also known as the ‘Bill of Rights’.³⁹⁴ It is under the Bill of Rights that provisions are made for the equality of all citizens³⁹⁵ and non-discrimination.³⁹⁶ The Bill of Rights is said to contain:³⁹⁷

... several features which combine to afford an exceptionally strong safeguard of individual freedom; among these being a requirement having the effect that in most cases where governmental or legislative action curtails a protected right of freedom, it is for the Government to establish in the Courts if challenged that, where there are several reasonable ways of achieving a legitimate governmental objective, the means least restrictive of human freedom must be chosen.

³⁹³ *Lesotho's Constitution of 1993 with Amendments through 2011*, https://www.constituteproject.org/constitution/Lesotho_2011.pdf?lang=en (accessed 14 September 2022).

³⁹⁴ Officially termed “Protection of Fundamental Human Rights and Freedoms” under the Constitution.

³⁹⁵ Section 4(1) provides that “[w]hereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following--” and proceeds to list the 16 protected fundamental human rights and freedoms.

³⁹⁶ Section 18(1) and (2) provides that 1() [s]ubject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

³⁹⁷ Report of the Basutoland Independence Conference 1966, 4, para. 3, Cmnd. 3038. HMSO (Supplement to Basutoland Gazette 3538 of 29 July 1966, as cited in O’Leary 1968:269.)

Despite these safeguard-features, the Constitution still contains claw-back clauses that hamper the impact of the rights it provides,³⁹⁸ as well as deeply ingrained customary laws and values.³⁹⁹ With the dual nature of Lesotho's legal system, the Constitutional provision for customary law is not an anomaly. It may even point towards Constitutional reflection and acknowledgement of diversity,⁴⁰⁰ although this may come with its own dangers. For example as I illustrate in part one above, most customary laws place women in disadvantageous positions, thus acknowledging and protecting them is a simultaneous acknowledgment and protection of women's disadvantageous position under such laws.⁴⁰¹ In addressing this dilemma, it is suggested that even as Constitutions acknowledge and protect customary law's validity and application, this should not be done through blanket cover of customary law.⁴⁰² First and foremost, contradictions between customary law norms and human rights provisions should be resolved before they are protected in Constitutions.⁴⁰³ This is because blanket cover of customary laws immunizes them against human rights scrutiny and consequently perpetuates customary discrimination against women.⁴⁰⁴ Ndulo highlights that:

[I]t is important to evaluate customary norms in the context of human rights because... [w]hile African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities, human rights norms

³⁹⁸ An example is section 18's provision for freedom from discrimination, which is then followed by a claw-back clause under 18(4)(c), which provides that people may be discriminated against, if such discrimination is on the basis of custom.

³⁹⁹ For example, section 7(6) of the Constitution states "[n]othing contained in or done under the authority of any provision of the customary law of Lesotho shall be held to be inconsistent with or in contravention of this section to the extent that that provision authorises the imposition of restrictions upon any person's freedom to reside in any part of Lesotho" and section 18(4)(c) provides "[s]ubsection (1) shall not apply to any law to the extent that that law makes provision for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law."

⁴⁰⁰ Banda 2006:15.

⁴⁰¹ Banda 2006:16.

⁴⁰² Ndulo 2011:89.

⁴⁰³ Ndulo 2011:89.

⁴⁰⁴ Ndulo 2011:97.

typically enjoin state parties to treaties to respect human rights and take all appropriate measures to eliminate discrimination against women.

Ibhawon contends that "[i]n many African states, initial constitutional provisions were drawn overwhelmingly from patterns familiar to the departing colonial power, hence reflecting assumptions far more common in the metropole than in particular African societies."⁴⁰⁵ Lesotho is found to be no exception, as Lesotho's own Constitution has failed to move beyond the gender-based discriminatory nature it possessed when passed down to Basotho at the end of British colonialism,⁴⁰⁶ and thus still possesses legal norms from colonial officers who accorded women fewer rights than men and protected customary laws and norms that had masculinist constructions from men who sought to keep women subordinated in society.⁴⁰⁷ Section 18(4)(c), which originally appeared in the 1966 Constitution, serves as an illustration. I posit that had there been an intention to move away from a legal and social system that is discriminatory against women and subordinates them, then this section would not have been re-added to the 1993 Constitution. In contrast, the 1993 Constitution still contains section 18(4)(c), as well as provisions that demonstrate the elites' devotion to cultural identity ideals.⁴⁰⁸ Consequently, the Constitution that Lesotho has held on to is the same one that reflected and protected the patriarchal episteme that existed during its formulation.⁴⁰⁹

Sezgin argues that each state, when faced with the decision of what to do with their legal systems at the end of colonialism, decided what to do with the inherited pluralistic legal system depending on a number of factors.⁴¹⁰ These included the ideological orientations of the ruling elite at the relevant times, whether the state had the force to enable it impose its political will on the different social forces as well as whether the social forces had the capacity to deny government's invasion into their private

⁴⁰⁵ Ibhawoh 2000:845-846.

⁴⁰⁶ Banda 2006:17.

⁴⁰⁷ Banda 2006:14.

⁴⁰⁸ Such as the preservation of the male primogeniture rule in the occupation of the office of King.

⁴⁰⁹ Banda 2006:14.

⁴¹⁰ Sezgin 2010:8.

preserve or not.⁴¹¹ At the core of these deciding factors lay power relations and how those in power wanted both to shape and utilise power relations – this then necessitated both an examination of the prevailing power relations, as well as decisions around what those in power wanted the status to be going forward. This was a critical point in the shaping of, among other issues, the power relations of the nation of Lesotho post colonialism. In the analysis of power relations, Foucault highlights the need for the establishment of a number of points, which include:⁴¹²

1. The system of differentiations which permits one to act upon the actions of others: differentiations determined by the law or by traditions of status and privilege; economic differences in the appropriation of riches and goods, shifts in the processes of production, linguistic or cultural differences, differences in know-how and competence, and so forth. Every relationship of power puts into operation differentiations which are at the same time its conditions and its results.
2. The types of objectives pursued by those who act upon the actions of others: the maintenance of privileges, the accumulation of profits, the bringing into operation of statutory authority, the exercise of a function or of a trade.
3. The means of bringing power relations into being: according to whether power is exercised by the threat of arms, by the effects of the word, by means of economic disparities, by more or less complex means of control, by systems of surveillance, with or without archives, according to rules which are or are not explicit, fixed or modifiable, with or without the technological means to put all these things into action.
4. Forms of institutionalization: these may mix traditional pre-dispositions, legal structures, phenomena relating to custom or to fashion (such as one sees in

⁴¹¹ Sezgin 2010:8.

⁴¹² Foucault 1982:792.

the institution of the family); they can also take the form of an apparatus closed in upon itself, with its specific loci, its own regulations, its hierarchical structures which are carefully defined, a relative autonomy in its functioning (such as scholastic or military institutions); they can also form very complex systems endowed with multiple apparatuses, as in the case of the state, whose function is the taking of everything under its wing, the bringing into being of general surveillance, the principle of regulation, and, to a certain extent also, the distribution of all power relations in a given social ensemble.

Governments that opted for pluralistic legal systems have, according to Sezgin, often been those with exclusionary intentions and visions of building societies characterized by stratification⁴¹³ or, as Foucault puts it,⁴¹⁴ differentiations. The objectives of those deciding on the form of legal system to be adopted clearly included the maintenance of the privileges that men had over women, and that men in the elite class had over ordinary men, in line with the hegemony and episteme of the time. The pluralistic legal systems met this objective because they supported and maintained the ruling regimes' propagation of the supremacy of one social group above the other, hence the importance of the legal systems to the regimes.⁴¹⁵ The legal system that the Constitution was to adopt would thus bring about differentiations facilitated both by customary norms and law, and the Constitution.⁴¹⁶

The governments' opting for pluralistic systems were, therefore, strategic moves to enable them manipulate the systems to realise particular ideologies in societies and adopt pluralistic legal systems and preserve 'archaic' 'divide and rule' colonial legacies.⁴¹⁷ The fact that pluralistic legal systems have proven consistently detrimental to women's rights and freedoms was therefore no surprise.⁴¹⁸ This arguably came as

⁴¹³ Sezgin 2010:13.

⁴¹⁴ Foucault 1982:792.

⁴¹⁵ Sezgin 2010:10.

⁴¹⁶ Sezgin 2010:21.

⁴¹⁷ Sezgin 2010:7-8,12.

⁴¹⁸ Sezgin 2010:8.

a result of the institutionalization of the ‘... discriminatory patriarchal structures and gender inequalities of... traditions by giving them formal recognition and state-sanctioned backing’.⁴¹⁹ The result was the compartmentalization of different individuals in society.⁴²⁰ Sezgin’s argument sheds some light on why the Constitution is so heavy-laden with claw-back clauses, more so regarding rights that affect women, as well as why its Bill of Rights is said to possess lacklustre rights and provisions.⁴²¹

Should the regimes have sought to change from the often discriminatory pluralistic legal systems as I highlight above, Sezgin argues that they had the option to undertake various forms of reform, based on which would best suit their society.⁴²² Sachs also argues that in cases where there arose an apparent intertwine between male chauvinism and custom then Constitutions could have been used to emphasise principles of equal rights over patriarchal customs.⁴²³ The absence of such reform therefore indicates a lack of will to protect the rights and freedoms of all individuals in society, as most of these regimes constitutionally committed themselves to do.⁴²⁴

Of further direct relevance to my argument in this thesis – that the Constitution protects customary law and thus protects women’s subordinate social status and low political participation – are the Constitutional mentions of and provisions for customary law. The Constitution makes no mention of the Laws of Leretholi, only customary law in sections 7(6), 18(4)(c), 45(1), (2), (3) and (5), 46(1), and 154(1). I quote sections 18 and 154 below as they are relevant to my argument.

Section 18(1) and 18(4)(c) provides thus:

⁴¹⁹ Sezgin 2010:21.

⁴²⁰ Sezgin 2010:6.

⁴²¹ Bond 2007:290-291.

⁴²² Sezgin 2010:11-12.

⁴²³ Sachs 1990:1,20-21.

⁴²⁴ Sezgin 2010:6.

(1) - Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(4) - Subsection (1) shall not apply to any law to the extent that that law makes

Provision – (c) for the application of the customary law of Lesotho with respect to any

matter in the case of persons who, under that law, are subject to that law;

Section 154 states:

1. In this Constitution, unless the context otherwise requires:

- "customary law" means the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament;
- "law includes--
 - ii. the customary law of Lesotho and any other unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly;

As I highlight above, section 18 first affords all citizens freedom from discrimination, then takes away the same rights by providing that if one is discriminated against, based on customary law, then such discrimination will not be taken to have been a contravention of the freedom from discrimination. Section 154 recognises customary law as having the force of law in Lesotho. I discuss these provisions and their impact on the customary law of Lesotho and women's social status further in part three below.

3.4 Part Three – Custom, Customary law, the Constitution, and women’s social status in Lesotho

In part three I focus specifically on how the customs of the Basotho, the Laws of Lerotholi and the Constitution have contributed to the present social status that Basotho women occupy in Lesotho. In so doing, I zero in on particular customs and provisions in both the Laws of Lerotholi and the Constitution that I argue discriminate against women and also perpetuate their subordinate social status. I begin with detailing the present-day social status occupied by Basotho women and the factors argued to be the causes of such social status, which include custom and customary laws. I then discuss the role that custom played specifically in perpetuating this status quo. I narrate how custom assigns women a perpetual subordinate social status, even lower than their own sons at some point in their lives. I draw attention to how this perpetual subordinate social status condemns women to the guardianship of men at each stage of their lives and prevents them from exercising their autonomy, for example pertaining to concluding contracts, undertaking employment, or even purchasing assets. I indicate, however, that several occurrences that went against the status quo were noted, signalling a breeze of change or at least a decline in strict adherence to customary norms.

I then discuss the Laws of Lerotholi and how they too discriminate against women, argued to be a result of distortion by the male elite and chiefs, as well as the colonial influence which injected patriarchy into them and thus established patriarchal and discriminatory laws. I argue that the laws institutionalized power imbalance in Lesotho, setting men as superior and women as subordinate. I then provide evidence that the very intention behind the existence of the laws was the subordination of women, thus providing clarification of why the laws so jealously guard against women’s liberation in any manner, whether through denial of access to governance or through the exclusion from economic activity through denial of inheritance of land ownership. Finally, and to substantiate these claims, I look into specific provisions of the laws and the customs, and I begin with the provision concerning inheritance and how women are excluded from inheriting from their fathers or are required to consult male members of their husbands’ families in administering their family assets at the death of their husbands.

I then turn to the exclusion of women from the ownership of the times' most prominent means of economic activity and success – land and cattle. I provide and analyse the provision concerning ownership and occupation of land, which does not cater to women's ownership of land. I combine this with the customary exclusion of women from ownership of cattle, argued to be because, among other reasons, women's biology negatively affected the fertility of the cattle. I argue that this exclusion of women from ownership of the times' most prominent means of economic activity and success was strategic in establishing women's economic dependence on and subordination to men.

In concluding part three, I turn to discussing the relationship between the Constitution and women's social status in Lesotho. I argue that the umbrella protection that customary law enjoys under the Constitution not only legalises the discrimination of women on the basis of customary law, but equally perpetuates such discrimination. I relate how the Constitution initially paints a promising picture, through provisions that speak to the equality of all citizens and non-discrimination. This initial picture points to a constitution that is for equality and the protection of all citizens. I then turn to the provisions in the Constitution that negate these promising provisions and lead to the discrimination of women, for example section 18(1) of the Constitution, which prohibits the enactment of any law that, in its wording or effect, discriminates against anyone, while section 18(4)(c) goes on to legalise discrimination if justified by customary law provisions. I argue that the claw back clauses present in the Constitution serve to cement hegemony and keep power away from women. I also provide scholarly arguments to the effect that Lesotho's Constitution is deliberately patriarchal in nature, thus facilitating the subjection of women to discrimination, social inequality, and human rights violations. Although arguing that the above is the status quo, I provide some positive strides concerning women that have nonetheless been undertaken based on Constitutional provisions, for example the removal of women's minority status under civil law and the legalisation of women's right to buy land in their personal capacity. I do, however, also highlight how despite these positive strides the social hold of custom is still so strong that most citizens still conduct their affairs based on custom and customary law.

3.4.1 Custom, Customary law and Basotho women's social status

3.4.1.1 Subordinate social status

Research indicates that women in every country occupy a lower social status than their male counterparts, and Lesotho is no exception.⁴²⁵ Basotho women find themselves subordinated in almost all spheres of society, although evidence points towards them having historically occupied a 'contingent and independent, subordinate yet oddly powerful' social position in earlier years.⁴²⁶ A number of factors have been presented as causes of such subordination, amongst which falls custom and customary laws. In terms of Basotho custom, for example, a woman occupies a perpetual minor status throughout her life.⁴²⁷ Epprecht draws attention to how customarily, "[e]ven senior women, who commanded respect on account of their age or successful careers as prolific mothers of sons, were still considered minors.⁴²⁸ An unmarried woman is under the guardianship of her father, and therefore a minor, even after attaining the age of 21.⁴²⁹ Should she get married, her minority status subsists, except that she is placed under the guardianship of her husband,⁴³⁰ which guardianship is transferred to his heir when such husband dies.⁴³¹ A woman under customary law cannot, therefore, validly contract without assistance from her guardian, i.e. father, brother, husband or husband's heir.⁴³² They may also not own land, contribute to national issues through participation in the *pitso* or *khotla*, fully partake in economic endeavours or exercise any form of autonomy. They are, essentially, stripped of autonomy.

⁴²⁵ World Economic Forum "The Global Gender Gap", <http://reports.weforum.org/global-gender-gap-report-2015/> (accessed 11 November 2020) and UNDP "Human Development Report", <http://hdr.undp.org/en/2015-report/> (accessed 11 November 2020).

⁴²⁶ Hlalele & Letsie 2011:159.

⁴²⁷ Braun & Dreiling 2010:477.

⁴²⁸ Epprecht 1992:44

⁴²⁹ Maqutu & Sanders 1987:392.

⁴³⁰ There also exists an old Sesotho saying, that "A woman has no chief but her husband" (Report and Evidence of Commission on The Native Laws and Customs of the Basutos 1873:55).

⁴³¹ *Laws of Lerotoli 1946*, part 1, sec.12(4) & 13(1),

⁴³² Matashane-Marite 2005:3.

Poulter, however, noted a slight breeze of change in this former status quo that kept women subordinated. Basing himself on the judgment in the *Bereng Griffith v Mantsebo Seeiso* case,⁴³³ he relays how the position of women had changed to give a woman the same status as a man in the eyes of the law, allow her to be a guardian over her children on her husband's death as well as control and administer her family's estate and general affairs of her household.⁴³⁴ Transformation in Basotho customs also led to the availability of an emancipation option for single women.⁴³⁵ As per the judgment in *Monyake v Monyake*,⁴³⁶ a single woman now possesses the ability to emancipate herself. *Paneng v Paneng*⁴³⁷ also highlights that a woman who, on being evicted by their family, had gone on to support herself for several years, was said to have emancipated herself. Despite these changes in the custom, many women still adopt the old manner of conducting such issues.⁴³⁸

The Laws of Lerotholi, regardless of these changes in the status quo, also remain unchanged and govern society as is, leaving members of society believing that their provisions are the 'norm' and the way of life. Women who decide to exercise their rights, for example through approaching the courts, are left at the mercy of whichever judge will be presiding over their case and their view of women and women's status and or rights.

Some scholars argue that women's marginalisation and minor status were mainly introduced or exacerbated in African countries, including Lesotho, by colonialism,⁴³⁹ while other scholars argue that Lesotho already discriminated against women in various ways even pre-colonialism. This argument, the latter group of scholars contend, is supported by, amongst other examples, the exclusion or vague mention⁴⁴⁰

⁴³³ *Bereng Griffith v Mantsebo Seeiso*, 58-60.

⁴³⁴ Duncan 1960:6.

⁴³⁵ Duncan 1960:7.

⁴³⁶ *Monyake v Monyake* J.C. 293/53.

⁴³⁷ *Paneng v Paneng* J.C. 111/57.

⁴³⁸ Duncan 1960:6.

⁴³⁹ Ntseane 2011:308.

⁴⁴⁰ For example, Sanders mentions in passing 'MaMohato's (Moshoeshoe I's great wife) management of Thaba Bosiu in Moshoeshoe's absence (Sanders 1975:50).

of the important economic and social roles women played in historic accounts⁴⁴¹ and how violence against them mainly went unpunished.⁴⁴² The seeming passing of blame for women's subordinate position in Basutoland to the colonialists then raises an interesting question – whether the British found a fair and just Basutoland or a nation in which women were already subordinated.

Whether women's marginalisation and minor social status pre-dated colonialism or not, what would take much debate to negate is the adverse impact colonialism *did* have on relations between the genders both in the colonial as well as post-colonial eras. This adverse impact was evidenced through the entrenchment of patriarchy into both customary and civil laws, with each boasting provisions that legalized the discrimination of women.⁴⁴³ I argue here that even if colonialism introduced patriarchy in Lesotho, it had to have found a ready platform on which to cement patriarchy. In essence, if there did not already exist patriarchal undertones in Lesotho's society on which the colonialists could hinge their patriarchal ways, patriarchy would have failed to take hold in Lesotho. I therefore do not believe that colonialism entirely introduced patriarchy in Lesotho, but that it cemented and worsened what already existed in the society.

As highlighted in *Bhe*:⁴⁴⁴

Although *African law and custom has always had [a] patriarchal bias*, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young.... Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status,

⁴⁴¹ Epprecht 1996:187 and generally Eldredge 2007.

⁴⁴² A case in point being Moshoeshoe's murder of his wife who was accused of adultery – a murder that neither earned him punishment nor tampered with his famous title as a man of peace. (See Epprecht 1996:187).

⁴⁴³ Mohlakoana-Motopi 2019:25.

⁴⁴⁴ *Bhe and Others v Khayelitsha Magistrate and Others*: para 89.

rendered wives, children and unmarried sons and daughters invisible in a social and legal sense. (emphasis supplied).

This legalized discrimination against women trickled down into almost all spheres of life.⁴⁴⁵ The power imbalance between the sexes was so expertly institutionalized in both the pre-colonial and colonial eras that it created resilient and generational barriers against the realization of gender equality even to this day.⁴⁴⁶

The provisions addressing women within the Laws of Lerotholi also leave much to be desired. This is because Lesotho's customary laws, like many customary laws, favour men and their interests, while pushing women to the periphery.⁴⁴⁷ The Laws of Lerotholi, for example, are anchored in patriarchal provisions that disempower and disadvantage women and their rights.⁴⁴⁸ Eldredge highlights that, contrary to the popular belief that women's subordinate position is a result of customary law, the formulation of customary law was such that it would facilitate women's social subordination.⁴⁴⁹ This means that, for all intents and purposes, '... customary laws were the means for, rather than the cause of, Basotho women's subordination',⁴⁵⁰ thus explaining why their 'sanctity' is often claimed in instances where issues that affect women to a greater extent than men are on the table.⁴⁵¹

Mosetse also draws attention to how heavily guarded the discriminatory nature of customary laws is, highlighting how "... wherever women encounter gender discrimination, it is usually explained in terms of their minority status according to

⁴⁴⁵ Juma 2013:161.

⁴⁴⁶ Juma 2013:161.

⁴⁴⁷ I mention earlier that before legalization of the *Laws of Lerotholi* Basotho women held chieftainship positions both as regents and in their personal capacities. This statement may, therefore, seem to be ignoring this positive aspect and making a negative blanket statement. It should, however, be noted that the laws did away with this practice and made chieftainship men's exclusive purview, hence the statement.

⁴⁴⁸ Bennett 2009:1.

⁴⁴⁹ Eldredge 1991:728.

⁴⁵⁰ Eldredge 1991:728.

⁴⁵¹ Okin 1998:36.

custom and anyone who seems to oppose this state of affairs is negatively described as “Khoana-tsoana”, or one who perceives herself as better than her custom and people.”⁴⁵² Codification of the customs and customary laws did not ease the situation for women either, as codification rendered customary law inflexible and unable to adapt to changing social circumstances such as alienation, the growth of male labour migration, and severe rural impoverishment.⁴⁵³

Several provisions in the Laws of Lerotholi reflect the subordination and discrimination of women that I argue above. A discussion of the customary and customary law provisions that impact specific areas of women’s social status, as relevant to my discussion on women’s social status as well as their political participation as I discuss in chapter four, follows. I touch specifically on women’s customary law exclusion from succession and inheritance, and their customary exclusion from ownership of land and cattle.

3.4.2 Inheritance

The Laws of Lerotholi are negatively prejudiced against women in the areas of succession and inheritance. The laws, for example, categorically state that an heir in families may only be the male first born, never a daughter.⁴⁵⁴ I quote and discuss the provisions below.

a) Part 1, section 11 (1), (2) and section 14 (3)

Section 11 (1) and (2) provides that:

⁴⁵² Mosetse 2006:125.

⁴⁵³ Walter (ed.) 2001:203.

⁴⁵⁴ *Laws of Lerotholi 1946*, part 1, sec. 11(1). This provision was incorporated into civil law through section 10 of the Chieftainship Act.

(1). The heir⁴⁵⁵ in Basutoland shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child of the next wife married in succession shall be the heir.

(2). If there is no male issue in any house the senior widow shall be the heir, but according to the custom she is expected to consult the relatives of her deceased husband who are her proper advisers.

Section 14 (3) provides that:

If there is male issue in any house other than the house from which the principal heir comes, the widow shall have the use of all the property allocated to her house and at her death any property remaining shall devolve upon the eldest son of her house who must share such property with his junior brothers in his house; provided that no widow may dispose of any property without consultation with the guardian while that son is a minor, and provided further that on the eldest son reaching his majority he will assume control of the property in his house.

The justification behind the preference of males over females in inheritance is that the eldest son, or whichever male was appointed as the heir, took over not only the finances of the deceased but also all their responsibilities, including the duty to care for all surviving dependants of the deceased.⁴⁵⁶ This is why in Sesotho the heir is called *mojalefa*, which is broken down to '*moja-a-lefa*', meaning one who simultaneously eats and pays.

⁴⁵⁵ Heir to a deceased male, as "succession to women was socially less important in traditional society" and would therefore not warrant laws made regarding it. (South African Law Reform Commission: 2004:13).

⁴⁵⁶ Mbatha 2002:259.

Duties accruing to an heir include:⁴⁵⁷

- i. To acquire and take charge of the deceased's estate. This means that the deceased's property became the heir's property.
- ii. To bury and to make arrangements for the burial of the deceased. This is to be done in conjunction with the other members of the deceased's extended family; however, it is the heir that has the legal obligation.
- iii. The heir has a right to the debts that were owed to the deceased and consequently had a duty to collect those debts.
- iv. The creditors of the deceased had a right to claim payment of the deceased's debts.
- v. The heir who stepped into the deceased's shoes had a duty to look after the deceased's dependants and to discharge all the legal obligations that the deceased had.
- vi. If the deceased allotted property among his houses and children and the heir came to know about this, the heir must carry out the deceased's wishes.

⁴⁵⁷ Obioha 2016:137-138.

The heir therefore essentially succeeds to the position of the deceased, taking up a trustee-like position.⁴⁵⁸ This is one of the reasons for male preferred over female preference, as only men are seen as capable of heading families in their own right or taking over the duty of heading a deceased's family's affairs.⁴⁵⁹

The reality is, however, that not all heirs take their duty to manage the family affairs or care for the surviving dependants seriously. Most heirs are, in fact, found to be irresponsible.⁴⁶⁰ This has been exacerbated by the modern-day changes in traditional family structures and dynamics such as urbanisation and migration, which has seen most men leave their rural homes in search of work in urban areas and neighbouring countries.⁴⁶¹ This means the justification for the male primogeniture rule no longer stands in modern days.

This status quo still sadly persists, even in cases where it can be argued and or proven that the daughters or widow are fully capable of administering their family's property to the best interests of all the children and or dependents. Even in cases where spouses who had jointly acquired assets during their marriage separate, men are still favoured regarding asset distribution. In *Evelina Rakhoabe v Jeriel Rakhoabe*⁴⁶² for example, the Court rejected an application for division of matrimonial property upon the parties' judicial separation. The Court held that as per customary law, parties are married out of community of property, hence there can be no division of matrimonial property on judicial separation. Although the Court had erred in its decision, since the parties had been in a civil marriage, the decision highlighted customary law's disposition towards denying women access to property, even if they had taken part in its acquisition.

There have, however, been indications of customary law's transformation in this approach to women's access to their matrimonial property upon their husband's death.

⁴⁵⁸ Diala 2017:153.

⁴⁵⁹ South African Law Reform Commission 2004:13.

⁴⁶⁰ Women and Law in Southern Africa 1994:99-100.

⁴⁶¹ South African Law Reform Commission 2004:8.

⁴⁶² *Evelina Rakhoabe v Jeriel Rakhoabe* 1967-70 LLR 210.

In *Matokelo Pheko v Estate late Mothethe Pheko and Others*,⁴⁶³ for example, a deceased man's family appointed an heir over his matrimonial property and proceeded to grab said property, movable and immovable, to the exclusion of his wife. The widow sought, and was granted, an interdict from the court, prohibiting the parties from grabbing and alienating such assets. Had the position and approach to customary law been the same as in the Rakhoabe case, it is doubtful that such interdict would have been granted, more so as the parties in the above case had been married by customary law. Khadiagala argues that the courts' decisions regarding women's rights to property, whether through succession, inheritance, matrimonial property division or purchase, reflect and hinge on '...whether the courts view female authority over land as essential to social order or a sign of impending chaos.'⁴⁶⁴ The lack of consensus in the courts' rulings regarding women's inheritance under customary law upon their spouse's passing means women do not have an assurance of protection from the courts against matrimonial property grabbing should their spouses pass.

In the event that the deceased leaves no male child behind in either of his houses (in the case of polygamous marriages), the senior widow shall be the heir, but custom requires her to administer such inheritance in consultation with the relatives of her deceased husband, who are deemed her proper advisors.⁴⁶⁵ Poulter highlights, however, that where there is a son and he inherits his father's property on the father's death, he only acts for his mother in the administration of such property, as his mother has charge of all her late husband's property until her own death.⁴⁶⁶ In *Sekoumane v Sekoumane*⁴⁶⁷ the heir overrode his mother's authority and instructed the herd boy to carry out his personal wishes over the family stock. The Court held that the son had a duty to always discuss decisions involving the stock with his mother. This decision was upheld on appeal. In *Lekaota v Lekaota*⁴⁶⁸ the heir failed to consult the widow

⁴⁶³ *Matokelo Pheko v Estate late Mothethe Pheko and Others* (CIV/T/623/2012) [2013] LSHC 50 (16 May 2013).

⁴⁶⁴ Khadiagala 2002:13.

⁴⁶⁵ *Laws of Lerotholi* 1946, part 1, sec. 11(2).

⁴⁶⁶ Duncan 1960:11.

⁴⁶⁷ *Sekoumane v Sekoumane* J.C. 295/47.

⁴⁶⁸ *Lekaota v Lekaota* 1963-1966 HCTLR 38 (LSHC).

regarding his decision to sell a portion of the inherited estate. The holding of the court was that the widow was entitled to use of the property, and sale of such property denied her enjoyment of her usufructuary rights. She was therefore entitled to the return of the sold property.⁴⁶⁹ The basis of these decisions was section 13(2) of the Laws of Lerotholi, which provides that the heir is under obligation to make use of the estate with the widow and other members of the family.

The widow is also entitled to support from the estate, the extent of which is to be decided by the heir in consultation with all relevant parties, such as his uncles.⁴⁷⁰ These provisions therefore bestow usufructuary rights on widows, which would be tampered with should the estate be alienated. The heir consequently bears the obligation to administer the inherited property with the best interests of the family as the main goal. As Poulter puts it:⁴⁷¹

It is a cardinal feature of Sesotho law that the heir does not possess unfettered and absolute rights over the estate. He has far-reaching obligations towards other members of the family. The property he has inherited belongs not so much to him as to the family and he must administer it with the family's best interests in mind.

The patriarchal elephant in the room remains how women are deemed so incompetent to be in control of anything that has a tie with economic power to the extent of giving sons administrative authority over their own mothers and their mothers' assets. It has been argued that the exclusion of women from inheritance in African states was a misinterpretation of customary law,⁴⁷² and that African women historically had a right to inherit from a deceased's estate, whether as widows or daughters.⁴⁷³ The

⁴⁶⁹ *Lekaota v. Lekaota* at 42.

⁴⁷⁰ *Laws of Lerotholi* 65 of 1960 § 13(2).

⁴⁷¹ Poulter 1976:255.

⁴⁷² WLSA Zimbabwe Inheritance Pilot Study 1992.

⁴⁷³ Armstrong *et al* 1993:354.

requirement that heirs act in consultation with their mothers regarding the inheritance implies an understanding that women are capable of making substantive decisions regarding the inheritance. This understanding does not, however, translate into women being allowed to inherit their matrimonial property and exercise full autonomy in the use of the inheritance.⁴⁷⁴ This is notwithstanding the supreme law of the land, the Constitution, being based on principles of equality and non-discrimination.

In the event that a man passed on and did not leave behind a widow or son but only a daughter, such daughter would not be entitled to inherit such property.⁴⁷⁵ In *Lethaha v Lethaha*,⁴⁷⁶ a man died, leaving only his daughter. The issue was then who was to inherit the man's property, with the debate focusing on whether his heir was his daughter or his brother. The Local Court held that the daughter was to inherit her father's property, but this decision was reversed in the High Court, where it was held that the brother was the rightful heir of the deceased's property.⁴⁷⁷ In *Thatho v Ntsane and Others*,⁴⁷⁸ the High Court of Lesotho stated that:

Unfortunately, the girl child, does not feature anywhere as a customary heir. She is at all times considered only as a dependant on the estate.... Even where the families have met and appointed heir if such appointment ignores the provisions of section VI Laws of Lerotholi Part I such appointment is illegal.

The exclusion of women from having succession rights therefore prevails despite the fact that succession under Lesotho's customary law is expected to be cognizant of the 'ethos of negotiation and the obligations of the family to honour the principle of mutual

⁴⁷⁴ Section 11(2) of the *Laws of Lerotholi* denies widows autonomy by demanding that they consult the late husband's family in decisions relating to the property.

⁴⁷⁵ Duncan 1960:12 and *Laws of Lerotholi* 1946, part 1, sec.12(4) & 13(1), where the distribution of property by the heir does not include the daughters of the family).

⁴⁷⁶ *Lethaha v Lethah* H.C.C. 14/10/43.

⁴⁷⁷ *Lethaha v. Lethaha* H.C. 22/1943.

⁴⁷⁸ *Thatho v Ntsane and Others* (CIV/T/357/97) [2000] LSCA 111 (12 September 2000), para 6-7, 9-10.

co-operation and sharing which Basotho family law requires of them.⁴⁷⁹ Although this statement seemingly implies that all members of the family are to participate equally in decisions regarding the family property, this was and is still not the case.

Basotho women do not take kindly to these discriminatory provisions. An inheritance study by Women and Law in Southern Africa found that the male primogeniture rule does not find approval from Basotho women, the majority of whom complain about the irresponsibility of most heirs.⁴⁸⁰ These dissatisfactions led to the relaxation of the male primogeniture rule application in some instances, leading to women and younger sons being appointed heirs in some instances.⁴⁸¹ The courts were, however, often found to not be as willing to adapt to such relaxations, as was seen in *Mohlabane v Mohlabane*.⁴⁸² In this case, property was allocated to a daughter, despite the presence of a son. The court applied customary law to reverse the property allocation to the daughter and pronounce the son the rightful heir as per customary law.

Male preference regarding inheritance, and other means of excluding women from the economy of the day, strategically denied and still denies women access to economic resources which could help them gain social status, power and influence to aid them in their overall development.⁴⁸³ This male preference creates and secures women's perpetual dependence on men for survival and advancement in life, leaving their livelihoods at the mercy of the men in their lives. The preference of men over women in inheritance also reflects an overall preference and regard of men over women in Basotho society.

⁴⁷⁹ Court ruling in *Moteane v. Moteane and Others* (C OF A (CIV) NO.14 OF 1994) [1997] LSCA 14 (05 February 1997) 8.

⁴⁸⁰ Women and Law in Southern Africa 1994:99-100.

⁴⁸¹ Women and Law in Southern Africa 1994:99-100.

⁴⁸² *Mohlabane v Mohlabane* CC 249/91 (LSHC) 101.

⁴⁸³ I discuss later how women were kept from all sources of economic empowerment such as inheritance or owning the main sources of economic power at the time – land and cattle.

3.4.3 Land

Historically, land allocation authority was vested in chiefs, who had the power to apportion land.⁴⁸⁴ They were mainly guided by custom and customary norms in their allocations.⁴⁸⁵ Most customary laws do not provide for women's ownership of land, whether through purchase, gifting, or inheritance.⁴⁸⁶ This means women were excluded from land ownership. This customary law position in Lesotho still stands to some degree despite various social and legal advancements.⁴⁸⁷

Civil law dealt with the uncertainty regarding women's rights over land through the Local Government Act of 1997. The Local Government Act, amongst other undertakings, distanced land allocation from chiefs and customary laws and norms and transferred the powers of land allocation to elected councils and committees. The Land Act also introduced leasehold to Lesotho's land tenure system, enabling people to exchange and alienate leases as they wish, without needing authorisation from external parties.⁴⁸⁸ The Land Act's enactment also sought to transform Lesotho's land system through removal of unpredictability and introduction of impartiality in the rights offered,⁴⁸⁹ a move projected to especially benefit women.⁴⁹⁰ The Land Act therefore directly benefits women through legalising their holding of leases in any and all capacities⁴⁹¹ as well as mandating that leases belonging to married couples reflect both spouses' names.⁴⁹² This has been a significant step towards women's empowerment in Lesotho, as affording women access to land also positively impacts

⁴⁸⁴ Fogelman 2016:36.

⁴⁸⁵ Section 7(1) and (2) of the *Laws of Lerotholi* gives authority to chiefs to allocate and take away land from their subjects.

⁴⁸⁶ The only mention made of women under land allocation in the *Laws of Lerotholi* is under section 7(4), where it states that "[n]o widow shall be deprived of her lands except under the provisions of subparagraphs (2) and (3)."

⁴⁸⁷ Lesotho underwent land reform, which culminated into the passing of the *Local Government Act of 1997* and the *Land Act* in 2010 (Act No. 8 of 2010), discussed below.

⁴⁸⁸ Fogelman 2016:37.

⁴⁸⁹ Sekatle 2009.

⁴⁹⁰ With the LCMPA having afforded women the right to own property, the Land Act also sought to reconcile Lesotho's land rights with the LCMPA's provisions.

⁴⁹¹ Whether acquired through purchase, gifting, inheritance etc....

⁴⁹² Fogelman 2016:39.

them socially, economically and politically.⁴⁹³ Fogelman, who shares the same sentiments, argues that “[l]and access is never merely about the land – land is a place of many values: social, agricultural, economic, religious, and so on.”⁴⁹⁴

Despite the commendable theoretic changes that the Land Act brought to women’s social, economic and political status, the situation on the ground has arguably not improved much for women. Evidence points towards land allocation still favouring men and customary norms,⁴⁹⁵ widows still being passed over regarding land inheritance,⁴⁹⁶ as well as husbands still being in charge of decisions regarding land as was the case before the passing of the Land Act.⁴⁹⁷ It has also been discovered that despite the Land Act providing legal recourse for injustices concerning land, most women choose to preserve the peace in their homes⁴⁹⁸ over making use of the legal recourses provided in the Act.⁴⁹⁹ It has therefore become evident that the mere presence of laws on paper has proven insufficient in truly empowering women, even making matters worse in some cases.⁵⁰⁰ There is need for work targeted towards ensuring the proper enforcement of the Act, before the Act is said to truly have reached its goals. This may involve partnerships between all relevant actors and stakeholders to ensure dissemination of the Act’s provisions as well as the promotion of a conducive environment for the implementation of the Act.

3.4.4 Cattle

In the past, the more cattle a man had, the wealthier he was considered to be, and this was wealth that he was able to leverage to gain social status, networks, and socio-

⁴⁹³ Agarwal 2001:1634-1635.

⁴⁹⁴ Fogelman 2016:41.

⁴⁹⁵ Hlalele & Letsie 2011:161.

⁴⁹⁶ Mphale “HIV/AIDS and food insecurity in Lesotho.’ Southern African Regional Poverty Network”, http://www.sarpn.org/documents/d0000222/mp hale/Lesotho_food_security.pdf (accessed 11 November 2020).

⁴⁹⁷ Fogelman 2016:39.

⁴⁹⁸ Fogelman 2016:39.

⁴⁹⁹ Mosetse 2006:41.

⁵⁰⁰ Fogelman 2016:41.

political power.⁵⁰¹ Cattle ownership determined a man's social status.⁵⁰² As Ferguson puts it:⁵⁰³

...the owner of a large number of livestock...[is] a 'big man'... A man with animals may also establish himself in the community by helping others with various chores and rituals that may require animals, or, less altruistically, by sharecropping the fields of those unable to plough by themselves.... A man wealthy in livestock ... thus regards his herd as a resource which is at once social and economic. ...a man with many animals is for this reason greatly respected – he is a man who can help the people.

Cattle afforded men the ability to create wealth that went beyond economic gain. Assisting those in need gained a man favour in the community, favour he could then later leverage for votes, to grant him a seat in places of importance, favour amongst community members and other benefits he may need. Cattle were and still are a great bargaining chip, and women's exclusion from their ownership served to deny them access to all other benefits accruing from such ownership. Women could only own animals such as pigs and chicken, and if a woman ever bought 'male animals' like sheep, it was said that she purchased these for her husband.⁵⁰⁴ The animals that women were allowed to buy and keep were often the first to be sold when there was a need in the household.⁵⁰⁵ Men's herds were sold as the very last resort, since these were regarded as retirement funds, the sale of which would bring them shame in the community.⁵⁰⁶ This limited women's ability to grow and maintain their own animals, and hence gain wealth and economic strength and independence.

⁵⁰¹ Ferguson 1985:647-674.

⁵⁰² Ngale 2021:34.

⁵⁰³ Ferguson 1985:658.

⁵⁰⁴ Ferguson 1985:657.

⁵⁰⁵ Mueller 1977:161-162. See Also Armstrong *et al* 1993:344.

⁵⁰⁶ Ferguson 1985:664.

Women's ownership of 'male animals', more so cattle, was also promoted as a social taboo, going as far as claiming that women's fertility had a negative impact on cattle's fertility.⁵⁰⁷ Eldredge highlights that the main goal was to "... prevent women from owning the most productive resource of the society, preventing them in turn from building the client relationships that formed the basis of socio-political power."⁵⁰⁸ Epprecht also advances that "[m]en's power over women in pre-colonial society stemmed from several sources. First, women were banned from owning, touching, or even talking about the most productive asset of the nation, cattle."⁵⁰⁹ There was seemingly no length that men would not go to, to ensure women did not have access to any and all forms of empowerment as available in society. These constraints greatly set women behind men in many social spheres.

The value and honour attached to cattle and cattle ownership has, nonetheless, decreased in present-day Lesotho, overtaken by a preference for 'modern material goods.'⁵¹⁰ Women's attainment of full autonomy, one of the consequences of which has been the right to own property in their individual capacity, means women now have the capacity and choice to own cattle or not. Women's interest towards cattle ownership has not, however, changed from Ferguson's earlier observation, that though they acknowledge the earlier value of cattle as means of wealth and respect, they believe those days are long gone and monetary wealth is now of greater value.⁵¹¹

The economic exploitation that women's exclusion from inheritance and ownership of land and cattle on the basis of their minority status subjected them to, served to confine and dominate women both internally/psychologically and externally/socially.⁵¹² These economic constraints placed on women and their earning and trading capacities were, then, strategies put in place to ensure the power dynamics remained in men's favour and women remained fully dependent on them.⁵¹³ Economic empowerment, whether

⁵⁰⁷ Eldredge 1991:728

⁵⁰⁸ Eldredge 1991:728

⁵⁰⁹ Epprecht 1992:44.

⁵¹⁰ Turkon 2003:158.

⁵¹¹ Ferguson 1990:160–165.

⁵¹² Bryson 1992:185.

⁵¹³ Ferguson 1985:656.

in the form of inheritance, land or cattle possession, was therefore another crucial area in which women's participation and success was limited through customary norms and laws. The exclusion of women from wealth and economic participation was a well calculated strategy, as it afforded men exclusive control of production and reproduction.⁵¹⁴ This status quo still persists in some part to this day,⁵¹⁵ through for example women's occupation of lower-ranking positions in the public sphere, as well as being paid less than their male counterparts in similar positions.⁵¹⁶

The subordinate status customarily assigned to women in society also negatively impacts their experience of everyday life along different spheres of society. It has, for example, led to the creation of, and women's relegation to, the private sphere based on their sex and the gender roles constructed around it.

3.4.5 Relegation to private sphere

As I discuss in more detail in chapter two above, the public/private divide came to be owing to the artificially drawn line which, on a patriarchal basis, separated the 'public' and 'private' spheres.⁵¹⁷ As per this divide, and on the basis of sex and gender as I narrate below, all that pertained to the home, personal, and non-professional contexts was assigned to the private divide, while all that dealt with the 'professional' world outside the house was assigned to the public sphere.⁵¹⁸ The private sphere was therefore where activities like home care and child rearing were found, while the public sphere boasted activities like business and politics.⁵¹⁹ Women were then restricted to the private sphere, while men dominated the public sphere.

⁵¹⁴ Eldredge 1991:728.

⁵¹⁵ Kali 2018b:55.

⁵¹⁶ Government of Lesotho 2019:4,19.

⁵¹⁷ Tamale 2004:52.

⁵¹⁸ Ford 2011:550.

⁵¹⁹ Tamale 2004:52.

It was in women's restriction to the private sphere that they were subjected to what has been equated to "... natural inequality between master and slave, parent and child, husband and wife."⁵²⁰ Women were, within the private sphere, also subjected to oppression,⁵²¹ undervalued and thus un/poorly remunerated labour,⁵²² subjection to male dominance, silencing of their voices in public discourse and a legitimisation of their discrimination.⁵²³ These negative experiences that women experienced in the private sphere went unchecked because it was argued that the private sphere was outside the reach of the state's 'public' authority, as the private sphere was characterised by voluntary relations.⁵²⁴

This reasoning was challenged by several feminists, even leading to the coining of the phrase 'the personal is political', as I discuss in chapter two above. As Hanisch asserts, "[w]omen are messed over, not messed up".⁵²⁵ The state could thus not ignore how social power relations affected women's experiences in the private sphere. Hanisch further states "[t]aking the position that "women are messed over, not messed up" took the focus off individual struggle and put it on group or class struggle, exposing the necessity... to deal with male supremacy."⁵²⁶ Second wave feminists thus argued that the limitation of the private sphere, wherein were found issues such as reproduction, sexuality, marriage and family, from falling within political issues was a grave error. They contended that the purview of the political extended to any and all issues that dealt with power relations in which any group was found to be ruled by another.⁵²⁷ These arguments aided women's liberation from their restriction to the private sphere. One of the victories won by second wave feminists was the ground-

⁵²⁰ Squires 2018:133.

⁵²¹ Cohen & O'Byrne 2013:39.

⁵²² Cohen & O'Byrne 2013:39.

⁵²³ Cohen & O'Byrne 2013:40.

⁵²⁴ Squires 2018:131.

⁵²⁵ Hanisch "The personal is political", <https://www.carolhanisch.org/CHwritings/PIP.html> (accessed on 17 November 2022).

⁵²⁶ Hanisch "The personal is political", <https://www.carolhanisch.org/CHwritings/PIP.html> (accessed on 17 November 2022).

⁵²⁷ McCann & Kim 2017:18.

breaking decision in *Roe v. Wade*,⁵²⁸ which secured reproductive freedom to women.⁵²⁹

I speak below of three means through which the public/private divide was initiated, justified, and sustained. As Foucault asserts, power is exercised and enabled through several means, one of which is through a system of differentiations.⁵³⁰ I, thus, draw attention below to how the system of differentiations was adopted and used to relegate women to a subordinate position, and thus 'successfully' keep them from power. I specifically look into the use of the sex and gender divide, initiation school, and the modern-day language of education.

3.4.5.1 Sex and gender divide

As I highlight in chapter two above, sex and gender are used as justifications for women's relegation to the private sphere. Sex, being one's biological makeup, as defined by their genitalia, hormones, gonads, and/or chromosomal makeup, has been used as the basis for the argument that distinctions between males and females "naturally" occur based on the presence or absence of these biological makeup.⁵³¹ Sex is then further used as a basis for the creation of gender - a social construct that refers to positions and roles that are "naturally" said to fit men and women differently because of their biology. From a customary perspective, gender is "... the sum total of... [custom's] notions of what is appropriate to each gender by way of temperament, character, interests, status, worth, gesture, and expression."⁵³² On the basis of sex, different gender roles are then created and assigned. Children are then exposed to and taught expected norms and behaviour from an early age through means like

⁵²⁸ *Roe v. Wade* 410 U.S. 113 (1973).

⁵²⁹ *Roe v. Wade* was overturned by the United States of America's Supreme Court on June 24, 2022.

⁵³⁰ Foucault 1982:792.

⁵³¹ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022).

⁵³² Millett 1971:31.

education and language, which lessons often survive even in the presence of exceptions to what they have been taught to be the norm.⁵³³

As sex-and-gender-based roles were assigned, women were assigned roles based in the home, as they were seen “naturally” fit for. These involved reproduction and home care such as cooking and cleaning. The justification was that because of their reproductive responsibilities, women are ‘naturally’ drawn to activities that belong in the private domain.⁵³⁴ Casalis even posits that the private sphere “... is the realm of woman par excellence.”⁵³⁵ This, De Beauvoir strongly disagrees with. She argues that “[o]ne is not born, but rather becomes, a woman.”⁵³⁶ This is, according to her, because females are not born with womanhood, femininity, and the maternal instinct, but are rather educated and forced into possessing these traits.⁵³⁷ Therefore, gender is a product of behaviour, not nature.

Foucault highlights that separating men and women based on their sex, was a power play, meant to subject women to men. He posits:⁵³⁸

My objective, instead, has been to create a history of the different modes by which, in our culture, human beings are made subjects. My work has dealt with three modes of objectification which transform human beings into subjects. The first is the modes of inquiry which try to give themselves the status of sciences; for example, ... the objectivizing of the productive subject, the subject who labors

Biology was evidently used as a means to justify women’s relegation to the private sphere, and why this relegation “naturally” made sense. Science was also used to

⁵³³ Diamond 2000:46.

⁵³⁴ Tamale 2004:52.

⁵³⁵ Casalis 1997:80.

⁵³⁶ De Beauvoir 2009:330.

⁵³⁷ De Beauvoir 2009:342-343.

⁵³⁸ Foucault 1982:777.

keep women away from the prominent means of economic empowerment. Casalis observed during his time with Basotho that:⁵³⁹

... [t]he sotho village is divided into two realms, that of women (the houses) and that of men (the cattle kraals/*khotla*) ...woman's realm is connected with fertility and she is not to enter the man's realm lest she disturb it with her potency (or conversely, lest she pollute it). ... The house is like a womb where procreation occurs.

Women's participation within the public sphere was also restricted due to the supposed threat they posed to moral and social stability resulting from their biological makeup.⁵⁴⁰ There was therefore a clear manipulation and or weaponization of science and biology to orchestrate and sustain women's relegation to the private sphere.

3.4.5.2 *Initiation school*

During the initiation process, boys are educated on issues involving cultural and national history and philosophy, patriotism, and military techniques.⁵⁴¹ For girls, initiation involves trainings on sexually satisfying their husbands, respect for men and which foods are regarded as taboo for them.⁵⁴² After initiation, boys are allowed to attend *khotla* gatherings, and girls are not. This further affirms and cements the view of social and national issues as the exclusive purview of males, as is instilled into both boys and girls through women's banning from the national platform for discussion of national issues such as governance and politics in the *khotla*.⁵⁴³ The teachings at the initiation schools were, then, used to train both girls and boys on how they were to

⁵³⁹ Casalis 1997:80.

⁵⁴⁰ Smart 2002:8.

⁵⁴¹ Khalanyane 1995:52.

⁵⁴² Laydevant 1953:63.

⁵⁴³ Mukurunge & Bhila 2019:432.

think, see themselves, see the other sex and then finally how to conduct themselves according to the received knowledge.

The trainings given to boys and girls during their initiation were vital because they were tools and platforms through which the underlying customary norms that regulated the language, logic, perception schemes, values, and other procedures of the time could be sustained. These underlying regulatory customary norms are what Foucault terms an episteme, that is "... a world-view, a slice of history common to all branches of knowledge, which imposes on each one the same norms and postulates, a general stage of reason, a certain structure of thought, that the men [sic] of a particular period cannot escape."⁵⁴⁴

Thus, an episteme is the manner in which a society thinks at a given moment, which in turn governs how the people of that time come to understand and use their bodies. It is, then, a means of the exercise of power over the person of a society through a particular ideology. As Foucault highlights:⁵⁴⁵

This form of power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word "subject": subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to.

The power in this form of exercise of power, is in how it imposes on people particular forms of thinking and being, which forms are then internalized by the people and turn into personal-regulation tools. This is what Foucault refers to as normalising power -

⁵⁴⁴ Foucault 1976:191.

⁵⁴⁵ Foucault 1982:781.

the ability to cause people to internalize power structures in a way that conforms them to social behaviour standards, such as how a school teaches kids to heed a bell's sound and sit in rows in a classroom.⁵⁴⁶ It is the power that dictates what we see as 'normal'. It moulds our views, desires, and decisions while making us believe that they are all personal, uninfluenced perceptions and decisions. As a result, society creates individuals who wish to carry out its will.⁵⁴⁷ Additionally, Foucault is of the view that the strength of normalizing power rests in the fact that everyone is exposed to it and that it can be found everywhere, not only in specific locations.⁵⁴⁸

In order to facilitate this imposition of desired patterns of thinking and being, ideological apparatuses such as legislations and modern educational systems are engaged. Pieces of legislation are then used to establish the tacit norm through legalisation. This is a manifestation of biopolitics - how the very life of people has become a focal point for politics, even bringing about the development of strategies and mechanisms aimed towards the management and control of peoples' lives to tame them and make them docile and useful.⁵⁴⁹ One of the ideological apparatuses used, is the language of education in the modern education system, as well as the language adopted in everyday life.

3.4.5.3 The language of education and women's social status

Language impacts how people think about varying issues such as women's status.⁵⁵⁰ It can both shape and/or distort perceptions.⁵⁵¹ Language also falls within the means considered most powerful and effective for the perpetration and reproduction of sexism and gender discrimination.⁵⁵² This is because the language and terms used to

⁵⁴⁶ Foucault 1995:182-183.

⁵⁴⁷ Foucault 1995:242-243.

⁵⁴⁸ Foucault 1978:82.

⁵⁴⁹ Foucault 1976:242.

⁵⁵⁰ Pérez & Tavits 2019:16785-16786.

⁵⁵¹ DeFranza *et al* 2020:3.

⁵⁵² Menegatti & Rubini "Gender bias and sexism in language. Oxford research encyclopedia", <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-470?print=pdf> (accessed on 14 November 2022).

describe men and women have an impact on how people perceive and thus value them. Men are, for example, described using terms such as strong, wise, authoritative, decisive, and so on. Women, on the other hand are described using terms such as weak, soft, emotional etc, which place them as 'other', in comparison with men, instigating and affirming their relegation to subordinate status. Language is thus a key element in the shaping of the perceptions, value and consequently the experiences of both men and women.

Language is thus a key element in the formation of hegemony, as society's psychology, realised in social stereotypes and bias, interactions between members of society and general attitude, is heavily influenced by the language adopted by such society.⁵⁵³ Peoples' comprehension of, and function within, their surroundings and the world as a whole are also centred on language.⁵⁵⁴ The process of peoples' formulation and understanding of 'self', and how this translates regarding their place in society, similarly involves language.⁵⁵⁵

Language has also been found to possess the ability to reflect a society's view on different issues, including its view and attitude towards women and men.⁵⁵⁶ It is also strongly woven into formulations of culture and how this culture is diffused within a society.⁵⁵⁷ Studies of a society's language can, therefore, reveal its underlying beliefs regarding power and power dynamics.⁵⁵⁸ It is, therefore, in a society's language, whether in conversations by or about women, that women's subordination and discrimination may be identified.⁵⁵⁹

⁵⁵³ Opayemi et al. 2019:1.

⁵⁵⁴ Liu et al/ 2018:83.

⁵⁵⁵ Liu et al/ 2018:86.

⁵⁵⁶ Machobane 1996:34.

⁵⁵⁷ Wanitzek 2002:4.

⁵⁵⁸ Wanitzek 2002:4.

⁵⁵⁹ Lakoff 1973:45.

Language has, unfortunately, historically been found to have been ‘weaponized’ against women, turning it into a weapon that is not only powerful, but one that also yields extensive emotional and cognitive effects.⁵⁶⁰ Schwarz-Friesel posits⁵⁶¹

... words are like weapons, they wound like bullets, some are like poison, they slowly affect the mind and activate a lethal semantics. Using language as a tool in order to discriminate against and demonize human beings as members of a hostile group, can lead to radical political and social consequences in a society.

Women, in their pursuit of liberation and equality cannot, therefore, overlook language and the power it wields over them and the power it also enables others to wield over women. In this light, Parpart refers to Simone de Beauvoir’s argument where she states “... women have been created and defined as ‘other’ by men... [de Beauvoir then]... challenged male definitions of woman and called on women to define themselves outside the male/female dyad. Women, she urged, must be the subject rather than the object (other) of analysis.”⁵⁶²

Thus, the language used in everyday conversation can either contribute to the continuation of gender inequality and the social subordination of women or be used as a liberation tool. Foucault highlights how this can play out, using the classification of homosexuality. He posits that the classification of homosexuality:⁵⁶³

... made possible the formation of a “reverse” discourse: homosexuality began to speak on its own behalf, to demand that its legitimacy or “naturalness” be acknowledged,

⁵⁶⁰ Schwarz-Friesel 2015:161.

⁵⁶¹ Schwarz-Friesel 2015:161.

⁵⁶² Parpart 1993:443.

⁵⁶³ Foucault 1978:101.

often in the same vocabulary, using the same categories by which it was medically disqualified.

Though intended for the subjugation of those who were categorised, categorizing homosexuality in this manner provided a language for the empowerment of those it was meant to subdue. Language that has formerly been used as a weapon of subjugation against women can, therefore, be used as a tool for women's liberation.

Mokotso posits that colonialists used language as a strategy through which they could transmit "... accepted beliefs, patterns of behavior and thought that are considered congruent with the intended... 'identity'."⁵⁶⁴ Through post coloniality, we realise that although colonialism seems to have ended, with most former colonies now having attained independence, it continues to shape the world in profound ways, just as it did prior to the independence of its former colonies. Some of the means through which colonialism is seen to continue to shape our world, is through the education system, which has enabled it to target the very "... body of the colonised as much as their minds."⁵⁶⁵ One of the examples of this targeted shaping is seen through the colonialists' language, a language foreign to the colonised, being used as the medium of instruction in education. This disadvantaged the colonized and instilled fundamental insecurity in themselves and their intelligence.

The colonialists also educated the colonised in knowledge that had been produced by the colonialists themselves. The production of knowledge about the colonised by the colonialists was a strategic step in the process of hierarchical power and dominance construction. The goal was twofold: portray the colonised in a negative light, and the colonialists as the positive light to strive for, thus allowing the colonialists to gain control and dominance over the colonised.⁵⁶⁶ This is, according to Said, orientalism - a process of stereotyped knowledge-production through which the colonialists were

⁵⁶⁴ Mokotso 2015:161.

⁵⁶⁵ Manjapra 2020:151.

⁵⁶⁶ Sajed 2022:67.

able to dominate the colonised through producing knowledge that portrayed the colonialists as the ultimate greats and the colonised the lesser other.⁵⁶⁷ This knowledge was then used by the colonialists to produce the kind of colonised people they could dominate and restructure as they desire,⁵⁶⁸ through the colonised peoples' internalisation of the colonialists' created knowledge of the colonialists as the ultimate greats and the colonised the lesser other.⁵⁶⁹

Men arguably subjected and still subject women to the same fate that colonialists subjected their colonial subjects, also using language. For example, the language adopted in education was and is still used instrumentally in grooming boys and girls towards social gender norms, whether covertly or overtly.⁵⁷⁰ For example, a substantive portion of the proverbs, idioms, terms, and phrases that form part of curricula have embedded in them notions of gender discrimination and women's subordination.

Words, phrases, proverbs, and other manifestations of languages have thus often been found to directly and or indirectly demean,⁵⁷¹ objectify,⁵⁷² and subordinate women.⁵⁷³ Sesotho language has not itself been immune from this discriminatory use and impact of language. Most Sesotho proverbs and phrases have negative connotations regarding women, often assigning characteristics that align with strength, authority, and dominance only to men.⁵⁷⁴ These proverbs and phrases are then taught to children from young ages, thereby instilling in them belief in and conformity to the patriarchal and discriminatory messages carried in them.⁵⁷⁵ I discuss some of these below:

⁵⁶⁷ Said 1978:11.

⁵⁶⁸ Said 1978:11.

⁵⁶⁹ Sajed 2022:67.

⁵⁷⁰ Such as the fact that the most famous compilation of Chiefs praises used in schools, *Lithoko tsa Marena a Basotho*, does not mention a single female chief, despite there being a number of these.

⁵⁷¹ Lakoff 1973:73.

⁵⁷² Lakoff 1973:45.

⁵⁷³ Lakoff 1973:45.

⁵⁷⁴ Machobane 1996:40.

⁵⁷⁵ Machobane 1996:40.

3.4.5.3.1 'Mosali o moma metsi' (A woman keeps quiet and does not talk back)

Although this phrase is mainly used in reference to wives, it is an extension of what girls are taught from a young age. These teachings essentially police not only what girls and women can and cannot communicate but go on to strictly dictate even their intonation where they *may* speak. Women are, therefore, trained from young ages to avoid being assertive in their expressions or hold too strong an opinion regarding issues deemed 'serious' in society.⁵⁷⁶ These dictations and restrictions are used to facilitate a view of women as only interested in and well versed in inconsequential issues; in order to justify women's exclusion from crucial discussions that often take place in the public sphere. Lakoff illustrates it thus:⁵⁷⁷

If a little girl 'talks rough' like a boy, she will normally be ostracized, scolded, or made fun of. In this way society, in the form of a child's parents and friends, keeps her in line, in her place. This socializing process is, in most of its aspects, harmless and often necessary, but in this particular instance - the teaching of special linguistic uses to little girls - it raises serious problems, though the teachers may well be unaware of this. If the little girl learns her lesson well, she is not rewarded with unquestioned acceptance on the part of society; rather, the acquisition of this special style of speech will later be an excuse others use to keep her in a demeaning position, to refuse to take her seriously as a human being. Because of the way she speaks, the little girl - now grown to womanhood - will be accused of being unable to speak precisely or to express herself forcefully. So a girl is damned if she does, damned if she doesn't. If she refuses to talk like a lady, she is ridiculed and subjected to criticism as unfeminine; if she does learn, she is ridiculed as unable to think clearly, unable to take part in a serious discussion: in some sense, as less than fully human. These two choices which a woman has - to be less than a woman or less than a person - are highly painful.

⁵⁷⁶ Lakoff 1973:45.

⁵⁷⁷ Lakoff 1973:47-48.

Lakoff highlights the use of language as a social programming tool, used to mould girls into stereotypical categories that serve the male narrative of women as ill-equipped for participation in the public sphere, thus justifying their relegation to the private sphere. Standards, such as the ability to be assertive, are set as benchmarks for participation in the public sphere, then girls are actively taught and trained to shy away from these very benchmarks, with social ostracization for those who dare aspire to or pursue them. While some may argue that this is no longer the case, that women now enjoy uncensored freedom of speech and expression, thereby crippling custom's hold over girls' and women's expression through language, Lakoff's next illustration may illustrate the contrary as correct:⁵⁷⁸

An objection may be raised there that I am overstating the case against women's language, since most women who get as far as college learn to switch from women's to neutral language under appropriate situations (in class, talking to professors, at job interviews, etc.). But I think this objection overlooks a number of problems. First, if a girl must learn two dialects, she becomes in effect a bilingual. Like many bilinguals, she may never really be master of either language, though her command of both is adequate enough for most purposes, she may never feel really comfortable using either, and never be certain that she is using the right one in the right place to the right person. Shifting from one language to another requires special awareness to the nuances of social situations, special alertness to possible disapproval. It may be that the extra energy that must be (subconsciously or otherwise) expended in this game is energy sapped from more creative work, and hinders women from expressing themselves as well as they might otherwise, or as fully or freely as they might otherwise.

⁵⁷⁸ Lakoff 1973:48.

This need for women to constantly navigate between "... women's [language] to neutral language under appropriate situations..."⁵⁷⁹ falls into Bhabha's concept of hybridity, as I narrate in chapter two above.⁵⁸⁰ With the public sphere being constructed along patriarchal male standards, women find themselves having to constantly move between the two poles of the gender binary, femininity, and masculinity. Women are trained from birth to internalize and embody gender stereotypes of femininity, then called on to reflect desired male attributes as they enter the public sphere. This necessitates that women become gender hybrids if they are to survive in the public sphere, limiting the extent to which women are able to perform freely and effectively. Lakoff posits:⁵⁸¹

First, if a girl must learn two dialects, she becomes in effect a bilingual. Like many bilinguals, she may never really be master of either language, though her command of both is adequate enough for most purposes, she may never feel really comfortable using either, and never be certain that she is using the right one in the right place to the right person.

Having to navigate, almost always simultaneously, both femininity and masculinity reduces women's capacity to engage and participate successfully in the public sphere. The result is often the creation of the third space of enunciation, where they craft a revolutionary new identity that is neither masculine nor feminine, to enable them to maintain the feminine traits yet also take on masculine traits that afford them acceptance and the ability to function in the public sphere. Despite women's ability to master gender hybridity, I still argue that it negatively impacts them in the public sphere, more so when compared to men who have been trained to function in the public sphere since birth.

⁵⁷⁹ Lakoff 1973:48.

⁵⁸⁰ Bhabha 2012:296.

⁵⁸¹ Lakoff 1973:48.

Women are also trained and socialized from young ages to dull down their views, opinions, and forms of expression. Men, on the other hand, have their 'manliness' celebrated when they display strong emotional expressions such as losing their temper or using foul language to get points across.⁵⁸² This socialization is carried out and sustained in different spaces of one's life, whether at home, amongst one's peers and even into marriage and motherhood. These tactics have both social and psychological impacts on women.⁵⁸³ For one, women find themselves denied the chance to personally define their identities and express themselves through unrestrained social participation. They are, rather, daily forced to conform to men's ideas of what their identities, thoughts and expressions should be.

Society then associates effectiveness and leadership attributes with abilities to get points across, debate opponents with vigour and unwavering confidence; the very things girls were trained from birth to not do.⁵⁸⁴ This lowers women's abilities to engage effectively in social development activities without having to first undergo vigorous battles to prove their abilities and competencies.⁵⁸⁵

3.4.5.3.2 '*Ho nyala vs. ho nyaloa*' (To marry vs. being married)

The phrase '*ho nyala*', solely associated with males, denotes an active role on the side of men regarding marriage. They are the ones socially permitted to initiate marriage. '*Ho nyaloa*', on the other hand, denotes a passive role on the side of women entering into a marriage, even where her consent is sought. Although the Laws of Lerotholi⁵⁸⁶ state that only marriages in which both partners give their consent are valid, the sincerity of the consent granted by women to marriage can be a subject of debate. Armstrong highlights that:⁵⁸⁷

⁵⁸² Lakoff 1973:51.

⁵⁸³ Lakoff 1973:73.

⁵⁸⁴ Kane & Patapan 2010:371-372.

⁵⁸⁵ Budhwar *et al* 2005:186.

⁵⁸⁶ Section 34 (1) (a).

⁵⁸⁷ Armstrong *et al* 1993:331-332.

[c]ustomary law marriages... are frequently group or family alliances... As such, the notion of individual consent is often subsumed by the larger interests of the family alliance. In those countries where the father of the bride is able to use his giving or withholding of consent to secure higher bridewealth payments, and even to pressure the woman into a particular marriage, the issue of consent is a very significant feature in the life of the woman... the consent of the party being married may not be considered at all... Second, being a group contract or alliance, the ceremonies where consent is given are often attended by members of both families and this may have a direct impact on whether the consent is real or not. Even though the parties may be asked whether they consent to the marriage, that consent may be induced by pressure from the wider family group.

Women are, as a result, left without many options besides to consent to marriage, due to the childhood socialization into not voicing their opinions, as well as the social shame that would follow them if unmarried. This in essence negates the claim that women genuinely have a say in such settings as to whether they do get married and to whom.

The term *ho nyala* also implies that the man has 'acquired' a wife and the woman has been 'acquired' through *ho nyaloa*. The woman's change of name, domicile, and family to that of the husband, signifying an attachment to the man, also highlights this implication of the term. *Ho nyaloa* therefore transitions a woman from subordination under her father to subordination under her husband, facilitating transfer of power and authority over the woman. This perpetual subordination of women under men serves, among others, the perpetuation of the narrative that a woman cannot exist outside of association with a man,⁵⁸⁸ to the point of making her subordinate under her own son upon her husband's death. '[I]t is as though the woman has no personality and exists

⁵⁸⁸ Gould 1980:45.

only as an extension of... [a] male....⁵⁸⁹ This transfer also serves to secure women's productivity, whether through labour or reproduction, under men's control.

The next word attached to unmarried women who are of age sheds more light on the complexities around whether women really do have the power of consent or choice regarding marriage.

3.4.5.4.4 *Lefetoa* (plural *mafetoa*) (literally 'the one who has been passed/left behind')

The term *lefetoa* is used to describe a woman who is considered to be within or beyond the set age for marriage and yet remains unmarried.⁵⁹⁰ It is rarely used to indicate that such woman has *chosen* to remain single, but rather that no man has chosen to marry her. Of note is that bachelors within the same age as women labelled *mafetoa* are seen as socially appealing, while the spinsters are seen as 'old unwanted goods.'⁵⁹¹ Age limits for being regarded as marriage material are also set higher for men than for women, placing more pressure on women to be married than on men to marry. The *lefetoa* term also has patriarchal undertones attached to it, which are made apparent by the absence of a derogatory term attached to an unmarried man of marriage age.⁵⁹²

The *lefetoa* term carries a negative connotation in Sesotho custom,⁵⁹³ because marriage and motherhood are associated with 'proper' womanhood.⁵⁹⁴ Women who deviate from this set norm are then labelled as the deviant 'other' and can only escape this label through conforming to the social standards set for them. This 'othering' of unmarried women stands strong even if such *lefetoa* is a socially accomplished woman, whether through education, employment, asset ownership or any other social accomplishment. Society weighs a woman's 'true' value on her being wanted enough by a man to be married by him, all other accomplishments in her life being considered

⁵⁸⁹ Gould 1980:45.

⁵⁹⁰ Tshehla 2006:20

⁵⁹¹ Lakoff 1973:66.

⁵⁹² Mohlabane 2020:3-4.

⁵⁹³ Monyakane 2014:178.

⁵⁹⁴ Mohlabane 2020:6.

vanity when considered against the achievement of marriage. This is a customary strategy adopted to not only 'other' such women against married women and set social norms, but also force them to conform to set stereotypical social norms, such as women always being linked to men in one way or another.⁵⁹⁵ It is a tactic through which male supremacy was institutionalized, and particularistic conceptions of women that necessitated that women be married were reinforced, in order to enable the formation of a sexual contract that facilitated women remaining in the minority.⁵⁹⁶

By labelling unmarried women as *mafetoa*, language is used to limit women's ability to see themselves beyond attachment to men and the private sphere. The routines and established norms encourage particular conduct from women, thus propelling them to act in a particular manner, in pursuit of acceptance and fitting in. The result is women's transformation into docile and conforming people, due to their internalisation of the set standards of thinking, which prevent them from forming their own identities.

3.4.5.4.5 Mosali o ngalla mots'eo ('A woman does not run back to her family when she has quarrelled with her husband or has been beaten by her husband, but sulks around the kitchen.'597)

According to this proverb, a woman is not encouraged or allowed to report any negative experiences she has within her matrimonial home, even if such include abuse in its different forms.⁵⁹⁸ It is considered shameful for a woman to tell anyone the intimate issues of her marriage, as she is expected to protect the sanctity of her marriage, even if this means her protecting her abuser.⁵⁹⁹ It is deemed the woman's sole responsibility to solve her matrimonial challenges.⁶⁰⁰ This proverb perpetuates the isolation of women from their support structures and leaves them vulnerable to any

⁵⁹⁵ Mohlabane 2020:3-4.

⁵⁹⁶ Mohlabane 2020:57.

⁵⁹⁷ Machobane 1996:39.

⁵⁹⁸ Sekese 1907:127.

⁵⁹⁹ Sekese 1907:127.

⁶⁰⁰ Mokitimi 1997:18.

and all forms of abuse or ill-treatment. This also often places the blame for spousal abuse on the women who find themselves as victims of such abuse.⁶⁰¹ Women's abuse not only impacts them at a physical and or emotional level, but also hampers their social and economic engagement at a personal and communal level.⁶⁰²

As I highlight above, language can also facilitate women's abuse within society while simultaneously protecting the perpetrator of such abuse. The physical, mental, psychological, economic, and overall social impact of women's abuse is such that it negatively impacts their full and effective participation in society, once again setting them up to fall behind men in social participation and progression.

Language, whether that which is used in reference to women or that which women are confined to using, shapes women's personal and social identity, while concurrently affecting their position and contribution in society.⁶⁰³ Terminology used in reference to women can either enhance or cripple women's social participation, and language has oftentimes been found to formulate and perpetuate women's '... invisibility, trivialization, objectification, and deprecation....'⁶⁰⁴ This further emphasises how a society's patriarchal and sexist undertones and inclinations are often found within its adopted language.

These proverbs, reflecting language in Lesotho, also go against black feminist thought's concepts of self-definition⁶⁰⁵ and self-valuation.⁶⁰⁶ These two concepts advocate for the rejection and removal of negative stereotypes used against women, such as the above proverbs, which have been used to subordinate women in society and exclude them from particular spheres in society. If women are not made part and

⁶⁰¹ Pickup *et al* 2001:102.

⁶⁰² Pickup *et al* 2001:102-103.

⁶⁰³ Lakoff 1973:48.

⁶⁰⁴ West 1983:30.

⁶⁰⁵ Self-definition involves probing and transforming the definitions that have been attached to women, as well as the 'political knowledge-validation process' through which these definitions were reached and validated. This process is posited to be able to end women's labour under stereotypical external views imposed on them without any say or input from them. (Collins 1986:16-17)

⁶⁰⁶ Self-valuation deals more with what goes into black women's self-definitions, following rejection of former stereotypical and controlling definitions, as it is insufficient to simply reject stereotypical and controlling definitions without replacing them with 'authentic Black female images'. (Collins 1986:18)

parcel of social constructs of language, this denies them the opportunity and right to do away with past negative stereotypes imposed on them and the negative results of such negative stereotypes. Spender argues that language creates reality, and the one who controls language, controls reality.⁶⁰⁷ This therefore means that Basotho women's exclusion from the exercise of language creation denies them the opportunity to self-define, self-value, and create a reality that speaks to their true or desired experiences.

Lesotho has, through the Education Sector Strategic Plan 2016-2026 (Strategic Plan), undertaken to ensure that gender equity and equality are advocated for, as well as the mainstreaming of gender throughout the education sector's programmes, curricula and policies.⁶⁰⁸ The Ministry of Education and Training bears the task of seeing to the execution of the Strategic Plan's goals, the main objective of which is to do away with all gender disparities throughout the education sector by the year 2026.⁶⁰⁹ In carrying out this role, the Ministry of Education and Training will take charge of all coordination, reporting, monitoring and evaluation as well as ensure that there is liaison with all relevant stakeholders.⁶¹⁰

3.4.6 The Constitution and Basotho women's social status

The Constitution starts off well by providing in section 4 that all citizens, regardless of any status, are entitled to enjoy the rights provided for under the Constitution.⁶¹¹ Section 18 then provides that no laws are to be made that would discriminate against any person whether in wording or in effect.⁶¹² On the face of it, it seems the Constitution is in support of women, their status and them enjoying their rights on the same basis as men. However, a deeper look tells a different and contradictory story.

⁶⁰⁷ Spender 1980:143.

⁶⁰⁸ Ministry of Education and Training 2016:104.

⁶⁰⁹ Ministry of Education and Training 2016:104.

⁶¹⁰ Ministry of Education and Training:2016:105 & 109.

⁶¹¹ Section 4(1).

⁶¹² Section 18(1).

For example, while section 18(1) prevents the making of any law which would, whether in wording or effect, discriminate against anyone, section 18(4)(c) of the same Constitution legalises discrimination on the basis of custom. Section 18(4)(c) provides that “[s]ubsection (1) shall not apply to any law that seeks to apply the customary law of Lesotho.” This in essence nullifies section 18(1) in the face of customary law. One of the consequences of this provision is that it has provided customary law with an umbrella protection against scrutiny, while also effectively legalizing discrimination based on customary law. It sanctions and cements laws that discriminate against a person if such law is based on customary law provisions. This provision provides legality and validity to pieces of legislation that establish men as superior to women, and thus give men an advantage over women, as long as their basis is customary law.⁶¹³ The danger with this approach is that, once branded as based on customary law, discrimination of any kind will be protected.⁶¹⁴

The provision under section 18(4)(c) of the Constitution is thus directly problematic for women and their social status. This begs the question whether there ever truly was an intention to protect women from gender inequality and discrimination. The SADC Gender Monitor,⁶¹⁵ Letuka *et al*⁶¹⁶ and Molapo⁶¹⁷ are of the opinion that this was not the case. They argue that the government of Lesotho, in their capacity as legislators, is taking a long time to reform the country's justice system, which signals a dragging of feet when it comes to justice reform. They also highlight that whenever issues of women empowerment are raised, the Government of Lesotho uses customs and culture as justifications for their inactivity or lack of transformation.⁶¹⁸ It has therefore been argued that Lesotho's Constitution is intentionally patriarchal in its very nature, and thus subjects women to inequality and human rights violations.⁶¹⁹

⁶¹³ Juma 2013:177.

⁶¹⁴ Juma 2013:177-178.

⁶¹⁵ Southern African Development Community Gender Monitor 1999:4.

⁶¹⁶ Letuka *et al* 1998:150-151.

⁶¹⁷ Molapo 2005:20.

⁶¹⁸ Molapo 2005:20.

⁶¹⁹ Metsing 2015:3.

Some noteworthy positive strides have, despite the above, been made over the years towards gender equity and equality in Lesotho, although there is still a long way to go, more so regarding dissemination, implementation, policy, and legal reviews.⁶²⁰ These steps are necessitated by the realisation that the patriarchal nature of Lesotho's society continues to perpetuate several injustices and cases of gender inequality in different spheres of society. Of specific relevance to the scope of this thesis, and thus to be discussed below, is the transformation that the Constitution has enabled towards women's social status.

3.4.6.1 The overall age of majority under civil law

The age of majority is not addressed in Lesotho's Constitution.⁶²¹ Under civil law, however, the customary law standard of women's perpetual minority standard is done away with. As per The Age of Majority Ordinance No. 62 of 1829 (Age of Majority Ordinance), the legal age of majority in Lesotho is 21 years old.⁶²² This means that under civil law, both boys and girls are recognised as having reached majority once they reach 21 years of age. Section 5 of the Age of Majority Ordinance also provides that operation of law may also enable one to be deemed as having become a major earlier than at 21 years under certain circumstances, such as getting married before reaching 21 years of age. The Labour Code Order⁶²³ defines a child as one below 15 years of age.⁶²⁴ The Children's Protection and Welfare Act,⁶²⁵ on the other hand, provides that anyone that is under 18 years of age is regarded as a child.⁶²⁶ There is, evidently, no consensus as to what the age of majority is in Lesotho. In cases where

⁶²⁰ Civil society organisations such as the Lesotho Federation of Women Lawyers (FIDA), Women in Law in Southern Africa (WILSA) and Phela Health and Development Communications (PHELA), Transformation Resource Centre (TRC), as well as independent entities such as Lesotho Law Reform Commission (LLRC) have been very instrumental in spearheading these processes in Lesotho.

⁶²¹ This has been raised as problematic, since the Constitutional silence on the age of majority has enabled inconsistencies in pieces of legislation addressing the age of majority. This inconsistency is seen as I narrate the different legislations and their provisions regarding the age of majority.

⁶²² *The Age of Majority Ordinance 62/1829*, section 2.

⁶²³ Order No. 24 of 1992.

⁶²⁴ Section 3.

⁶²⁵ 7/2011.

⁶²⁶ Section 3.

the age of majority is of significance, such age is determined according to the relevant piece of legislation. What is clear and worth celebrating, nonetheless, is that under civil law women do not labour under a perpetual minor status.

3.4.6.2 Married women's' social status

Apart from providing for the overall age of majority under civil law as I discuss above, common law has also specifically done away with the lack of autonomy that Basotho women suffered under customary marriages.⁶²⁷ I compare and contrast Basotho women's formerly mandatory status under customary marriage⁶²⁸ and the new status that the regulations governing civil marriages makes available to them.⁶²⁹

Marriages in Lesotho, as in other African states, are still greatly influenced by patriarchy, social norms, colonial laws and systems, as well as customary laws.⁶³⁰ Patriarchy and women's discrimination and subordination remain most evident under customary law and customary marriages. Women, for example, remain minors throughout their lives and do not gain autonomy even upon marriage.⁶³¹ Husbands, on the contrary, are regarded as heads and chief decision makers in families, despite women having often been recognised as the de facto occupants of these positions⁶³² as well as active participants in the nation's and family's economy.⁶³³ As a result of this patriarchal set-up and perspective of men and women in customary marriages, married women are socio-economically, legally and politically categorised as minors.

⁶²⁷ As I show below, these positive developments unfortunately only apply to marriages governed by civil law, while those governed by customary law are still under customary and customary law provisions.

⁶²⁸ In the former absence of common law regulations and pieces of legislation, all marriages in Lesotho were automatically governed by customary law and its provisions.

⁶²⁹ It is key, at this point, that I begin by highlighting that Lesotho recognizes both customary and civil marriages, due to its dual legal system. Customary marriages are governed by the Laws of Lerotoli, while common law caters for civil marriages. See generally Maqutu 2005 on discussions on Lesotho's marriages and marriage laws.

⁶³⁰ See Eze 2008.

⁶³¹ See Letsika 2005, *Ramaisa v. Mpholenyane* 1977 LLR 143 and *Women and Law in Southern Africa* 1998.

⁶³² Hlalele & Letsie 2011:160-161.

⁶³³ Mohlakoana-Motopi 2019:1.

Although this status quo no longer stands in civil marriages,⁶³⁴ this was historically the position Basotho wives occupied in both forms of marriage.

This status quo was and still remains significant because women's perpetual minor status impacts not only how they experience life on a personal level, but also how they experience life as married women. They could not, for example, take part in political activities or become economically active.⁶³⁵ Men understanding their payment of bride price for their wives as a form of attaining ownership of their wives did not help women's situation either.⁶³⁶ Women were also socialized from young ages into holding marriage and being married in the highest regard,⁶³⁷ leading most of them to prioritizing their marriages and marital status over their own safety and wellbeing.⁶³⁸

With married women also often being unable or lacking authorisation from their husbands to take up employment, more so in the public sphere, they often found themselves confined to the home and bearing the families' caregiving and maintenance duties, whether as wives, mothers or general caregivers as the need arose.⁶³⁹ Women consequently primarily occupied the role of caregiver towards their own children, their children's and relatives' children, and oftentimes sick relatives.⁶⁴⁰ These sex roles were, as I highlight above, based on traditional and customary beliefs of the roles best suited for each sex.⁶⁴¹ Women's confinement to the home through care duties mainly served to prevent their independent participation in public life, whether politically⁶⁴² or economically,⁶⁴³ thereby relegating them to secondary citizenship.⁶⁴⁴ Moguerane invokes Virginia Woolf's famous statement in relation to such cases, submitting that it is imperative that 'a woman must have money and a

⁶³⁴ See Legal Capacity of Married Persons Act (LCMPA) 2006, discussed in more detail below.

⁶³⁵ Hlalele & Letsie 2011:162.

⁶³⁶ Moseitse 2006:154, 276.

⁶³⁷ Harrison 2014:598.

⁶³⁸ UNDP 2005:22.

⁶³⁹ Harrison 2014:600.

⁶⁴⁰ Hlalele & Letsie 2011:161.

⁶⁴¹ Moseitse 2006:41.

⁶⁴² Political participation, engagement and decision-making occur in the public space, from which women historically found themselves excluded, whether directly or strategically.

⁶⁴³ Moguerane 2018:140.

⁶⁴⁴ Lister 1997:69.

room of her own...'⁶⁴⁵ or else she runs the risk of being 'straightjacketed in normative gender moulds – more so homemaking'.⁶⁴⁶

As the above background has indicated, married Basotho women historically lacked majority status socially and within their marriages, which impacted their abilities to, amongst others, contract without their spouses' consent, negotiate sexual relations⁶⁴⁷ or parenthood in the marriage or bargain regarding sex roles or spousal duties. This meant women had to seek their husband's consent before entering into employment contracts, purchasing any assets that involved contractual agreements, suing or being sued in their personal capacity and many other activities. As I relate, colonialism worsened and institutionalised women's marginalisation in Lesotho. Concerning marriage specifically, the colonialists introduced the following governing laws:⁶⁴⁸

- The husband is the head of the family and possesses the decisive voice in all matters affecting the common life of spouses.
- Joint or household property is under the administration of the husband, and he is vested with the legal power to alienate or deal with it as he wishes without the necessity of his wife's consent.
- Women cannot enter into or take up gainful employment without their husbands' prior authorisation.
- A woman does not possess *locus standi in judicio* (legal standing) to participate in legal proceedings unassisted by her husband, whether as a plaintiff or a defendant.

⁶⁴⁵ Woolf 2005:565, as quoted in Moguerane 2018.

⁶⁴⁶ Moguerane 2018:140.

⁶⁴⁷ Although this will not be delved into in detail in this thesis, it is worth noting that Lesotho enacted the *Sexual Offences Act* in 2003, effectively barring and making illegal any and all sexual acts that take place in coercive environments, whether these occurs between married or unmarried people.

⁶⁴⁸ Mohlakoana-Motopi 2019:14.

- No land shall be registered in the name of a woman married in community of property (Land Act No. 19 of 1979 repealed by Land Act No. 8 of 2010).

It was these very patriarchal and outright discriminatory provisions that continued to govern marriages in Lesotho until the Legal Capacity of Married Persons Act (Married Persons Act)⁶⁴⁹ was enacted in 2006,⁶⁵⁰ changing the status quo for civil marriages. The Married Persons Act transformed the historic form that sex and gender roles took within the family. As a result, more women are questioning and rejecting the former gender roles and limitations placed upon them, such as caregiver and sex roles as well as the restrictions towards them taking up employment and participating in the public sphere when they so wish.⁶⁵¹

The coming into force of the Married Persons Act legally did away with women's minority status in civil marriages⁶⁵² and the husband's marital power over his wife's person and property.⁶⁵³ The Married Persons Act then bestowed upon women the legal right to contract in their names,⁶⁵⁴ sue or be sued in their personal capacity,⁶⁵⁵ register immovable property in their name,⁶⁵⁶ act as company directors,⁶⁵⁷ and many other activities which wives had previously been legally barred from engaging in on the basis of the marital power that husbands possessed.⁶⁵⁸

The enactment of the Married Persons Act was a ground-breaking leap towards gender equity and equality in Lesotho. For one, it ensured married women's access to and enjoyment of socio-economic rights and political representation.⁶⁵⁹ Married

⁶⁴⁹ 9/2006.

⁶⁵⁰ This Act does not cover couples married under customary law, as these are exclusively governed by the Laws of Leretholi.

⁶⁵¹ Naidoo *et al* 2011:686-687.

⁶⁵² Section 3(1) & (2).

⁶⁵³ Section 3(2).

⁶⁵⁴ Section 3(3)(a).

⁶⁵⁵ Section 3(3)(b).

⁶⁵⁶ Section 3(3)(c).

⁶⁵⁷ Section 3(3)(f).

⁶⁵⁸ Listed in the Legal Capacity of Married Persons Act.

⁶⁵⁹ Mohlakoana-Motopi 2019:5.

women also had bestowed upon them full citizenship rights as well as full rights to own property, contrary to the absence of these rights under customary law.⁶⁶⁰ The Married Persons Act also signalled an abandonment of perspectives and institutions that prioritised men over women. Theoretically, women had finally been granted majority status in their civil marriages. However, the situation on the ground was, sadly, different. In her interview of married couples in Maseru, Lesotho's capital city, Mohlakoana-Motopi discovered that despite the presence of the Married Persons Act, most couples continue to conduct their family affairs on the basis of customary principles.⁶⁶¹ This includes women still being regarded as minors, key family decisions falling within husbands' exclusive purview as well as joint family assets such as land and cars being registered in the husband's name. Even where the Married Persons Act availed legal recourse in instances such as the above, women were generally found to not be in favour of taking legal action against their spouses.⁶⁶²

This negatively impacts the implementation of the Married Persons Act, as Judges are not afforded an opportunity to decide on and create case law involving the legislation. In cases where women are interested in instigating such cases, they face challenges such as high legal fees, extended court processes and social stigma that is likely to rise from their actions. The presence of other pieces of legislation which still uphold inequality between the genders also poses a problem to the effectiveness of the Married Persons Act. An example is the Deeds Registry Act,⁶⁶³ which still prevents women from registering any immovable property, thereby negating the progress sought to be made through legalising women's registration of immovable property through the Married Persons Act.

Mohlakoana-Motopi argues that one of the main challenges to the full transformational impact of the Married Persons Act is women and men's gendered socialisation from young ages.⁶⁶⁴ It is these customary beliefs and views of men and women that impede

⁶⁶⁰ Fogelman 2016:37.

⁶⁶¹ Mohlakoana-Motopi 2019:76-80.

⁶⁶² Moseitse 2006:41.

⁶⁶³ 12/1967.

⁶⁶⁴ Mohlakoana-Motopi 2019:78.

the work done through legislation, dissemination, and advocacy. It is therefore key that the customary beliefs and principles that discriminate against women be acknowledged and addressed, coupled with advocacy around psychological transformation, more so for women in rural areas, who are identified as key gatekeepers of patriarchal and discriminatory customary norms and practices in most societies.⁶⁶⁵ Kali is of the opinion that the supposed intentions of the government of Lesotho to empower women will only be seen as genuine if the government improves the situation and status of women by guaranteeing rigorous adherence to currently existing policies and amending problematic laws, such as the conflict between the constitution and customary law.⁶⁶⁶ Until such a time, the Married Persons Act is argued to have not as yet attained transformational success for married women's marital rights and status.

3.5 Conclusion

In this chapter I explore the customs of Lesotho, the Laws of Lerotholi, the Constitution of Lesotho, and their impact on women's social status. My analysis of the origins, content and surrounding circumstances of the customs and laws through an African feminism and Postcolonial theory lens reveals that the provisions of the customs and Laws of Lerotholi are discriminatory against women, subordinate them under men and exclude them from participation in the public sphere. I find that this signals a view and approach towards women that does not place them on an equal footing with men but rather seeks to confine them to a perpetual subordinate status in all spheres of society. Drawing from the codification process of the customary laws of Lesotho, I find that the underlying intention of both the colonialists and the male elite involved in the codification process was to secure male domination over women and subordinate women under men.

⁶⁶⁵ Mohlakoana-Motopi 2019:26, 79, 99.

⁶⁶⁶ Kali 2018b:55.

Of note under part one is the erasure of Basotho women from the historic narrations of the lives and customs of the time, save for when presented as active in the private sphere. I highlight how this erasure of women was carried over even into the process of the codification of customary law. I regard this as important, as I engage the work of Gramsci to draw attention to how law was and is still instrumental in creating and sustaining the episteme and hegemony of any given time – which have predominantly been patriarchal. Thus, women’s exclusion from both the historic narrations and codification process was a strategic step towards first cementing male dominance over women and second condemning women to a perpetually subordinate social status in Lesotho. Interestingly, an observation is made that “... customary laws were the means for, rather than the cause of, BaSotho women's subordination”.⁶⁶⁷ This further supports my hypothesis that the customary laws of Lesotho facilitate and perpetuate Basotho women’s subordinate social position.

In part two, I point towards the Constitution’s retention of colonial ideologies, such as women’s subordination to men as well as the use of the system of differentiation to deny Basotho women access to public sphere engagement. I highlight how the dual nature of Lesotho’s legal system, reflected in the Constitution, is instrumental in protecting customary law and perpetuating the subordination of Basotho women to men. Of significance is the discovery that at the formulation of the Constitution, there was an opportunity to abandon colonial and customary ideologies that negatively impacted women in order to create a gender equal society, yet this opportunity was not taken up. This essentially cemented the historic customary and colonial hegemony and safeguarded its survival even in present-day society.

I therefore find that despite its numerous provisions on equality and anti-discrimination, the Constitution’s umbrella protection of discriminatory customary law provisions reveals a reluctance to protect Basotho women truly and fully from inequality and discrimination. This is further revealed by the Constitution’s protection of customary law from scrutiny where it discriminates against women, as well as its

⁶⁶⁷ Eldredge 1991:728.

legalisation of discrimination against women in Lesotho. This highlights the absence of legitimate Constitutional will to protect women and facilitate their equal social status with men.

Finally, in part three, I highlight how custom, the customary laws and Constitution of Lesotho have been instrumental in initiating and perpetuating Basotho women's social status through, for example exclusion from inheritance, ownership of land and cattle, and relegation to the private sphere facilitated through and on the basis of the sex and gender divide, traditional initiation school and the language of education. Of note is the narration of how the above enabled and supported Basotho women's economic underdevelopment and subjection to oppression, male dominance, unpaid labour and a silencing of their voice both in the private and public sphere. I also find that women were denied autonomy, citizenship, and agency as a result of customary law and the Constitutional protection of customary law. It was following the argument that 'the personal is political' that women's liberation from the private sphere ensued. I find, therefore, that these two pieces of legislation negatively impact Basotho women's social status and place them in subordinated positions socio-economically as well as from a civil and political stance.

My discussion in this chapter is key for chapter four, in which I bring to light how the generally subordinate status that Basotho women labour under, brought about by customary law and the Constitution, negatively impacts their political participation.

Chapter Four

The relationship between the Laws of Lerotholi, the Constitution and women's political participation in Lesotho.

4.1 Introduction

The main research problem that I explore in this thesis concerns the extent to which the customary law of Lesotho, and the Constitutional protection enjoyed by such customary law, impacts women's social status and political participation in Lesotho. In the preceding chapters I highlight key concepts and theoretical frameworks that guide my inquiry into the link between customary laws, the Constitution and Basotho women's subordinate social status and low political participation. I also look into the connection between the Laws of Lerotholi, the Constitution and Basotho women's low social status. In this chapter, I explore the relationship between the Laws of Lerotholi, the Constitution and women's political participation in Lesotho.

At the core of this chapter, is my reiteration of the feminist argument that the personal is political. I begin this argument by way of my expansion throughout chapter three on how custom, customary law and the Constitutional protection afforded customary law dictate and negatively impact Basotho women's social status, condemning them to a subordinate social status. Following on this argument, in this chapter I highlight and explore the many ways in which the customs, customary law and Constitution of Lesotho further negatively affect and impact Basotho women's political participation. My reasoning for this approach is based on how it has become clear that it is not just the happenings in and during legislative debates or voting stations that shape politics.⁶⁶⁸ Hence, approaching the debate between the personal and the political through a feminist lens clarifies the link between the occurrences in the private sphere and the impact observed in the political sphere.⁶⁶⁹

⁶⁶⁸ Enloe 2000:195.

⁶⁶⁹ McLeod 2015:52.

Foucault, speaking on bioethics as biopolitics, highlights that the very life of people has become a focal point for politics, evidenced through the development of strategies and mechanisms meant to facilitate the management and control of peoples' lives.⁶⁷⁰ The first stages of this management and control of peoples' lives was seen to have been targeted towards adopting techniques that would transform people into docile and useful members of society, and this was facilitated through the creation of systems of hierarchy and surveillance, so that people would observe and stay within artificially drawn lines and boundaries.⁶⁷¹ An example is the propagation of the idea of men as dominant leaders over women, and women's lives and livelihood being restricted to the private sphere and away from leadership roles. Women's restriction to the home, where men lord over them, is significant for women's political participation, because if the essence of politics is power, then men's patriarchal control over women also allows them political authority over women.⁶⁷² I posit that it is women's denial of power, whether through relegation to the domestic sphere or overall denial of autonomy, which also actively works to keep them away from politics, because as I advance in chapter two above, politics drift towards power. I therefore explore the impact that customs, customary law, and the Constitution of Lesotho have on women's political participation on a personal level, but also look into the systemic means engaged to deny women access to power and thus allow men continual domination over women in the political sphere. Towards this goal, I divide the chapter into two parts.

I begin part one with an introduction and exploration of custom's relationship with the socialization of society, which affords it a platform in the formation of people's and society's overall being. I also look into custom's inter-generational nature, its value to people imbibed in it and the impact it has on people. I do this as groundwork for expanding into the political sphere the argument I explore throughout chapter three on the impact custom and customary law have on people. In order to adequately argue that custom and customary law do indeed impact women's political participation, I find

⁶⁷⁰ Foucault 2008:2.

⁶⁷¹ Foucault 1976:242.

⁶⁷² Millet 2016:25.

it important to expound in detail why I make this claim, and what it is about custom and customary law that affords them such great impact over people. I argue in this part that due to the macro-concept nature of custom, everyone who grows within particular customs becomes imbibed into them, gets infused into the norms and values of such society and consequently has custom forming the foundation of their whole being and belief system. This is important for highlighting the link between one's customs and who they see as a viable political candidate and leader.

I then move on to discuss Lesotho's customary political system, consisting of the chieftainship and the *pitso* and *khotla* institutions. I focus on these customary political systems in order to detail how they excluded women from membership and or participation, setting a stereotypical view of women as unfit for leadership and political engagements. I highlight too how women's exclusion from these customary political systems also kept them away from significant social power and influence and denied them full citizenship, in that they were denied participation in their society's decision-making processes. Moving on from this, I provide evidence that the exclusionary approach of these customary political systems still persists to this day, to the point of one scholar stating that even the present-day National Assembly is a replica of the traditional *khotla* institution. In closing this part, I highlight and elaborate on how the traditional leadership institutions of Lesotho legitimise and perpetuate the absence of women from decision making processes.

In part two, I look into the ways in which the Constitution facilitates women's low political participation. I investigate, primarily, how the Constitutional umbrella protection of customary law transfers the customary patriarchal values into the Constitution and thus modern-day governance. I also analyse how this subjects the Constitution to customary law when it comes to provisions pertaining to women. I further look into the Constitutional adoption of a dual legal system and how this enabled the carrying over of customary governance structures into Lesotho's post-independence political system, and how the dual legal system also negatively influences the impact of international women's rights instruments in Lesotho. I also explore the Constitutional give-and-take approach to women's rights and how this translates into women's inability to fully enjoy rights seemingly afforded them in the

Constitution, such as the giving of the right to participate in government while simultaneously keeping women out of two prominent leadership structures – the office of King and the chieftainship.

Looking into these two issues enables me to argue that the Constitution is innately anti-women's equal political participation, as it so jealously protects and sees to the perpetuation of systems and structures that keep women on the periphery of leadership. Exploring these two issues also paves way for my investigation into how this Constitutional position also enables the establishment of structural obstacles to women's political representation. Under this portion I look into both customary and modern political structures and how they reflect traditional exclusion of women from governance and are thus also instrumental in women's exclusion from political participation. This reflection helps to create a clearer picture of why it is that I claim that custom has so strong and active an impact on modern and 'evolved' politics and women's place in them.

4.2 Part One - Politics in Lesotho: Custom, customary law and women's political participation

As I highlight above, in this part of the chapter I delve into the connection between custom, customary law and women's political participation. I begin with an analysis of the nature of custom, its place in society, and how it interacts with members of a society. I argue that owing to custom forming part of the socialization process of society, it is greatly influential in the formation of the individual form and belief system that is taken by members of a society both on an individual level, as well as in a social setting. I also analyse the inter-generational nature of custom, which enables it to survive and thrive through generations, thus retaining its hold over people. This analysis provides ground for my main argument in this chapter – that custom, and customary laws that come from such custom, bear influence on the political participation of women in Lesotho.

I go on to discuss chieftainship and the *pitso* and *khotla* institutions, which make up Lesotho's customary political system. I detail their composition, roles they served in society and how they shaped the politics of the nation. I then focus on these institutions' exclusion of women, which served to deny women political participation, keep them on the periphery of political power and set a stereotypical perspective of women as not being associable with leadership and governance. I show how women were also, through this exclusion, denied the exercise of their full citizenship, which entails taking part in the decision-making processes of the society they were members of. Following on this background, I proceed to detail how this same exclusionary tactic evidenced in customary political systems still holds firm and greatly influences the modern-day political system and set-up, thus enabling the continuation of the legitimisation and perpetuation of women's exclusion from decision-making, governance and political participation and leadership.

4.2.1 Custom

Custom is argued to bear influence in shaping almost every area of human and social being.⁶⁷³ The acquisition of custom also forms a crucial part of the socialization process in the life and evolution of any society, group of people and individuals.⁶⁷⁴ This makes custom one of the starting points when analysing any social group or society. Such an analysis would not be restricted to a limited space and time, as customs are passed on and carried down through generations, most times without any alterations.⁶⁷⁵ As a result, and despite having gone through different developmental stages, society remains heavily influenced and controlled by custom. This influence spans across, amongst others, the status of women in society and voters' view of female political candidates.⁶⁷⁶

⁶⁷³ Sibani 2018:58.

⁶⁷⁴ Sibani 2018:58.

⁶⁷⁵ Schech & Haggis 2000:16.

⁶⁷⁶ See Olaleye 2004. This report touches on how the patriarchal social image of women and men, presenting women as followers and men as leaders, negatively impacts women's leadership aspirations.

As I highlight above, custom possesses an inter-generational lens, that is, it is passed on from generation to generation, resulting in each new generation taking on the customs of those who came before them.⁶⁷⁷ In an effort to expound on custom's generational heritage aspect, Fafunwa holds thus "[t]he child just grows into and within the... heritage of his people. He imbibes it. ... The child observes, imbibes and mimics the action of his elders and siblings. The child ... cannot escape his ... environments."⁶⁷⁸⁶⁷⁹

Fafunwa brings out a key aspect - every individual who grows up in a particular society gets infused with the norms of that society, whether consciously or subconsciously, during a process referred to as "social interaction."⁶⁸⁰ It is safe to posit, then, that the norms that one grows up in fall into foundations that cause them to believe in or reject different issues, such as women's political participation. Scholars like Bronstein argue, however, that despite the integral role that social norms play in people's lives it still does not 'own' them.⁶⁸¹ Evidence does, nevertheless, point towards social norms' clear role in shaping people's values and ways of being. For example, it is contended that social norms exert '... fundamental influences on basic psychological processes... [which have] enduring consequences on individuals' thoughts, feelings, and behaviours.'⁶⁸² This creates a clear link between the social norms and episteme that an individual grows within and how they shape the individual's psychology, which is often in stereotypical ways. This in turn stereotypically shapes how individual think, feel and behave.

Rigsby argues that one of the ways through which different social norms gain importance in societies lies in how they are perceived as both embodying wisdom from ancestors as well as having an aura that sparks positive feelings, while playing to the

⁶⁷⁷ Idang 2015:99.

⁶⁷⁸ Fafunwa 1974:48.

⁶⁷⁹ Although Fafunwa speaks of 'culture', Schech & Haggis (2000:16) define culture as 'customary beliefs and values that ethnic, religious, and social groups transmit fairly unchanged from generation to generation' thereby allude to culture referring to custom.

⁶⁸⁰ Idang 2015:99.

⁶⁸¹ Bronstein 1998:163.

⁶⁸² Lehman et al 2004:695.

sentiments of the people.⁶⁸³ The approach has often been that '[w]e learned it from our ancestors and practise it.... There is no other reason. It is... done to satisfy our ancestors.'⁶⁸⁴ It is, thus, arguably almost impossible for one to escape the social and legal systems into which they are born, as these are often so far-reaching that the full range of a human's life, from their birth until their death, is regulated by them.⁶⁸⁵ This stands true even in states where there exists 'formal' laws and constitutions. Fenrich puts it thus.⁶⁸⁶

In villages, towns, and cities across the African continent, peoples' lives continue to be regulated by customary laws. Traditional legal systems are often the only ones functioning in remote corners of the continent, where the reach of the State is at best limited and at times non-existent. Even where available, the formal legal system, with its legitimate obstacles, intricate rules, formalities and expense, is often out of reach of the poor or uneducated. In addition, the persistence of long-standing expectations and social practices informed by customary laws has given rise to many problems in enforcing contract or constitutional or statutory law.

Before many learn of patriarchy, corrupted customs, human rights and other transformations of the social legal sphere, they have often already been socialised into existing customary patterns and beliefs. This often causes a portion of such society to reject 'foreign' conceptualisations of society and life, thereby cementing the authority and hold of custom and customary law in their lives. Custom then, as a result, exerts a grip so strong that for some, it cannot be shaken off.

In order to ensure custom is neither questioned nor abandoned, it has often been promoted as the very core and essence of belonging to a society and being a true and

⁶⁸³ Rigsby 2006:113-138.

⁶⁸⁴ Behrendt 2006:11.

⁶⁸⁵ Simisola 2018:25, see also Fenrich et al (eds.) 2011.

⁶⁸⁶ Fenrich et al 2011:1.

committed member of such society,⁶⁸⁷ often coupled with the ostracization of any and all members who question any elements of custom. This socialisation has been so strong and arguably successful that human rights are often promoted and seen as a foreign ideal that only seeks to dilute African nationality and pride. As Marett highlights "... no-one dreams of breaking the social rules. Custom is king, nay tyrant, in... society."⁶⁸⁸ For some the hold is so deep that they believe they run the risk of curses falling on them if they dare go against the ancestral dictates found in custom.⁶⁸⁹ This also consequently cements customary law as a seemingly inviolable legal system that is inescapable for those who find themselves falling within its reach. Even in cases where some people wish to remove themselves from customary law's governance, the process to achieve such may be a tedious one.

The macro-concept nature of social norms and laws such as custom enables their influence to cut across many disciplines, influencing even political participation and representation.⁶⁹⁰ It is important to note that the patriarchal setup of the public sphere in which politics are found, as well as customary influences on women's social status and participation in the public sphere, remain a factor even in present day politics,⁶⁹¹ albeit being less drastic in some states.⁶⁹² These patriarchal influences and exclusionary customary norms and laws are dearly protected by those members of society who still derive benefits from them, such as power and authority over those deemed subordinate.⁶⁹³ They therefore continue to perpetuate women's delegation to secondary social standing as well as protect the patriarchal systems that have kept decision making powers away from women.⁶⁹⁴ These are key issues to note, as there is a link between the denial of women's social, customary and economic rights, often unduly affected by customary practices, and how women are able to exercise their civil and political rights in order to influence decisions and policymaking in the public

⁶⁸⁷ Coplan & Quinlan 1997:28.

⁶⁸⁸ Marett 1912:183.

⁶⁸⁹ Ambunda & De Klerk 2008:48. See also Bazin 1985:183-197.

⁶⁹⁰ Chwarae Teg 2015:50.

⁶⁹¹ I narrate this in more detail below.

⁶⁹² Southern African Development Community 2016:13.

⁶⁹³ Mokgoro 1997:1283.

⁶⁹⁴ Kiamba 2008:10,12.

sphere.⁶⁹⁵ For instance, custom facilitates women's denial of their political rights and participation in the politics of the nation through, among other means, exclusion from chieftainship and the *khotla* and *pitso* institutions, as I show and discuss in more depth below.

4.2.1.1 Lesotho's customary political system – Chieftainship, *pitso* and *khotla*

4.2.1.1.1 Chieftainship

4.2.1.1.1.1 Formation of the Basuto nation as a chiefdom

Basotho formally became a nation under Moshoeshoe I's leadership in the 1820s, composed of a varying number of chiefdoms, tribes and peoples scattered by the *lifaqane* wars.⁶⁹⁶ The Basotho chiefdom's formation during a time when battles and wars were raging made national strength and solidarity a key need. Moshoeshoe I, in response, adopted the southern Bantu nation building and expansion strategy centred on 'a chiefdom of chiefdoms' that was both segmentary and hierarchical.⁶⁹⁷ He then anchored the link between his subjects on a bond of kinship, based on a 'placing system' that appointed chiefs along male lines, mainly from his *Bakoena* clan.⁶⁹⁸ This was despite his clan making up about only 30 per cent of the general population. This was a strategic move by Moshoeshoe I, meant to secure his leadership and prevent rebellion from his subjects or male relatives. Each appointed chief was a patriarchal head in their chiefdom, though remaining subject to Moshoeshoe I as the Principal Chief. This leadership structure chosen by Moshoeshoe I was often the source of many quarrels and divisions during the deaths and appointments of new leaders.⁶⁹⁹

I posit that the above highlighted leadership structure chosen by Moshoeshoe I is where Lesotho's non-representative governance structure stems from, where

⁶⁹⁵ Chwarae Teg 2015:41-42.

⁶⁹⁶ The formation of the Basotho nation and where each adopted custom originated fall beyond the scope of this work and will hence not be delved into in detail and depth.

⁶⁹⁷ Coplan & Quinlan 1997:32.

⁶⁹⁸ Hamnett 1975:165.

⁶⁹⁹ Eldredge 2002:9, 31.

leadership was granted not primarily for the good of the nation, but as a powerplay for the one(s) in authority. With this having been Lesotho's first governance structure, I also advance that it has had much influence on the foundation of Lesotho's leadership structure - a patriarchal leadership structure that has been jealously guarded and perpetuated throughout generations. Finally, I suggest that Moshoeshoe I's chosen leadership structure has also cemented two principles of patriarchy into Lesotho's politics – female domination by males, and the domination of young males by elder males⁷⁰⁰ - aspects still seen manifesting predominantly in Lesotho's present power relations.⁷⁰¹

4.2.1.1.1.2 Chieftainship in Lesotho post-Moshoeshoe I

As in the days of Moshoeshoe I, until Lesotho's independence and transition to a democratic state, national leadership remained in the hands of the chieftainship, led by *Morena e Moholo* (Principal Chief). Basotho chiefs and leaders were primarily men, with women customarily barred from the positions,⁷⁰² unless a chief dies leaving a minor heir, in which case the senior widow may act as chief until the heir comes of age.⁷⁰³ This exclusion of women was despite them often stepping up to leadership roles whenever the need arose, whether as chiefs in their own right, regents if an heir to the chieftainship was not yet of age, or when assigned leadership roles in the absence of their husbands.⁷⁰⁴ These exceptions to the customary law provisions signalled the lack of an absolute disregard of women and the value they could add to leadership. On the other hand, accounts of Moshoeshoe I's positive relationships of advisor and mentor with the male Mohlomi, who was a healer and rainmaker,⁷⁰⁵ and his rejection and exile of the female Mantsopa⁷⁰⁶ who had also once been his advisor

⁷⁰⁰ Millett 1970:25.

⁷⁰¹ I expound on this point in more detail below.

⁷⁰² *Laws of Lerotholi* 1946, Part 1, sec. 2.

⁷⁰³ *Laws of Lerotholi* 1946, part 1, sec. 3(1).

⁷⁰⁴ Eldredge 1991:729, Sanders 1975:50. Judge Lansdow also highlights, in the Regency case, women's presence in Basutoland's chieftainship ranks prior to arrival of the British.

⁷⁰⁵ See generally Prozesky 2016:6-16.

⁷⁰⁶ Ouzman 1999:13.

and is also recorded as having had similar powers as Mohlomi,⁷⁰⁷ leaves this question open for further future exploration. Although not falling within the scope of this thesis, this question and its supporting examples above is a relevant one to keep in mind as I explore women's exclusion from positions of power even where they matched or exceeded men's qualifications and skills.

Chieftainship in Lesotho is regulated by the Laws of Lerotholi which, as I state above, do not make provision for women to occupy the chieftainship position in their own right. Relevant provisions in the laws provide thus:

b) Part 1, section 2 and section 3 (1) and (2)

Section 2 provides that:

The succession to chieftainship shall be by right of birth: that is the first born male child of the first wife married: if the first wife has no male issue then the first born male child of the next wife married in succession shall be the chief. Provided that if a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses.

Section 3 (1) and (2) provides that:

(1). If a chief dies leaving a minor son the senior widow or the younger brother of the deceased chief may act as chief during the minority of such son, and when that son ceases to be a minor the widow or the younger brother shall give place to him.

(2). A minor heir immediately after his marriage if he is under the age of twenty-one years, or on attaining the age of twenty-one years shall be presented

⁷⁰⁷ Post et al 2014:214.

through the correct channels by his paternal uncles or such other persons whose duty it is under Basuto Law and Custom to do so, to the Paramount Chief, who may if he is satisfied that such heir is capable of carrying out the duties of chief, recommend to the High Commissioner his declaration as a chief or defer such recommendation for such period as he shall think fit.

This exclusion of women from the chieftainship was of great significance, as all authority was vested in the chief. The chief was, as Schapera put it, the “ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people.”⁷⁰⁸ This meant that women’s exclusion from the chieftainship kept them away from significant social power and influence.

Some scholars justify women’s exclusion from the chieftainship by claiming that they are incapable of efficiently governing and taking full charge and authority, especially in challenging and demanding times. Mahao, for example, argues this point by using Regent Chieftainess ‘Mantsebo Seeiso as an example, claiming that she was ill-fitted for the challenges of the 1950’s due to her political and administrative weakness.⁷⁰⁹ He further argues that these highlighted weaknesses of the Regent left the nation vulnerable to factions that sought to promote their own agendas for the nation.⁷¹⁰ Other scholars are, on the contrary, of the opinion that no significant differences in women and men’s leadership can be pointed out. Juma highlights, that:⁷¹¹

... in terms of quality, there is little difference between male and female chiefs; certainly, there are no records suggesting that women chiefs have underperformed because of their gender. There is evidence suggesting that, in certain cases, women chiefs were preferred.... Moreover, the jurisprudence seems to show that the

⁷⁰⁸ Schapera 1938, as quoted in Juma 2011:38.

⁷⁰⁹ Mahao 1997:169.

⁷¹⁰ Mahao 1997:169.

⁷¹¹ Juma 2013:210

appointment of women in acting capacity is no longer contentious and that the Basuto seem to have accepted that women can perform such a role, both where their children have been declared heir to the estate and in their own right.

Mahao, interestingly, later on joins the above scholars, recognising that some female chiefs attained so much favour amongst their subjects that such subjects went out of their way to prevent the ending of their rule, such as was the case with Princess Mmamochesane Sebetoane.⁷¹² Presently, chieftainship still enjoys legitimacy and significance in Lesotho's politics,⁷¹³ especially with the Constitution and the Chieftainship Act⁷¹⁴ having facilitated the incorporation of the chieftainship into Lesotho's modern legal leadership structure. Every village in Lesotho, thus, still has a chief.⁷¹⁵

4.2.1.2 *Pitso and khotla institutions*

Also key in Basotho's political system and traditional democracy, and also where women found themselves excluded and placed on the periphery, were the social settings that took the form of *pitso* and *khotla*. Prior to Basutoland's administration being taken over by the British in 1868, there already existed what were deemed participative politics among the Basotho.⁷¹⁶ These participative politics were exercised through traditional institutions that took the form of *pitso and khotla*. Under these two institutions, political socialisation was undertaken and the norms, attitudes and standards that later came to form Basotho's customary laws were developed.⁷¹⁷ These

⁷¹² Mahao 2010:325-326.

⁷¹³ Kapa 2013:135.

⁷¹⁴ 22/1968.

⁷¹⁵ Kapa 2013:135. These chiefs referred to as existing in each village could be any from one of the five categories of chiefs – principal chief, independent chief, area chief, chief and headman.

⁷¹⁶ Makoa 1997:6.

⁷¹⁷ Makoa 1997:7.

institutions thus had a significant role in facilitating the political development process in early Lesotho.

4.2.1.2.1 Pitso

*Pitso*⁷¹⁸ was the national council, an entity that served as the chief's legislative and judicial organ.⁷¹⁹ A *pitso* was conducted in the form of an open-air meeting convened by a chief. When one was convened, those in attendance took part in the discussion of issues deemed to be of communal or national significance, whether administrative, political or social.⁷²⁰ *Pitso* gatherings were also used by chiefs as opportunities to obtain endorsements or ratifications for their policies or decisions from those present.⁷²¹ There was also opportunity for those in attendance to raise any other matters deemed to be of public concern, including criticisms of their leaders.⁷²²

According to Mahao, the procedure followed during a *pitso* gathering was such that a member of the chief's council would table the subject that was up for discussion, and then provide a platform for a debate around the tabled subject.⁷²³ All who had opinions or suggestions concerning the subject were allowed to voice such,⁷²⁴ thus freedom of speech and openness were respected.⁷²⁵ There did not, however, exist any voting rights during *pitso* gatherings.⁷²⁶ There was also no mechanism of checks and balances to challenge or restrain the chief's opinions and or decisions.⁷²⁷ Following the debate and discussions, the chief would conclude the discussions by expressing what he felt was the correct view, which would subsequently be the view that was

⁷¹⁸ The noun *pitso* originates from '*ho bitsa*', the verb meaning 'to call'. The *pitso* was therefore a 'call' by the chief to the people to gather for the discussion/resolution of varying issues. (Wallman 1968:169).

⁷¹⁹ Juma 2011:107.

⁷²⁰ Makoa 1997:7.

⁷²¹ Makoa 1997:7.

⁷²² Makoa 1997:7.

⁷²³ Mahao 1993:164.

⁷²⁴ It is this element of the *pitso* that for many indicated that the decision-making process in Lesotho's leadership regarded and respected popular opinion.

⁷²⁵ Mahao 1993:164.

⁷²⁶ Casalis 1965:236.

⁷²⁷ Juma 2011:107.

adopted at the *pitso*.⁷²⁸ The chief was not, in his own deliberation and decision of what was the best view and decision to be taken, expected to factor in what had been said during the debates by those in attendance.⁷²⁹ To this, Mahao is of the opinion that the *pitso* seemed to be meant more to simply legitimise decisions that the chief and his allies had already taken, than it was to engage the people in decision making.⁷³⁰

Attendance at *pitso*s was dominated by males, although women were not restricted from attendance.⁷³¹ When they did attend though, women would often occupy back seats and not take part in the discussions.⁷³² Phohlo notes that during a *pitso* "... only circumcised male folk were allowed to participate. It is worthwhile to note that women did not enjoy this freedom of thought and speech. The right was exclusively a prerogative of men."⁷³³

In cases where women sought to communicate certain interests during a *pitso* gathering, these interests had to be communicated through their husbands and not by them directly.⁷³⁴ Women were, then, excluded from genuine participation and engagement in *pitso* gatherings. The *pitso* set-up, where women would be seated at the back and restricted from speaking and voicing any opinions during the gathering also perpetuated stereotypical perspectives of women as unable or incapable of participation in administrative, political, or social issues, thus justifying their 'othering' and exclusion from the public sphere where such issues were discussed. The set-up also reflected the denial of full citizenship for women, in that women were not afforded the same rights which enabled men to speak up and participate during *pitso* gatherings,⁷³⁵ which in turn denied women the right to take part in the society's overall decision-making processes.⁷³⁶ There was also a clear stifling of women's voices in public discourse, a strategic step towards the erasure and marginalization of women

⁷²⁸ Mahao 1993:164.

⁷²⁹ Weisfelder 1972:19-20.

⁷³⁰ Mahao 1993:164.

⁷³¹ Wallman 1968:170.

⁷³² Kimane & Ntimo-Makara 2008:241.

⁷³³ Phohlo 2011:40.

⁷³⁴ Armstrong 1993:334.

⁷³⁵ Nyamu-Musembi 2007:177.

⁷³⁶ Tamale 2004:54.

from the public sphere. The set-up and structure of *pitso* gatherings thus transformed women into subalterns, that is, a "... group of people in a particular society suffering under hegemonic domination of a ruling elite class that denies them the basic rights of participation in the making of local history and culture as active individuals of the same nation."⁷³⁷

4.2.1.2.2 *Khotla*

Khotla began as a dispute settlement court, dealing with any and all disputes between community members,⁷³⁸ thereby playing a role in the maintenance of social cohesion within Basotho communities.⁷³⁹ It was also a platform through which laws were administered.⁷⁴⁰ Over time it evolved into a platform where males could engage in different issues, ranging from politics, public policy and economics.⁷⁴¹ It then became a platform where chiefs and adult males would meet on a day to day basis and discuss issues⁷⁴² that were deemed of societal importance.⁷⁴³ Here, consensus from the group was used to decide on issues.⁷⁴⁴ Approved attendees at *khotla* gatherings were exclusively chiefs and adult males.⁷⁴⁵ Women were thus not allowed to attend *khotla* gatherings. The grooming of young boys into adulthood, fatherhood and positions as

⁷³⁷ Louai 2012:5.

⁷³⁸ As I show below, women were not allowed to attend *khotla* gatherings. As a result, in instances where women were involved in cases or dispute resolutions before the *khotla* and had to give testimony, men had to give testimony on behalf of such women, since women could not attend.

⁷³⁹ Mohlakoana-Motopi 2019:12.

⁷⁴⁰ Juma 2011:100.

⁷⁴¹ Machobane 1990:14.

⁷⁴² There is an old Sesotho saying "*Mo-oa khotla ha a tsekisoe*", which means that one cannot be blamed for what they say during a *khotla* gathering. This enabled the attendees to voice their opinions and engage in debates without a fear of negative backlash.

⁷⁴³ Makoia 1997:7.

⁷⁴⁴ Ngozwana 2014:84-85.

⁷⁴⁵ Makoia 1997:6.

husbands also later became part of the activities undertaken during *khotla* gatherings.⁷⁴⁶ The chief's court hosted the *khotla* gatherings and procedures.⁷⁴⁷

It was also at the *khotla* gatherings that information and knowledge were delivered to the public.⁷⁴⁸ The information and knowledge delivered here is said to have instilled in the people a sense of identity, more so one that was consistent with African ideals.⁷⁴⁹ Ngozwana, citing Gboku and Lekoko, draws attention to the fact that "... this type of education was relevant to the life and culture of the communities and helped citizens to cope with realities of life, meaning that this education was purposeful, functional and practical."⁷⁵⁰ It is important to note again that women were not allowed to attend *khotla* gatherings. This means that women were excluded from this delivery of information, knowledge and education that contributed to, among other things, the people's sense of identity and belonging. As I highlight in both chapters two and three, knowledge production and dissemination are part of the exercise, distribution and or denial of power.⁷⁵¹ This means the absence of women from the knowledge production and dissemination platform placed them on the periphery of power, thus condemning them to subordination and domination by those who did have access to power. This then left the men at *khotla* free to produce knowledge that would serve to secure the hegemony and produce the society they desired.⁷⁵² This strategy was similar to what colonialists had done in their colonies – produce and disseminate knowledge that cast the colonised as the negative 'other', and the colonialists as the positive standard to be aspired to, thus allowing the colonialists to gain control over the colonised.⁷⁵³ The

⁷⁴⁶ These grooming sessions included the boys' socialisation into the male Basotho beliefs of what manhood entailed, most of which beliefs were entrenched in patriarchal practices and values. Lessons taught to the young boys revolved around problematic masculinities that promoted perceptions of male supremacy and female inferiority. These grooming sessions also took place during pitsos (Mohlakoana-Motopi 2019:12).

⁷⁴⁷ Juma 2011:105.

⁷⁴⁸ Ngozwana 2014:11.

⁷⁴⁹ Ngozwana 2014:11.

⁷⁵⁰ Ngozwana 2014:11.

⁷⁵¹ Foucault 1995:27-28.

⁷⁵² Said 1978:11.

⁷⁵³ Sajed 2022:67.

men took over the roles of the colonialists and women were doomed to the position of the colonised.

There are, however, those who hold the view that women were actually not excluded from *khotla* gatherings. For example, a respondent to an interview by Ngozwana in Qacha's Nek Lesotho, shared:⁷⁵⁴

Democracy was there in [the] chieftdom system through a pitso and khotla that were held where chiefs would seek the views from adult males. Men had women's thoughts from their families, therefore when issues were discussed the decisions made incorporated the views and opinions of all the citizens, as men consulted their wives (Male educator, focus group, Qacha's Nek).

I argue that if this was regarded as the manner through which women were said to be involved in the politics and social issues of the day, then it is a greatly flawed belief and strategy. For one, there is no guarantee that the men actually consulted with their wives and in fact factored in their wives' opinions in the views they took or decisions they made during *khotla* gatherings. Armstrong actually argues that it was well known that even when it was said that the community's interests had been factored in, 'community's interests' was simply a code phrase for the interests of the male elite.⁷⁵⁵

Second, can one be truly said to exercise their citizenship if such exercise happens through another? I say this aware of the existence of representative democracy, and how some may argue that the husbands stood as their wives' representatives. One of the characteristics of a representative democracy is, however, that all people be free to participate in public life and *choose for themselves* those who will represent them. In *khotla* gatherings, women were neither allowed to take part in the activities of public

⁷⁵⁴ Ngozwana 2014:123.

⁷⁵⁵ Armstrong et al 1993:317.

life as dealt with at the gatherings, nor were they given the opportunity to actually decide for themselves that men attend and speak at *khotla* gatherings on their behalf. I assert, therefore, that it is misleading to argue that *khotla* represented a democracy. What *khotla* gatherings did do, was to exclude women and consequently present them as incapable of leadership or engagement in leadership issues or discussions.⁷⁵⁶

4.2.1.3 Exclusion of women in *pitso* and *khotla* gatherings

Women's absence from the two institutions which formed Lesotho's primary governance structures was almost a norm, hindered but not absolutely restricted by custom.⁷⁵⁷ This was on the basis of women being deemed incompetent to participate in 'intellectual' discourses involving the national good and wellbeing. By implication, the exclusion of women and girls from participating in the *pitso* and *khotla* denoted their relegation from the governance terrain of Basotho society and thus a socially inscribed belief and perception that women were unfit to be leaders in society beyond reproduction, garden tilling and cooking. Women's sex was used against them, and stereotypes created along these sex discriminations. Makoia argues that the influence of both the *khotla* and *pitso* institutions on Basotho peoples' lives is such that it dictated and still dictates not only the social and sexual relations, but also the political landscape and the social and political distribution of power. He posits:⁷⁵⁸

Not only do these institutions legitimise the exclusion of women from decision-making processes but greatly determine the nature of power relations between men and women and how such power is exercised. Denial of equal rights to women is certainly not simply a sexual or social problem. It is, in fact, a political problem directed at

⁷⁵⁶ Phillips 1995:40.

⁷⁵⁷ See Kimane & Ntimo-Makara 2008.

⁷⁵⁸ Makoia 1997:8.

maintaining the existing power relations which subordinate women. Indeed, it is the exercise of power by men over women.

Through these institutions, Basotho men created a clear line separating them from women, and proceeded to distribute different degrees of power to different classes of men in Lesotho, and none to the women. It was also from and within these institutions that Schmitt's political divide of "us versus them" and the distribution of power along these identity lines began and were cemented.⁷⁵⁹ As I highlight in chapter three above, the creation of this clear line of separation began so early that boys were first educated on matters of politics and governance during the initiation process, during which they were educated and trained on issues involving cultural and national history and philosophy, patriotism and military techniques.⁷⁶⁰ They were, afterwards, then allowed to attend the *khotla* gatherings where issues of governance and politics were discussed.⁷⁶¹ For girls, their initiation trainings involved teachings on respecting and sexually satisfying their husbands.⁷⁶² They were excluded from *khotla* gatherings even after initiation. Boys and girls thus grew up already observing and being socialised into patriarchal political cues and gender stereotypes, and having the levels of their political inclination, interest and participation heavily dictated and controlled. The public/private divide and gender stereotypes were therefore introduced and cemented in Basotho boys and girls as early as their birth and initiation stages.

The patriarchal ideologies on which the customary norms and laws were based also instilled in boys and men the perception of women as subordinate and child-like, supporting their choice to exclude women in all decision making processes.⁷⁶³ The *khotla* and *pitso* institutions, where these norms and laws were taught and put in action, thereby became central in the perpetuation of gender inequality, unequal

⁷⁵⁹ Schmitt 2008:35.

⁷⁶⁰ Khalanyane 1995:52.

⁷⁶¹ Mukurunge 2019:432.

⁷⁶² Laydevant 1953:63.

⁷⁶³ Mohlakoana-Motopi 2019:13.

power relations and women's subservience in Basotho society.⁷⁶⁴ Murray⁷⁶⁵ and Makoa⁷⁶⁶ also posit that the purpose behind the establishment of the two institutions was to establish a social order in which men were perceived as supreme and women inferior. Another foundational goal of these institutions was a socio-political status quo anchored on masculinity.⁷⁶⁷ There was therefore a clear underlying goal of marginalising and discriminating against women in and through these institutions, more so regarding political participation.

I am of the view that historical access to these governance platforms as well as the freedom to participate during the meetings would have served to expose women to the ins and out of politics as well as equip them psychologically and emotionally for the political sphere. This exclusion therefore historically denied Basotho women the opportunity to gain knowledge, experience and networks which would benefit their political participation aspirations, thus taking politics out of their purview from a young age. Women's exclusion from these platforms also socialised society to see them as incapable of participation in political discussions, the effect of which was to further alienate them from the political sphere and give men an added advantage against them.⁷⁶⁸ The exclusion also politically socialised men into thinking of and seeing themselves as greater than women, and thus think of and see women as the lesser other.⁷⁶⁹ This socialisation affected women too. Phohlo argues that the separation that the socialisation had created and perpetuated impacted not only how women felt about themselves and carried themselves, but even the principles that served as their daily compass.⁷⁷⁰

⁷⁶⁴ Makoa 1997:8.

⁷⁶⁵ Murray 1981.

⁷⁶⁶ Makoa 1997:6-10.

⁷⁶⁷ Mohlakoana-Motopi 2019:11.

⁷⁶⁸ It is interesting to note that with the Batlokoa, chief 'Manthatisi disrupted the status quo set around *khotla* as a male-only space. She is recorded as not only attending *khotla* gatherings, but also officiating over their proceedings and public interest discussions, as well as presiding over legal proceedings and fining lawbreakers'. (Phohlo 2011:102.)

⁷⁶⁹ Makoa 1997:6-10.

⁷⁷⁰ Phohlo 2011:100.

Another consequence of *khotla*'s exclusionary attendance was women's relegation to the domestic sphere, perpetuating the patriarchal format that Basotho society had adopted.⁷⁷¹ While men spent their time at *khotla*, women were left at home, where they bore reproductive, care and household maintenance duties.⁷⁷² The bulk of these duties, which involved cleaning, childcare, meal preparation, wood and water fetching, kept women occupied throughout the day, leaving little time for other activities.⁷⁷³ I discuss this further below.

4.2.1.4 The extent to which the exclusionary structure of the pitso and khotla persisted in colonial times and still persists in post-independence Lesotho

4.2.1.4.1 Colonial times

The customary values, attitudes and laws developed and cemented within the *pitso* and *khotla* institutions are argued to have continued to thrive during colonial times and even post-colonially because the British deemed it unwise to do away with them when they took up control and administration of Basutoland.⁷⁷⁴ The British actually went a step further than simply retaining the customary laws they found in Basutoland, by supporting the codification of the customary laws.⁷⁷⁵ The colonialists, chiefs and male leaders consequently later worked together towards the codification of the customary laws. Makoa opines that the customary institutions and laws were possibly not done away with because they were just as discriminatory as the Roman Dutch Law that was imposed on the Basuto people as a parallel law.⁷⁷⁶

⁷⁷¹ Mahao 2010:325.

⁷⁷² Mohlakoana-Motopi 2019:13.

⁷⁷³ Mohlakoana-Motopi 2019:13.

⁷⁷⁴ Makoa 1997:9.

⁷⁷⁵ Juma 2011:109-113.

⁷⁷⁶ Roman Dutch Law was introduced by the British and Dutch into South Africa after capturing the area and putting it under their dominion, so the Roman Dutch Law applied in Basutoland was the same legal regime that was in operation in the Cape Colony (Makoa 1997:9).

The result was continued and unfettered⁷⁷⁷ perpetuation of injustices against Basuto women socially, economically, and politically.⁷⁷⁸ Socially, women were still confined to the home, where they were expected to carry out daily domestic tasks such as cleaning, cooking, childcare and general upkeep of the homes. Epprecht highlights how both the colonial government officials and missionaries carried on women's domestication, even further expanding such domestication even into what they were to be educated in at school, because this was what women "... really wanted...."⁷⁷⁹ Epprecht puts it thus:⁷⁸⁰

As we have seen, Europeans, both officials in the government and most missionaries, justified a type of domestic education for Basotho girls and women which served their own interests on the grounds that this was what the girls and women themselves most desired. Needlework, laundry, childcare, knitting, cooking, and so on, were alone held to satisfy women's "natural instincts." Thus, good mothercraft, and how to find and keep a good husband, were almost universally asserted by European men and women in the period of the early to middle colonial rule to be the only skills which women really wanted or needed.

This continued restriction of women to the home served to perpetuate keeping women from the market space, where everyday empowerment engagements took place, such as the community building discussions held at the *khotla*, wherefrom the customary laws of Lesotho eventually came. This was normalising power at play – conforming the women to expected and desired social behaviour patterns, with school and education falling within the engaged channels of normalisation.⁷⁸¹ Women's relegation

⁷⁷⁷ Attempts were made around 1871 to bring about 'Christianity and civilization' amongst the Basuto, but these did not fare well and brought about negative results for the British administrators as these transformations focused on the sensitive areas of chieftainship and family. (See Juma 2011:104-105.)

⁷⁷⁸ Makoia 1997:9.

⁷⁷⁹ Epprecht 1992:268.

⁷⁸⁰ Epprecht 1992:268.

⁷⁸¹ See for example Foucault 1982:792 where Foucault speaks of school as a form of institutionalization, through which norms are formed and power relations are decided upon and maintained.

to the private sphere was strategically presented and touted as the norm, then social perceptions were moulded along these lines through means such as education, resulting in people's reception and internalisation of stereotypical worldviews and personal desires and beliefs as though they were their own.⁷⁸²

Economically, men remained in control of the times' main sources of economic empowerment: land and cattle. Women could still only access these resources through relationships with men, whether as daughters, wives, or mothers. Epprecht does, however, note a later change in the status quo, in how women began owning and even herding cattle during colonial times.⁷⁸³ The spread of cash into Lesotho's economy also enabled women to enter, and be active within, the economic sphere through, for example, selling the pigs they owned.⁷⁸⁴ Concerning land directly, land allocation authority remained with the chiefs until the agenda to reform land began in 1959 and resulted in the post-independence Land Act of 1979.⁷⁸⁵ As I show below, this Act was later replaced by the Land Act of 2011, under which women can now own land.

Politically, women remained restricted from taking part in governance through participation in *pitsos*,⁷⁸⁶ *khotlas* or occupying chieftainship positions in their own right.⁷⁸⁷ They were therefore condemned to living under a political environment that was fashioned according to and for catering to men's desires and needs, leaving women's own needs and desires on the periphery. Phohlo advances that both the *khotla* and *pitso* institutions have "... served as a device by which Lesotho's male dominated scheme of law replicated and maintained itself, the breadth of which

⁷⁸² Foucault 1995:136-138.

⁷⁸³ Epprecht 1992:311.

⁷⁸⁴ Epprecht 1992:60,220.

⁷⁸⁵ Juma 2011:135.

⁷⁸⁶ I find no account of women participating in a *pitso* during colonial times, except Epprecht's account. Epprecht speaks of chief 'Mamathe Masupha speaking at a *pitso* in *Teyateyaneng* in 1963. Also important to note in Epprecht's account, is that chief 'Mamathe Masupha is said to have addressed women at this *pitso*, signaling that though they still could not speak, women still attended *pitsos* even during colonial times.

⁷⁸⁷ There has been no change of the *Laws of Lerotholi's* provisions which state that chieftainship is to devolve upon males. As I highlight in chapter three under the Masupha case, even the courts protect this provision of the laws.

measures the extent of the marginalisation of women in public affairs and decision-making forums."⁷⁸⁸

Epprecht shares an amusing account of a woman, 'Ma-Oshenea, who attempted to use women's customary exclusion from the *khotla* to her advantage, resulting in the colonial court declaring that there was no basis for women's seclusion from *khotla*, at least as far as it had to do with criminal charges laid against them. The account shows that:⁷⁸⁹

... women also appealed to or invented customs to protect themselves Nowhere was this more clearly demonstrated than in the case of 'Ma-Oshenea⁷⁹⁰ who stabbed a court messenger to death in 1931 while her husband was absent. She refused to come to court on the grounds that she was a "child" and had to be represented by her closest male relative and guardian (her brother-in-law). This sparked a debate about whether it was in fact custom for women accused of a crime to avoid appearing before the *khotla*. The court finally decided that there was no basis in custom for her claim and found her guilty of murder.

This account highlights how women were still customarily barred from the *khotla* institution even during colonial times. The colonial court's decision above, though shaking the status quo, did not do away with it, because even following the court's ruling in 1931, women still did not attend *khotla*.⁷⁹¹

The historic exclusion of Basotho women from the customary governance structures in Lesotho is significant to their present low participation, as women's historic exclusion from the political sphere has been found to still contribute to women's

⁷⁸⁸ Phohlo 2011:99.

⁷⁸⁹ Epprecht 1992:157.

⁷⁹⁰ LNA CR/1273/1931.

⁷⁹¹ Makoa, in 1997, still notes women as being absent from *khotla* and *pitso* gatherings on account of them being regarded as minors, hence 'unqualified' to attend. (Makoa 1997:7.)

present day struggles to enter the political sphere.⁷⁹² As Phohlo posits “... the practices of *khotla* and *pitso*... uphold the male hegemony, which side-lines participation of women in the public affairs of the community.”⁷⁹³

4.2.1.1.3 Post-independence

With Basotho being a traditional people, their modern political structure is heavily influenced by the traditional model of politics, beginning in the homes, and expanding all the way to government.⁷⁹⁴ This is despite the two *khotla* and *pitso* institutions’ setups and functions having not fully survived Lesotho’s transition to an independent and democratic nation. Although they still exist in present-day Lesotho, they have gone through a number of changes which have left them as modified versions of their original forms. *Khotla* has, for example, had some of its powers removed, leaving only enough to enable it to serve the varying functions deemed fit for its new social role.⁷⁹⁵ For instance, although villages in some parts of Lesotho, mostly in the rural areas, still have *khotla* gatherings, laws can no longer be administered from such gatherings as was the case during post-colonial times. Information and knowledge are also no longer delivered to the public exclusively through *khotla* gatherings, as there are now several information outlets such as social media platforms, newspapers, radio stations and televisions. Women are, therefore, now able to also access information on socio-political issues that was formerly only shared or made available to men at *khotla* gatherings.

Pitso gatherings, although still taking place in present-day Lesotho too,⁷⁹⁶ have however undergone some significant change. For example, during colonial times

⁷⁹² Paxton 2020:114.

⁷⁹³ Phohlo 2011:90.

⁷⁹⁴ Makoa 1997:8.

⁷⁹⁵ Mofuoa “Local governance in Lesotho: In search of an appropriate format”, <https://www.africaportal.org/publications/local-governance-in-lesotho-in-search-of-an-appropriate-format/> (accessed on 20 August 2022).

⁷⁹⁶ They are mostly made use of in rural areas where other forms of communication are scant. (United Nations Human Rights Council “Kingdom of Lesotho mid-term progress report on the implementation of accepted recommendations from Lesotho’s 2nd cycle review”,

colonialists began taking part in the gatherings, and relegated chiefs to the same status as other attendees.⁷⁹⁷ *Pitso* gatherings were also, under colonialism, no longer used to enable discussion and debate of tabled issues. Those who had opinions or suggestions concerning any issues could no longer raise them during *pitso* gatherings. This is said to have been because Colonel Griffith, then agent to the Cape governor in Lesotho, turned the *pitso* into a platform through which the government would "... acquaint the people of laws and regulations; correct wrong impressions and mould public thought not to seek their opinion."⁷⁹⁸ After independence, women began participating more actively in *pitso* gatherings. In 1987, for example, Edgar noted women's presence and participation during a Presidential address held in Thaba-Bosiu.⁷⁹⁹ *Lekhotla la Bafo* is also noted as giving women a platform to speak during *pitsos*.⁸⁰⁰ This transformation in the former status quo persists to this day, with women still being able to both attend and speak during *pitso* gatherings.

The traditional form of national politics, as evidenced through the *pitso* and *khotla*, is nevertheless still evident in modern politics today,⁸⁰¹ and still influences how welcoming of women modern politics are in Lesotho. Chwarae Teg points out that as much as legislative efforts have been made towards empowering women, traditional beliefs counter these efforts and leave the traditional culture holding strong.⁸⁰² The result has been women being denied a say in issues and decisions that affect them, and women shying away from participating where a platform to speak out is created.⁸⁰³ The results presently evidenced include women being in the numeric majority yet dominantly voting men into power, as well as Lesotho having only eight female-led

<https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session21/LS/LesothoMidTermReport.docx> (accessed on 16 November 2022).

⁷⁹⁷ Phohlo 2011:41.

⁷⁹⁸ Phohlo 2011:41.

⁷⁹⁹ Edgar 1987:119.

⁸⁰⁰ Epprecht 1995:44.

⁸⁰¹ Makoa 1997:8.

⁸⁰² Teg 2015:5.

⁸⁰³ Teg 2015:7-8.

political parties from a total of 65, as of 2022.⁸⁰⁴ This, Chwarae Teg argues, is because women in Lesotho are empowered on paper and not in practice, with the cultural norms that cause women's subordination left unaddressed.⁸⁰⁵

Makoa also cautions against a belief that political modernisation in Lesotho has resulted in an elevated political or social status for Basotho women.⁸⁰⁶ He argues that despite political modernisation, Basotho women still find themselves having to counter restrictions or constraints resulting from an array of obstacles including traditions, customs, societal norms and the ideology of patriarchy.⁸⁰⁷ Basotho women consequently still find themselves having to battle through customary, traditional and patriarchal structures, norms, beliefs and systems, which '... make it difficult, if not impossible for women to penetrate decision making structures within society.'⁸⁰⁸ Politics are, resultantly, still seen as a male arena in which women would fail to function or excel,⁸⁰⁹ and women are, consequently, still being socialised into accepting a backseat in society and political matters.⁸¹⁰ Juma posits:⁸¹¹

Though rarely acknowledged, these revisions and amendments have incrementally transfused custom into 'modern' institutions of governance, making tradition an integral part of Basoto society. Thus, even without finding a direct reference to the Laws of Lerotholi in the new constitutional dispensation, their influence is felt through the application of a wider spectrum of customary jurisprudence.

⁸⁰⁴ Independent Electoral Commission "Political parties", <https://www.iec.org.ls/political-parties/> (accessed 31 October 2022).

⁸⁰⁵ Teg 2015:8,12.

⁸⁰⁶ Makoa 1997:5.

⁸⁰⁷ Makoa 1997:5.

⁸⁰⁸ Olaleye 2004:13.

⁸⁰⁹ Makanya 1999:56-58.

⁸¹⁰ Matashane-Marite 2001:2-3.

⁸¹¹ Juma 2011:127.

This underscores how the traditional model of politics, which keeps women on the periphery, still influences how welcoming of women modern politics are in Lesotho. Khalanyane breaks this down further to highlight:⁸¹²

... the dominant role that traditions and customs still play in everyday life... for example, points out that the traditional role of men in “khotla” meetings has easily been transferred into modern politics. Secondly, ... politics are generally viewed as an arena for men in which women are ineffective, a view that fully supports patriarchy. Women vote for men, organize “pitsos” for them, and make ululations and applaud them. Most political women activists are relegated to women’s wings (leagues), supporting men. Once in the decision-making seats, men look for other men to join them. ... women are socialized to accept background positions in political issues and issues related to decision-making.

Kali brings it further home to Lesotho’s 21st century governance structures through highlighting the reality that “[t]he modern setup known as the national assembly is the replica of the Khotla. The same institution that used to exclude women has been modernised and efforts are being made to allow women to participate in this institution which we now refer to as parliament.”⁸¹³

Thus, although having failed to fully survive Lesotho’s transition to independence, the effects and influence of both the *khotla* and *pitso* institutions are still evidenced in Lesotho’s modern governance structures, where women still find themselves marginalised and unheard. Gender inequality, marginalisation of women and power imbalances are, therefore, still prominent features of present-day Lesotho politics and governance, as it was in pre-colonial and colonial times.⁸¹⁴ This is more so the case since the Constitution of Lesotho, along with the Chieftainship Act, facilitated the

⁸¹² Khalanyane 1995:133.

⁸¹³ Kali 2018a:8.

⁸¹⁴ See generally Matlosa & Sello 2005; Yoon 2001 and Fox & Southall 2004.

assimilation of the chieftainship, which includes the *pitso* and *khotla* institutions in its leadership model, into Lesotho's legally recognised governance structures.⁸¹⁵ As a result, and also owing to Lesotho's dual legal system, these institutions still enjoy legitimacy as leadership models in Lesotho.

4.2.2 Impact of the customary laws on women's political participation in Lesotho

Makoa argues that the absence of women from decision making processes was legitimised and perpetuated by the traditional leadership institutions of Lesotho.⁸¹⁶ These institutions, where political, social and administrative issues of national significance were discussed, excluded women, instead marginalizing and relegating them to the domestic sphere.⁸¹⁷ It was these same institutions that formed the basis of what are now known as the Laws of Lerotholi, thereby allowing the reproduction and perpetuation of discriminatory customary norms.⁸¹⁸

Basotho traditional views have also led to men being seen as superior to women,⁸¹⁹ and the male leadership style set as the benchmark of leadership, to the exclusion of women and their own leadership styles.⁸²⁰ These standards have often been based on sex and gender differences. For instance, Geddes and Thomson's argument concerning the link between the male metabolic state and the female anabolic state, and how these justify the social, psychological and behavioural traits of the two sexes.⁸²¹ They hold that the katabolic state of men inclines them to being '...leaders in evolutionary progress...', while the anabolic state that women labour under inclines them more to '... preserve the constancy and integrity of the species....'⁸²² This argument, formed on the basis of the differences between the sexes, then formed the

⁸¹⁵ Juma 2013:202.

⁸¹⁶ Makoa 1997:8.

⁸¹⁷ Makoa 1997:7.

⁸¹⁸ Makoa 1997:7.

⁸¹⁹ Teg 2015:15.

⁸²⁰ Kiamba 2008:8.

⁸²¹ Geddes & Thomson 1889:232.

⁸²² Geddes & Thomson 1889:270.

basis on which social and political arrangements, including women's exclusion from governance, were constructed.⁸²³ These arguments also support Young's argument pertaining to the denial of difference among people, to the point of trampling over difference and thus excluding those who are different from what has been set as the norm and the standard.⁸²⁴ Young goes on to emphasize the need for and importance of accepting difference in society, particularly in politics, in order to create a platform where any and all various groups of society are afforded access, can raise issues, and are represented.⁸²⁵ I propose that this would also combat the 'othering' of women that stereotyping and patriarchy have them presently labouring under.

The subordination of women through cultural norms and practices has also been found to be so deeply ingrained in society that even the presence of legislation that aims to increase women's rights and position in society has arguably not shaken it much.⁸²⁶ For instance, the subordinate status assigned to women through tradition and custom subsists and prevents women's full political participation even in the presence of explicitly afforded Constitutional rights such as their right to participate in governance.⁸²⁷ The detrimental traditional practises and customs which legitimize women's inequality clearly impede the full and effective implementation and enjoyment of human rights accruing to them.⁸²⁸

The preclusion of women from partaking in decision making from within the home up to national structures has also left women and society with the belief that women do not have leadership and decision making potential.⁸²⁹ This has also led to '... very low self-esteem amongst women and girls'.⁸³⁰ Kiamba advances that the results have also included a continual underrepresentation of women in leadership positions, despite

⁸²³ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022).

⁸²⁴ Young 1990:252-254.

⁸²⁵ Young 1990:267-268.

⁸²⁶ Teg 2015:3.

⁸²⁷ Teg 2015:39.

⁸²⁸ Teg 2015:41.

⁸²⁹ Teg 2015:3.

⁸³⁰ Teg 2015:8.

efforts aimed towards increasing women's representation in governance structures.⁸³¹ He argues that these prevailing customs continue to delegate women to secondary social standing, thereby perpetuating the patriarchal system that has kept decision making powers away from women.⁸³²

4.3 Part two – The Constitution, modern politics and Basotho women's political participation

Under part two, I explore the various ways in which the Constitution of Lesotho enables, protects, and promotes the low political participation of Basotho women. I look first into section 18(4)(c) of the Constitution, which legalises discrimination if done on the basis of customary law, thus essentially affording customary law umbrella protection of all its discriminatory provisions. I contend that this constitutional provision not only legalises discrimination, but also facilitates the transference of the patriarchal values and provisions of custom and customary law into the modern legal system and overall social system. I go on to highlight how this fundamentally leads to the subordination of constitutional provisions concerning women, under custom and customary law.

Following on this, I analyse the constitutional adoption of a legal system that encompassed both customary law and common law, resulting in a dual-legal system. Among the consequences of this decision, I highlight how this led to customary governance structures, such as the office of King and the chieftainship, being carried over into the modern system of governance. I demonstrate how this had a bearing on the post-independence structure of governance and leadership, as well as obstructing the impact of international women's rights instruments and movements in Lesotho. I further explore the claw back clauses found in the Constitution, which lead to a denial of women's enjoyment of the rights provided for in the Constitution.

⁸³¹ Kiamba 2008:9.

⁸³² Kiamba 2008:10,12.

I conclude with an assertion that the Constitution does not cater to nor protect women's political participation, but rather strongly protects and perpetuates systems and structures that have been proven to discriminate against women, subordinate them under men, deny them full citizenship and retain their exclusion from political participation.

4.3.1 Democratic governance

No state can claim to have democratic governance if such state does not have equal participation of all its citizens in its governance structures.⁸³³ Women's absence in a state's governance structures essentially weakens democracy in such state, as governance is left as the exclusive purview of men, and there cannot be claimed to exist inclusive representation in such state.⁸³⁴ Haque emphasises that a government, and its claim at being democratic, can only be legitimate if women in such state are ensured and afforded full and equal participation and representation as is afforded males.⁸³⁵ This, Haque argues, is because no government can be said to be valid if the larger proportion of its population is excluded from the governance and decision making structures.⁸³⁶ As well, the attainment of women's full and effective participation and representation in national political structures positively impacts states' position regarding human rights respect and inclusive growth, as well as contribute to sustainable development.⁸³⁷ It has also been highlighted that the attainment of equality between the sexes, sustainable development, democracy and peace are interlinked with women actively and equally participating and having representation in all governance structures.⁸³⁸ Panday also argues that the level and extent to which

⁸³³ Mlambo & Kapingura 2019:9.

⁸³⁴ Mlambo & Kapingura 2019:10.

⁸³⁵ Haque 2003:570.

⁸³⁶ Haque 2003:584.

⁸³⁷ Organisation for Economic Co-operation and Development "Women's political participation in Egypt barriers, opportunities and gender sensitivity of select political institutions", <https://www.oecd.org/mena/governance/womens-political-participation-in-egypt.pdf> (accessed on 15 November 2022):10.

⁸³⁸ Mlambo & Kapingura 2019:2.

women are represented in governance structures has a positive impact on people's overall living conditions, whether in a social or political context.⁸³⁹ There is, therefore, a critical need for women to have access to full, equal, effective and meaningful participation and representation in all political structures.⁸⁴⁰

The sad reality in Lesotho is, however, that Basotho women's historic exclusion from Lesotho's leadership structures, including the chieftainship and the kingship, thrives even in modern politics. This exclusion stood strong through transitions into colonialism, independence, democratic governance, and adoption of a constitution containing a bill of rights. I discuss below some of the reasons anchoring this status quo.

4.3.2 Lesotho's dual legal system

One of the causes, as I highlight above, was the transformation of Lesotho's legal system into a dual legal system, which enabled customary governance structures to be 'carried over' into colonial and post-independence legal and political systems. The dual legal system was formed as a result of the imposition of Roman Dutch Law into Basutoland. This was facilitated through the General Law Proclamation 2B of 1884 (the Proclamation). The 1884 Disannexation of Basutoland from the Colony of the Cape of Good Hope Order, in its Part II, had made provision for the continued operation of all laws in force in Basutoland at that time, until such a time as the High Commissioner repeals or alters them by proclamation.⁸⁴¹ Provisos to the same effect were added to the Proclamation, thereby setting customary law as a valid legal source and system in Lesotho.⁸⁴² The Proclamation allowed for the application of customary law in Basutoland alongside "... the law for the time being in force in the Colony of the

⁸³⁹ Panday 2008:489.

⁸⁴⁰ Hamandishe "Rethinking women's political participation in Zimbabwe's elections", <https://www.africaportal.org/features/rethinking-womens-political-participation-zimbabwes-elections/> (accessed on 14 November 2022).

⁸⁴¹ Poulter 1969:128.

⁸⁴² Poulter 1969:128.

Cape of Good Hope....”⁸⁴³ The Proclamation provided that “[i]n all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope...”⁸⁴⁴

This provision, though placing the law for the time being in force in the Colony of the Cape of Good Hope as the main law to be administered in suits, actions, or proceedings, still acknowledged customary law. The acknowledgement of customary law was through the phrase “... as nearly as the circumstances of the country will permit...”, since the phrase left room for the application of customary law if ever the circumstances of the country did not permit the application of colonial laws.

The codification of Lesotho’s customs into the Laws of Leretholi also meant that Lesotho had a definite source of its customary laws. This, in essence, validated the codified customary laws as not only right in their provisions, but as also having the force as law. The 1993 Constitution also later made provision for customary or local courts.⁸⁴⁵ These codified laws have remained in force even post-independence, with the 1993 Constitution and Chieftainship Act⁸⁴⁶ also lending credibility and legitimacy to customary law.

4.3.3 Constitutional give-and-take approach

In terms of post-independence Lesotho, and its governing legal authority, the 1993 Constitution, the customary and customary law exclusion of women is reflected through a denial of equality before the law for women, characterised through the give-and-take approach the Constitution takes regarding its gender equality and non-discrimination provisions. Under sections 4, 18 and 19 the Constitution speaks to the

⁸⁴³ *General Law Proclamation 2B* of 1884, section 2.

⁸⁴⁴ Section 2.

⁸⁴⁵ Sections 2 and 4 of the 1884 Proclamation established a system that recognized customary law. The Local Courts were established by the Local Courts Proclamation. Under section 9, these courts were given jurisdiction to preside over all customary law matters. Their jurisdiction extended to matters falling under customary law, and can only handle matters involving members of the Basotho nation. Legal representation is in terms of the Act not allowed in proceedings of these courts under Section 9.

⁸⁴⁶ 22/1968.

Constitutional recognition of the importance of, hence provision for, non-discrimination and gender equality for all citizens. In the same breath, the Constitution denies women the full enjoyment of these rights, on the basis of customary law, through section 18(4)(c), which deems discrimination as justifiable if carried out on the basis of custom. There is a clear contradiction between the Constitutional acknowledgement of the interlink between the rights to equality and non-discrimination and all other human rights, and how the Constitution then goes on to hold back women's enjoyment of the same rights to equality and non-discrimination. This contradiction arguably also indicates a lack of earnest intention for Basotho women to be afforded enjoyment of these two principal rights and all other human rights. In essence, the Constitution breaches its own provisions by giving rights then subsequently taking them back on the basis of custom.

Section 18(4) of the same 1993 Constitution does, nevertheless, contain a promising provision. It provides that “[n]othing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.”

This provision leaves room for the passing of legislation doing away with discriminatory laws. It also provides legal ground on which advocacy campaigns for the removal of section 18(4)(c) as well as all other discriminatory provisions under the Laws of Lerotholi may be based. The only catch to this promising provision under the ending of section 18(4) is found in how its application relies on the will of the legislature; a will the legislature is under no legal obligation to either have or act on. The same catch arguably holds concerning the provision in section 154(1) of the Constitution, which authorises parliament to amend customary law and rules. Although this provision may be seen as an opportunity to change the current position, it is unlikely that members of parliament would legislate or pass laws that would amend discriminatory provisions of customary law and rules from which they greatly benefit.

Interestingly, during the time of the submission of this thesis, The National Assembly of Lesotho passed the Laws of Lerotholi (Amendment) Bill 2022 (the Bill), which sought to remove the customary barrier to widows administering their joint assets with their

deceased spouses without consulting with the deceased husband's family.⁸⁴⁷⁸⁴⁸ This was after much debate and resistance, with some prominent figures in Lesotho making arguments such as that women are incapable of thinking on their own or making sound and profitable decisions, hence this need for them to consult.⁸⁴⁹ Also concerning the proposed amendment of the laws of Lerotholi, one of Lesotho's Principal Chiefs, Khoabane Theko, stated in an interview with the Lesotho Times Newspaper that:⁸⁵⁰

... I was once invited by the US ambassador (Maria Brewer), to discuss this law. I explained to her that we were not necessarily rejecting the initiative but that we would not condone tampering with the Laws of Lerotholi. I further told her that we would support any law that was meant to protect a woman in a marriage not to tamper with the Laws of Lerotholi.

This sadly supports the concern I articulate above that it is unlikely that members of Lesotho's parliament, the majority of whom are men, would easily allow the amendment of customary laws and rules from which they greatly benefit.

As a result of the above status quo, the impact of efforts aimed at ensuring an increase of women's rights, which would in turn bolster even their participation in Lesotho's political sphere, are often crippled. These efforts include Lesotho being a signatory to and having ratified several international instruments that protect women's rights.

⁸⁴⁷ Public Eye News "UNCCD: Women's access to land to be Strengthened in Lesotho", <https://earthjournalism.net/stories/unccd-womens-access-to-land-to-be-strengthened-in-lesotho> (accessed 30 October 2022).

⁸⁴⁸ The Bill is yet to be presented before the Senate. (Public Eye News "UNCCD: Women's access to land to be strengthened in Lesotho", <https://earthjournalism.net/stories/unccd-womens-access-to-land-to-be-strengthened-in-lesotho> (accessed on 30 October 2022)).

⁸⁴⁹ This was a statement made by the Judicial Commissioner, Advocate Morapeli Makara, while presenting the Judicial Commissioner's comment on the *Laws of Lerotholi* (Amendment) Bill 2022, proposed by the Minister of Gender, before the Legislative Committee of the Senate. This was broadcast on Lesotho's National Broadcasting Corporation <https://www.facebook.com/manthatasi/videos/5306906082678378> (accessed 23rd July 2022).

⁸⁵⁰ Lesotho Times "Tampane, Theko Clash Over Laws of Lerotholi", <https://lestimes.com/tampane-theko-clash-over-laws-of-lerotholi/> (accessed on 9 November 2022).

These include the African Charter on Human and Peoples' Rights (Banjul Charter), Convention on the Elimination of All forms of Discrimination against women (CEDAW), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), SADC Declaration on Gender and Equality and the International Covenant on Civil and Political Rights (ICCPR).

Due to Lesotho's dual legal system, however, international instruments only have legal force in Lesotho once they have been both ratified and domesticated. Domestication occurs through the passing of an Act of Parliament incorporating such international instrument into domestic laws. The Banjul Charter, CEDAW, Maputo Protocol, SADC Declaration on Gender and Equality, and ICCPR have been ratified but not domesticated in Lesotho. Consequently, they do not benefit Basotho women as the rights enshrined within them may not be claimed or implemented in Lesotho.

It was held in *Joe Molefi v Government of Lesotho*⁸⁵¹ that the prerequisite for international instruments to be held enforceable in Lesotho is for them to be incorporated into domestic laws. This requirement has bound the hands of the courts of Lesotho even in situations where they have desired to apply the international instruments as they became relevant, influential, or persuasive, for example with cases involving human rights.⁸⁵² This has arguably left Lesotho with unfettered power to disregard or overlook her commitments under these international instruments, to the extent of enacting laws that violate obligations they undertook under these international instruments.⁸⁵³

Some Judges have, however, begun a trend of referring to these international instruments. The Courts in *DPP v Sole and Another*⁸⁵⁴ and in *Molefi Ts'epe v The Independent Electoral Commission and Others*,⁸⁵⁵ for example, made a number of references to international instruments which though undomesticated, have been

⁸⁵¹ *Joe Molefi v Government of Lesotho* 1967-70 LLR 237.

⁸⁵² Hlatshwayo 2016:139.

⁸⁵³ Hlatshwayo 2016:136.

⁸⁵⁴ [2001] LSHC 101 (unreported).

⁸⁵⁵ 2005 LSHC 93 (20 April 2005).

ratified by Lesotho. The Court in *Molefi Ts'epe v The Independent Electoral Commission and Others* went on to hold that Lesotho, despite lack of domestication, is bound by the international instruments she ratified.⁸⁵⁶ This resonated with the holding of the Court in *Salomon v Commissioner of Customs and Excise*,⁸⁵⁷ which highlights that the starting point in looking at international obligations is that the signing or ratifying nation did not intend to breach the provisions of such instruments or their own obligations accruing from them. This then means that states may look to international instruments for clarifications in situations where their own domestic laws lack clarity or certainty.

Efforts to have some of the international instruments incorporated have been made. These include inclusion of provisions from the Maputo Protocol into the Legal Capacity of Married Persons Act⁸⁵⁸ and the Banjul Charter's provisions forming part of the Bill of Rights in Lesotho's 1993 Constitution. These efforts did not, however, give these international instruments full legal authority in Lesotho. This was evidenced in the *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea (Mr. Kolobe) and Others* case.⁸⁵⁹ In this case, Counsel for Applicant relied on international instruments in their argument for discrimination. They argued that the Chieftainship Act⁸⁶⁰ discriminated against the Applicant as far as it prohibited her from succeeding to the chieftainship of her area on her father's death, who had been chief during his lifetime. The Court held that Section 10 of Chieftainship Act, who's validity was being questioned, was constitutional, despite its clearly discriminatory nature. This, the Court argued, was based on the fact that the Constitution of Lesotho offered blanket cover over any discrimination on the basis of custom. The result of this position was the force of the international instruments referenced being negated by the Constitutional protection of customary discrimination against women.

⁸⁵⁶ Para 10.

⁸⁵⁷ [1966] 3 All ER 871 (CA) at 875.

⁸⁵⁸ Act 9/2006.

⁸⁵⁹ Constitutional Case No.5/2010) [2013] LSHC 9 (03 May 2013).

⁸⁶⁰ 22/1968.

As I highlight in chapter three, it is posited that there is an absence of evidence pointing towards genuine intention on the side of the government of Lesotho to empower women and end gender inequality and discrimination against women. Molapo, for example, highlights how the government of Lesotho always justifies their inaction or lack of transformation on the basis of customs and culture whenever women's rights issues are raised.⁸⁶¹ Lesotho's relationship with the CEDAW and the Maputo Protocol is a classic example.

Lesotho ratified the CEDAW, which aims to ensure that all women enjoy full access to and enjoyment of all human rights, in 1995.⁸⁶² The ratification was, however, accompanied by a reservation of article 2 – an article argued to bear the very heart of the CEDAW. On ratifying the CEDAW, Lesotho included a reservation to article 2, stating that:

The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and the law relating to succession to chieftainship. The Lesotho Government's ratification is subject to the understanding that none of its obligations under the Convention, especially in article 2 (e), shall be treated as extending to the affairs of religious denominations. Furthermore, the Lesotho Government declares that it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho.

Provisions of article 2 of the CEDAW that are most connected to custom and customary law provide as thus:

⁸⁶¹ Molapo 2005:20.

⁸⁶² UN Human Rights Office "Status of ratification of the principal international human treaties", www.ohrh.org (accessed on 14 November 2022).

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

Lesotho's entry of a reservation to the CEDAW was not an anomaly. States have the option to enter reservations if they wish to exempt themselves from certain provisions

in a treaty as well as the legal ramifications attached to such provisions.⁸⁶³ The presence of a conflict between domestic law and any of the international treaty's provisions also forms a ground on which states usually enter a reservation.⁸⁶⁴ Reservations may not, however, be '...incompatible with the object and the purpose of the treaty.'⁸⁶⁵ This is where Lesotho's reservation posed a problem, in that entering a reservation under article 2 in essence entered a reservation of the very heart of the CEDAW. As a result, a number of states entered objections to Lesotho's reservation, such as the Government of Norway, which stated that Lesotho's reservation, more so the latter part, was essentially Lesotho limiting its responsibilities under the CEDAW, the result of which was the invoking of doubt concerning Lesotho's commitment to the CEDAW's object and purpose.⁸⁶⁶ The reservation entered by Lesotho to the CEDAW was said to be against the object and purpose of the convention,⁸⁶⁷ which the Vienna Convention classifies as nullifying a reservation.⁸⁶⁸

Reservations of article 2 are generally considered problematic because article 2 serves the foundational purpose of laying out the central requirement that all articles of the CEDAW be complied with in States' constitutions, statutes, and policies. CEDAW's goal is to have states bring about transformation to their social, structural, and legal systems in order to reach the goal of gender equality, indicating that states may not enter a reservation on the basis of a CEDAW article contradicting standing social, structural or legal systems. As a result, the CEDAW Committee made a

⁸⁶³ United Nations "Glossary of the terms relating to Treaty actions", https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#reservation (accessed on 14 November 2022).

⁸⁶⁴ Akstiniene 2013:453.

⁸⁶⁵ United Nations "Glossary of the terms relating to Treaty actions", https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#reservation (accessed on 14 November 2022).

⁸⁶⁶ "Lesotho CEDAW Reservations and Declarations"

http://www.bayefsky.com/html/lesotho_t2_cedaw.php (accessed 15 March 2021).

⁸⁶⁷ The CEDAW Committee defined the Convention's object and purpose as being "to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms." (Committee on the Elimination of Discrimination against Women, 'General Recommendation 25' (2004) UN Doc A/59/38(SUPP) Annex I, para 4.).

⁸⁶⁸ Vienna Convention on the Law of Treaties (concluded – 1969, entered into force – 1980) Article 19(c).

recommendation that Lesotho withdraw its reservation, on the basis of the reservation being against the object and purpose of the CEDAW.⁸⁶⁹ On the 25th of August 2004, Lesotho modified its reservation and retained only the first portion of its reservation, relating to succession to the office of king as well as the chieftainship.⁸⁷⁰ This made clear Lesotho's lack of intent towards fully eradicating women's discrimination, more so discrimination sanctioned by customary law.

The reservation entered under the CEDAW, coupled with the provision under section 18(4)(c) of the Constitution, not only shed light on how jealously guarded custom and customary law are in Lesotho, but also directly negatively impact women's political participation in Lesotho's modern politics. As I highlight above, the customary structure of politics in Lesotho is greatly exclusionary to women, even going as far as overtly excluding them. Consequently, entering a reservation to the CEDAW that directly protects these institutions from reform, and going further to cement the customary exclusion of women from leadership through affording customary law Constitutional umbrella protection, cements an exclusionary, discriminatory, and patriarchal political system, which I show above still greatly influences modern politics.

Lesotho also signed and ratified the Maputo Protocol in 2004. The Maputo Protocol was developed with the specific aim of ending women's marginalisation, especially within a human rights context. It therefore targets women's access to and enjoyment of human rights, such as the rights to gender equality and political representation. Article 2(2) of the Maputo Protocol specifically calls on States Parties to actively work towards the elimination of '... harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.' Article 8(f) mandates States Parties to '...reform... existing discriminatory laws and practices in order to promote and protect the rights of women.'

⁸⁶⁹ CEDAW Committee on the Elimination of Discrimination against Women, 50th session, 2011:3.

⁸⁷⁰ Viljoen 2012:121.

After signing and ratifying the Maputo Protocol, no steps have been taken towards its domestication in Lesotho.⁸⁷¹ There has, on the contrary, continued to be an enactment of laws that go against the provisions of the Maputo Protocol.⁸⁷² Lesotho has also failed to legally do away with the minor status that women are subjected to under custom and customary law.⁸⁷³ A transformation of customary law provisions is crucial, as it is customary law, prejudiced by the patriarchal system of women's subordination and discrimination by which it is heavily influenced, that most subjects Basotho women to human rights infringements. As Hlatshwayo puts it, Basotho custom and customary law possess:⁸⁷⁴

... deep-seated harmful norms, practices and traditions (patriarchal attitudes) regarding the roles, responsibilities and identities of women and men. For instance, polygamy and bride price (Bohali) are key customs and practices that perpetuate discrimination and unequal status against women and girls in the fields of education, public life, decision-making and exacerbate the persistence of violence against women.

There is therefore a dire need for revision of discriminatory customary law provisions if gender equality, especially in the political leadership sphere, is to be fully received and enjoyed in Lesotho. Protecting customary law creates a barrier to the achievement of gender equality that would, amongst other things, open up the political sphere to greater women's participation.

In the spirit of domesticating some of the Maputo Protocol's provisions, the Legal Capacity of Married Persons Act (LCMPA)⁸⁷⁵ was passed in 2006, removing married

⁸⁷¹ Hlatshwayo 2016:136.

⁸⁷² Hlatshwayo 2016:136.

⁸⁷³ Braun & Dreiling 2010:477.

⁸⁷⁴ Hlatshwayo 2016:134.

⁸⁷⁵ 9/2006.

women's minor status. Although specifically targeting married women, the enactment of the LCMPA was a ground-breaking leap towards gender equity and equality for Basotho women in general, more so in ensuring their access to and enjoyment of socio-economic rights and political representation.⁸⁷⁶ There still, however, exists an absence of laws addressing discriminatory customary law provisions, like the customary law exclusion of girls and women from inheritance, in order to afford women governed by customary law the same gender equality as has been made available to those governed by civil law.⁸⁷⁷ Pholo notes:⁸⁷⁸

... while section 18(1) of the Lesotho Constitution provides for equality under the law in keeping up with international standards, section 18(4)(c) provides that the guarantee of non-discrimination does not apply to the customary law of Lesotho pertaining to persons who are subject to such law. This claw-back provision has the effect of perpetuating the application of customary law, including those of its aspects which legitimise gender-based discrimination.

The Constitutional protection of customary law under section 18(4)(c) in essence enables the perpetuation of gender inequality and discrimination against women, thereby creating a stumbling block against all attempts, whether international, regional, or domestic, towards gender equality and non-discrimination of women. The Constitutional protection of customary law, for all intents and purposes, effects the application of discriminatory customary law provisions against Basotho women.

This recently became most evident in Lesotho through the Masupha case. As I narrate in detail later in this chapter, the case challenged the barring of women from succeeding to the chieftainship in their own right, on the basis of the customary male primogeniture rule, a rule which had also become the basis for section 10 of the

⁸⁷⁶ Mohlakoana-Motopi 2019:5.

⁸⁷⁷ Hlatshwayo 2016:134.

⁸⁷⁸ Pholo 2013:5.

Chieftainship Act. The holding in this case was to the effect that Senate's barring from succeeding her father to the chieftainship did not constitute discrimination as such barring was justified by section 18(4)(c) of the Constitution.⁸⁷⁹ The holding highlighted the significant role that customary law plays in keeping women on the periphery of leadership in Lesotho. The protection afforded customary law through the Constitution and Chieftainship Act has succeeded in perpetuating Basotho women's marginalization and subjugation in different levels of the political sphere, from the chieftainship to the kingship and in parliamentary representation.

Concerning Basotho women's political participation specifically, Lesotho's Constitution also fails to truly provide for and protect Basotho women's freedom to take part in the nation's political sphere. The Constitution starts off well by providing in section 4 that all citizens, regardless of any status, are entitled to enjoy the rights provided for under the Constitution, one of which is the right to participate in government. Section 18 then provides that no laws are to be made that would discriminate against any person whether in wording or in effect. Section 20 goes on to specifically provide for women's political participation. The section grants all citizens of Lesotho the rights:⁸⁸⁰

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;
- (c) to have access, on general terms of equality, to public service.

⁸⁷⁹ Para 53.

⁸⁸⁰ Subsection (1)(a)-(c).

On the face of it, it seems the Constitution is in support of women's participation in Lesotho's political sphere. However, a deeper look tells a different and contradictory story. For one, section 18(4)(c)'s legalisation of discrimination on the basis of custom provides customary law with an umbrella protection against scrutiny and essentially legalizes discrimination on the basis of customary law. It fundamentally legalizes and cements laws that discriminate against a person if such laws are based on customary provisions. As Mosetse highlights:⁸⁸¹

The major flaw of the Amended Constitution of Lesotho of 1993... is the fact that all its provisions, particularly those that affect women, are subject to Customary Law. This means that the Amended Constitution of Lesotho of 1993 is not above Customary Law when it comes to the rights of women.

The provision under section 18(4)(c) of the Constitution is, therefore, directly problematic for women, because the customary laws of Lesotho are, as set out above, discriminatory against women, so affording them such protection negatively impacts women, and essentially places the Constitution in a position of subjection to customary law, more so when it comes to provisions concerning women. This provision also poses a number of setbacks for women's political representation in Lesotho. First, it affords protection to discriminatory and patriarchal customary law provisions, leading to women's subordinate status not only in society generally, but also in the political sphere.⁸⁸² Specifically, through protecting customary law, the section protects the discrimination of women from participation in two of the legally recognised governance structures in Lesotho – the office of the King and chieftainship. Second, it propagates the perception of the political sphere being the exclusive purview of men. Third, the social status quo set by the Constitution's umbrella protection of customary law leaves women with political office aspirations having to contend with and overcome custom

⁸⁸¹ Mosetse 2006:128-129.

⁸⁸² Mukurunge 2019:431.

and customary law hurdles in all their different forms.⁸⁸³ Finally, it cripples the impact of efforts aimed at ensuring an increase of women's participation and representation in the political sphere, more so in leadership positions.⁸⁸⁴

The political landscape of present-day independent and democratic Lesotho is, as a result, yet to boast a high presence of women in its leadership. Some scholars have gone so far as to classify Lesotho's female representation and participation in government as 'dismal'.⁸⁸⁵ It is argued that this 'dismal' representation and participation of women impacts not only Lesotho's full realisation of democracy⁸⁸⁶ but also impedes its development.⁸⁸⁷

4.3.4 Structural obstacles to women's political representation

Although the government of Lesotho has undertaken various endeavours aimed at increasing women's political participation and representation in Lesotho, such as affirmative action through gender quotas and policy review and or enactment,⁸⁸⁸ there is still a long way to go. There still, for example, remain significant and influential spaces wherein women's representation is strongly guarded against, such as kingship and chieftainship positions. Obstacles that prevent women from breaking into different political spheres are still upheld and even constitutionally and strategically protected from dismantling, such as customary law. Deliberate efforts geared towards women's political leadership are therefore key, as they have been found to enhance women's political efficacy.

Amongst the obstacles to women's political representation, and one of the ways through which we see the customary exclusion of women from governance structures

⁸⁸³ Mukurunge 2019:432.

⁸⁸⁴ Kalimo 2018:376.

⁸⁸⁵ Juma 2013:195.

⁸⁸⁶ Kimane & Ntimo-Makara 2008:249.

⁸⁸⁷ Makoia 1997:5.

⁸⁸⁸ For example, the National Assembly Election Amendment Act of 2011, Local Government Elections Act as amended in 2011 and the National Strategic Development Plan 2012/13-2016/17.

reflected in present-day Lesotho, lies in the form of government adopted when Lesotho transitioned into a democratic government, as well as the composition of the different structures of this new government. In order to illustrate the problematic nature of both the form and composition of Lesotho's adopted government system, I find it important to examine each government structure and the link between their organization, composition, and women's political representation in Lesotho. I begin from the national government and conclude with the chieftainship.

4.3.4.1 National government

Lesotho, following independence in 1966, adopted a unitary form of government, divided into national and local government structures. National governance is in the form of a bicameral parliament, consisting of the National Assembly (Lower House), in which law-making authority rests, and the Senate (Upper House), whose duty it is to oversee the function of the National Assembly and ensure accountability.⁸⁸⁹ The National Assembly comprises 120 democratically elected officials. The Senate, on the other hand, consists of 33 members – 22 of whom are mainly principal chiefs appointed by the King acting on the Prime Minister's advice, and 11 who are appointed on the basis of being prominent community members.⁸⁹⁰ In the previous elections held in 2017, women's representation in Lesotho's Senate only stood at 25 per cent, although it did boast a female leader.⁸⁹¹ Only 22 per cent of National Assembly seats were held by women in Lesotho,⁸⁹² a drop from the 25 per cent achieved in the 2015 national elections.⁸⁹³ These statistics all fell below the 30 per cent target set out in

⁸⁸⁹ Matlosa & Shale (eds.) 2007:33.

⁸⁹⁰ Matlosa & Shale (eds.) 2007:33.

⁸⁹¹ Lesotho Senate "General information about the parliamentary chamber", http://archive.ipu.org/parline-e/reports/2182_a.htm (accessed on 23 July 2022).

⁸⁹² Gender Links for Equality and Justice "Women representation in Lesotho govt recedes", <https://genderlinks.org.za/pressreleases/lesotho-womens-representation-new-coalition-government/> (accessed 20 October 2019).

⁸⁹³ Gender Links for Equality and Justice "Women representation in Lesotho govt recedes", <https://genderlinks.org.za/pressreleases/lesotho-womens-representation-new-coalition-government/> (accessed 20 October 2019).

international instruments and protocols such as the CEDAW,⁸⁹⁴ the Maputo Protocol,⁸⁹⁵ as well as the African Union's 50 per cent target.⁸⁹⁶⁸⁹⁷

The bicameral set up of Lesotho's parliament, or more specifically the decision on who would occupy the different Houses, is problematic for women's political representation efforts, contributing to Lesotho's low representation of women at the parliamentary level for example. For one, Lesotho's Senate consists mainly of chiefs. As I discuss in this chapter, Lesotho's chieftainship is governed by customary laws and uses the male primogeniture rule for appointment to the office.⁸⁹⁸ This means, despite the presence of some female chiefs, it is almost guaranteed that two thirds of the Senate will automatically be made up of mainly men, and not just any men, but men who have significant investments in customary ways of living as well as a great interest in ensuring the traditional ways of Lesotho are retained, in order to secure their own customary leadership positions and benefits. It is also suggested that this decision to have the Senate consist mostly of chiefs was a strategic move for the chieftainship to retain power in Lesotho's legislative system.⁸⁹⁹ With ordinary members of society not having a role in the nomination or election of chiefs, a privilege reserved only for chiefs and traditional leaders,⁹⁰⁰ it is argued that this composition of the Senate's two thirds may remain the status quo, unless there is legislative intervention at both customary and civil levels.

⁸⁹⁴ 1979.

⁸⁹⁵ 2003.

⁸⁹⁶ African Union "AU Strategy for Gender Equality & Women's Empowerment", https://au.int/sites/default/files/documents/36195-doc-au_strategy_for_gender_equality_womens_empowerment_2018-2028_report.pdf

⁸⁹⁷ At the time of this thesis' submission, Lesotho had just undergone the 2022 National Assembly elections. The updated statistics on the composition of the Senate and National Assembly could not, however, be provided as the proportional representation seats' allocation was being contested in the Courts of law. (Reuters "Lesotho election body says it made a mistake over parliament seats", <https://www.reuters.com/world/africa/lesotho-electoral-body-says-made-mistake-over-parliament-seats-2022-10-22/> (accessed 31 October 2022)).

⁸⁹⁸ *Laws of Lerotholi* 1946, Part 1, section 2 and section 3(1).

⁸⁹⁹ Government of Lesotho "Senate", <https://senate.parliament.ls/> (accessed on 14 November 2022).

⁹⁰⁰ Gender Links for Equality and Justice "50/50 by 2030 - Warning bells are ringing: gender in the 2017 Lesotho local government elections", <https://genderlinks.org.za/wp-content/uploads/2018/10/LG-elections-report-LES3.pdf> (accessed 19 November 2020).

The remaining third of the Senate consists of people deemed to be of prominent standing in their communities. With Lesotho still being a significantly patriarchal society, and men still greatly being perceived as truly representing leadership, it is once again almost guaranteed that most of this third will still consist of men. It is clear, then, why women's presence in the Senate stands at only 25 per cent.

The National Assembly's own composition of democratically elected officials is no exception to the argument that Lesotho's bicameral parliament is problematic for women's representation therein. It has long been posited that leaders are often chosen not so much on the basis of their leadership excellence, potential or track record but rather on a patron-client basis.⁹⁰¹ Women's subjection to historic and persisting disadvantages in arguably all spheres of society places them at a disadvantage in elections, as many voters see women as neither potential patrons from whom they may benefit, nor 'safe bets' worthy of former male-headed patron-client allegiances being severed. The abovementioned voters unfortunately also include female voters, as they too have been listed as falling within obstacles towards women being elected to the National Assembly. It has been argued that women, though composing the majority of most states' populations, rarely vote female candidates into political offices.⁹⁰² In an interview with Olaleye, the President of the Federation of Trade Union in Lesotho stated that "[t]he problem with women representation lies with women. Although women represent the majority of the electorate, they often resent voting for women instead they prefer electing men. This is partly explained by culture."⁹⁰³

A number of factors may be highlighted as causes of this present attitude towards female electorates and female leadership in general in Lesotho. Amongst these factors fall customary norms and laws, gender socialization, gendered education systems and social biases, as I highlight above.⁹⁰⁴ Also contributing to this pattern and status quo are stereotyping, hegemony and episteme.

⁹⁰¹ See Lindberg 2006.

⁹⁰² Olaleye 2004:13.

⁹⁰³ Olaleye 2004:13.

⁹⁰⁴ Rule 1994:15.

4.3.4.2 Stereotyping

Stereotyping negatively impacts women's political participation because the stereotypes propagated concerning women leave voters with a view of women as incapable of successful leadership.⁹⁰⁵ Customary norms, for example, create stereotypes that pit women against what voters expect from their leaders. As I highlight in chapter two, the "... sensitive, emotional and weak..."⁹⁰⁶ stereotypical characterisation of women, contrasted with the characterisation of men as "... tough, ambitious and strategic..."⁹⁰⁷ results in a loss of confidence and thus votes for female political candidates.⁹⁰⁸ Both trait and role stereotyping have been found to work against women's political participation because they promote a perspective of women as psychologically and behaviourally unfit for leadership, thus justifying the removal of leadership activities from their purview.⁹⁰⁹ In turn, both men and women conform to and act in accordance with the set gender stereotypes.

4.3.4.2.1 Hegemony and episteme

Hegemony, on the other hand, is a system of dominance and control, which is attained and maintained through the infusion of the dominant social group's ideals and values into the minds and daily lives of the marginalized groups, in such a way that the marginalized groups believe that the ideals and values are in their interest, even if they practically work against them.⁹¹⁰ Under postcolonial theory, we see this play out in colonial times, where colonialists infused their ideals so expertly into the colonised that the colonised people laboured to adapt to and even keep the colonial system alive.

⁹⁰⁵ Hayes 2011:133-134.

⁹⁰⁶ Bauer "Gender stereotyping in political decision making", <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-772?rskey=OruyZV&result=1> (accessed on 17 November 2022).

⁹⁰⁷ Huddy & Capelos 2002:29.

⁹⁰⁸ Huddy & Capelos 2002:29.

⁹⁰⁹ López-Sáez & Lisbona 2009:363-379.

⁹¹⁰ Ciocchini & Khoury 2018:76.

Post-colonisation, we see it play out in the spread of stereotypes concerning women and leadership, which present women as incapable of leadership and as only being effective in the private sphere. Once these ideals and ideologies have been so spread and cemented that they become the episteme of the time, with people also having internalized them, then those who have internalized them begin to self-regulate, that is, there no longer exists the need to apply force to have the marginalized follow the ideals of the dominant group, as the marginalized regulate themselves. This is why men or political parties do not have to instruct women to not vote for other women, but it is the women themselves, led by the internalized patriarchal ideals, who keep themselves from voting for women and carry out the will of the dominant group. It is clear then, that controlling people's consciousness is a political act.⁹¹¹

It is important to highlight, however, that the National Assembly Electoral Act⁹¹² mandates political parties providing their party lists of candidates for elections under proportional representation to present a list with names alternating between females and males. The Act provides:⁹¹³

47 (1) A political party intending to contest proportional representation elections shall nominate and submit a list of nominated candidates to the Director in the prescribed manner before the date stated in the elections time table for close of nominations.

(2) The list shall –

(a) include the names, electors' registration numbers, and addresses of at least 40 candidates but not more than 120;

⁹¹¹ Carnoy 1986:75.

⁹¹² 14/2011.

⁹¹³ Section 47(1) & (2).

(b) arrange the candidates in order of preference from top to bottom, with a female or male candidate immediately followed by a candidate of the opposite sex; and

(c) include equal numbers of women and men.

This is a significant step towards equal participation and representation of women in Lesotho's political sphere, although there remains room for much more work towards women's increased political participation. For example, the 2022 European Union Election Observation Mission's preliminary statement states that despite the National Assembly Electoral Act requiring an alternation between female and male names on the proportional representation list, this is often not adhered to, hence the desired outcome is yet to be observed.⁹¹⁴ The report provides that "...women are often not placed in the top position of the lists. Most women candidates have difficulties to pass the parties' internal selection processes to become candidates. A total of 837 women were nominated for FPTP seats, accounting for 35.5 per cent of candidates."⁹¹⁵ There seems to be a discord between what the laws provide for and what actually happens on the ground.

4.3.4.2.2 Political parties and the electoral model

The same absence and discrimination of women evidenced in Lesotho's traditional governance is also seen to have reproduced itself in the agendas of the first political parties to come up in Lesotho. Lesotho's earliest political parties did not have gender

⁹¹⁴ European Union "European Union Election Observation Mission Lesotho - National Assembly Elections 7 October 2022"
<https://www.eeas.europa.eu/sites/default/files/documents/EU%20EOM%20Lesotho%202022%20PS.pdf> (accessed 31 October 2022).

⁹¹⁵ European Union "European Union Election Observation Mission Lesotho - National Assembly Elections 7 October 2022",
<https://www.eeas.europa.eu/sites/default/files/documents/EU%20EOM%20Lesotho%202022%20PS.pdf> (accessed 31 October 2022).

on their agendas, nor did they create climates that enabled women's participation in politics. Makoa posits that this was because traditional norms prevailed even in modern politics and became instrumental in the denial of women's full political rights.⁹¹⁶ These norms presented men as the most capable candidates for leadership, whether in the home, community or in national leadership. The country's political parties' politics and electoral model then went on to also present women with further challenges in their political leadership aspirations.

Lesotho underwent an electoral model transformation before the 2002 elections, moving from a first-past-the-post (FPTP) to a mixed member proportional representation (MMPR) model. Under the MMPR model, political parties elect members who will stand as party representatives at different electoral constituencies. Electorates then vote for both a political party and a party representative. Success at the constituency level is determined by a party representative receiving the highest number of votes in the constituency.

The main purpose of the electoral model transformation was to have a more inclusive and representative National Assembly, a goal which was arguably achieved as Lesotho's opposition parties also won parliamentary seats in the 2002 elections. This was the first time that opposition parties had ever won parliamentary seats since Lesotho's independence and transition to democracy.⁹¹⁷ Lesotho's adoption of the MMPR electoral model was regarded a positive step towards elections anchored on transparency and democracy not only in Lesotho, but Africa as a whole.⁹¹⁸ This positive electoral transition did not, however, do much to improve women's odds at election into the Senate or National Assembly.

Approximately two decades after this electoral reform, for example, Lesotho has only eight political parties led by women, out of a total of sixty five.⁹¹⁹ Women with political

⁹¹⁶ Makoa 1997:10,12

⁹¹⁷ Cho & Bratton 2006:732.

⁹¹⁸ Shale 2005:101.

⁹¹⁹ Independent Electoral Commission "Political parties", <https://www.iec.org.ls/political-parties/> (accessed 31 October 2022).

aspirations still find themselves having to battle economic constraints as not much political campaign funding is available for women,⁹²⁰ as well as the expectations that they juggle personal, household and political activities.⁹²¹ Political parties have also not made much progress in ensuring women's representation in their parties beyond the typical token membership. Parties are also seen as unwilling to go out of their way to ensure that women are elected. Sanbonmatsu highlights that '... party is a much better predictor of voting behaviour than gender',⁹²² thereby providing parties leeway to place women on their constituency representatives list, knowing allegiance to the party will ensure electorates will vote for the female candidates. Most political parties still, however, overtly and covertly see women's presence in the parties as only meant to ensure '... proper care to all the guests of the party'.⁹²³

4.3.4.3 Local government

The sub-national level of Lesotho's government is in the form of a local government. This is an important element of Lesotho's government, as it is instrumental in facilitating community members' participation in local decision-making and development, as well as providing more efficient, targeted and speedy responses to local community needs.⁹²⁴ The local government was established through the Local Government Act,⁹²⁵ later amended in 2004 through the Local Government (Amendment) Act.⁹²⁶ Democratisation of the local government was achieved through

⁹²⁰ IDEA 2005:37.

⁹²¹ Ramakhula "In but out in Lesotho: women's representation dilemma", <https://www.africaportal.org/publications/out-lesotho-womens-representation-dilemma/> (accessed on 17 November 2022):5.

⁹²² Sanbonmatsu 2003:370.

⁹²³ The Basutoland Congress Party's Constitution (1964:25) cited this as the role of their Women's League.

⁹²⁴ Maleleka "The impact of democracy in Lesotho: assessing political, social and economic developments since the dawn of democracy", <https://www.africaportal.org/publications/the-impact-of-democracy-in-lesotho-assessing-political-social-and-economic-developments-since-the-dawn-of-democracy/> (accessed on 17 November 2022):6.

⁹²⁵ No. 6/1997.

⁹²⁶ No. 5/2004.

the local government elections of 2005,⁹²⁷ governed by the Local Government Elections (Amendment) Act.⁹²⁸ The purpose behind this move was supposedly “...to increase democracy in government by giving power to the people.”⁹²⁹ Previous attempts to achieve this goal were carried out through establishment of institutions and bodies such as the Basutoland Council of the 1930s, District Councils of 1943, District Secretariat of the 1970s and 1980s, as well as the Maseru Municipal Council of 1989. These institutions and bodies were later deemed inefficient in meeting their assigned goals and each was either dismantled or kept alive, depending on the aspirations of the relevant political authorities.⁹³⁰

In line with the 1997 Southern African Development Community (SADC) Declaration on Gender & Development,⁹³¹ the Local Government (Amendment) Act⁹³² and Local Government Elections (Amendment) Act⁹³³ made provision for women to make up no less than one third of local government structures. In pursuance of this decision, Lesotho’s Independent Electoral Commission (IEC), after consultation with and involvement of relevant stakeholders, selected specific electoral divisions which would be exclusively reserved for women.⁹³⁴ The table below presents a breakdown of district and community councils and their electoral divisions, and the number of electoral divisions reserved for women in each.

Table 4.1

⁹²⁷ Maleleka “The impact of democracy in Lesotho: assessing political, social and economic developments since the dawn of democracy”, <https://www.africaportal.org/publications/the-impact-of-democracy-in-lesotho-assessing-political-social-and-economic-developments-since-the-dawn-of-democracy/> (accessed on 17 November 2022):5.

⁹²⁸ No. 6/2004.

⁹²⁹ Local Government Training Manual 2005, as cited in Mofyoa 2005.

⁹³⁰ Mofuoia “Local governance in Lesotho: In search of an appropriate format”, <https://www.africaportal.org/publications/local-governance-in-lesotho-in-search-of-an-appropriate-format/> (accessed on 20 August 2022)

⁹³¹ Article H(ii).

⁹³² Section 4(3).

⁹³³ Section 18(1)(a).

⁹³⁴ EISA and the Lesotho Council of Non-Governmental Organisations 2008:15.

Electoral Divisions per District per Council

District Councils	No. of Community Councils	No. of electoral divisions	No. of reserved electoral divisions
Botha- Bothe	10	96	30
Leribe	18	178	54
Berea	10	104	30
Maseru	15	147	45
Mafeteng	12	116	36
Mohales' Hoek	14	140	42
Quthing	10	105	31
Qacha's Nek	11	103	33
Thaba- Tseka	13	127	39
Mokhotlong	15	156	45
Total	128	1 272	385

Source: Independent Electoral Commission Lesotho

This move by the IEC was met with some opposition, one of which resulted in the famous *Tsepe v Independent Electoral Commission and Others (Tsepe vs IEC)* case.⁹³⁵ In this case, Molefi Tsepe sought to have the IEC's decision to reserve one-third of the local government electoral divisions for women declared unconstitutional. Tsepe, a Mosotho man and candidate for the local government elections in electoral division Litjotjela 05, applied to have section 26 (1) A (a) and (b) of the Local Government Elections (Amendment) Act declared unconstitutional. He argued that the section contravened sections 18 (1), (2), (3) and 20 (1) of Lesotho's Constitution in

⁹³⁵ 2005 LSHC 96.

that it authorized his exclusion from participating in the local government as a candidate, on the basis of his sex.

Based on Lesotho's international law obligations such as the CEDAW, women's historical disadvantage and the eligibility of the applicant in other electoral divisions, the Court held that '...the limitation that the Section 26 (1) A (a) &(b) imposes on the applicant's rights in so far as it does is reasonably justifiable in a free and democratic society.'⁹³⁶ This decision is heralded as one of Lesotho's most progressive decisions, signalling the nation's commitment to women's empowerment, more so in the political and leadership spheres.

Following the 2017 elections,⁹³⁷ Lesotho had a 40 percent representation of women at the local government level.⁹³⁸ Although high, this percentage was a significant drop from the first and second local government elections, in which women's representation was at 58 and 49 percent respectively.⁹³⁹ Although women were evidently faring slightly better at the local government level than at the national level, the higher representation of women at the local government level is still arguably insufficient progress towards attainment of national political representation of women, more so at national government level. For one, local government politics arguably do not truly impact national politics and decision-making, which is hypothesized to be a necessity if equity and equality are to be achieved in Lesotho's political sphere. Women in local government positions also face challenges that prevent them from efficiently occupying and functioning in these positions, such as lack of capacity building and having their duties overridden by central government directorates.⁹⁴⁰ Finding a balance between their traditional household needs and their local government duties

⁹³⁶ *Ts'epe v Independent Electoral Commission and Others*: para. 22.

⁹³⁷ At the time of this thesis' submission, Lesotho had just undergone the 2022 elections. The updated statistics on the composition of the local government could therefore not be provided as yet.

⁹³⁸ Gender Links "50/50 BY 2030 - Warning Bells Are Ringing: Gender In The 2017 Lesotho Local Government Elections", <https://genderlinks.org.za/wp-content/uploads/2018/10/LG-elections-report-LES3.pdf> (accessed 19 November 2020).

⁹³⁹ Gender Links "50/50 BY 2030 - Warning Bells Are Ringing: Gender In The 2017 Lesotho Local Government Elections", <https://genderlinks.org.za/wp-content/uploads/2018/10/LG-elections-report-LES3.pdf> (accessed 19 November 2020).

⁹⁴⁰ Ngozwana 2014:89.

is another challenge that women in local governance leadership find themselves having to navigate.⁹⁴¹ This is coupled with the reality that most local government electorates are from the rural areas of Lesotho, where patriarchy and customary norms still persist, meaning most women still require their husbands' permission for most acts, such as attending local government meetings and activities.⁹⁴² There has also been poor arrangements for adoption of and transition to a local governance structure and capacitation of relevant stakeholders to ensure success at the local government level.⁹⁴³ These challenges have resulted in the inability of local governments, and the women representatives in them, to carry out their mandate fully. These, then, negatively impact women's ability to excel at local government level and transition to national government.

4.3.4.4 Office of the King

The Constitution of Lesotho creates the office of King, who is both the Constitutional monarch and Head of State.⁹⁴⁴ The King enjoys limited political power.⁹⁴⁵ The monarchy is hereditary, with succession based on customary law provisions and administered by the college of chiefs.⁹⁴⁶ Pertaining such succession to the office of King, and the place of women within it, section 45 and 46 are relevant.

Section 45(1), (2), (3) and (5) state:

1. The College of Chiefs may at any time designate, in accordance with the customary law of Lesotho, the person (or the persons, in order of prior right) who are entitled to succeed to the office of King upon the death of the holder

⁹⁴¹ Shale 2005:112.

⁹⁴² Shale 2005:112-113.

⁹⁴³ Ngozwana 2014:89

⁹⁴⁴ Chapter V.

⁹⁴⁵ *Constitution of Lesotho*, 1993, sec. 44(1) & (2).

⁹⁴⁶ *Constitution of Lesotho*, 1993, sec. 45.

of, or the occurrence of any vacancy in, that office and if on such death or vacancy, there is a person who has previously been designated in pursuance of this section and who is capable under the customary law of Lesotho of succeeding to that office, that person (or, if there is more than one such person, that one of them who has been designated as having the first right to succeed to the office) shall become King.

2. If, on the death of the holder of, or the occurrence of any vacancy in, the office of King, there is no person who becomes King under subsection (1), the College of Chiefs shall, with all practical speed and in accordance with the customary law of Lesotho, proceed to designate a person to succeed to the office of King and the person so designated shall thereupon become King.

3. Whenever the holder of the office of King or a Regent—

a. has occasion to be absent from Lesotho for a period which the College of Chiefs has reason to believe will be of short duration; or

b. is suffering from an illness which the College of Chiefs has reason to believe will be of short duration, the College of Chiefs may for the time being designate a person, in accordance with the customary law of Lesotho, to exercise the functions of the office of King, and any person for the time being so designated may exercise all the functions of the office of King during the absence or illness of the holder of that office or the Regent.

5. Where any person has been designated to succeed to the office of King in pursuance of subsection (1) or (2), any other person who claims that, under the customary law of Lesotho, he should have been so designated in place of that person may, by application made to the High Court within a period of six months commencing with the day on which the designation was published in the Gazette, apply to have the designation varied by the substitution of his own name for that of the first mentioned person, but, save as provided in this Chapter, the designation of any person for the purposes of this section shall not

otherwise be called in question in any court on the ground that, under the customary law of Lesotho, the person designated was not entitled to be so designated.

Section 46 provides:

1. The College of Chiefs may at any time designate, in accordance with the customary law of Lesotho, the person (or the persons, in order of prior right) who shall be Regent, that is to say, who shall exercise the functions of the office of King in any of the following circumstances--

a. when the holder of that office has not attained the age of twenty-one years; or

b. when the holder of that office (and any person who has been designated as having a prior right to be Regent) is unable by reason of absence from Lesotho or by reason of infirmity of body or mind to exercise the functions of that office; or

c. when, in the circumstances specified in section 45(2) of this Constitution, the College of Chiefs has not yet made a designation in pursuance of that subsection, 1. and if, in any of those circumstances, there is a person who has previously been designated in pursuance of this subsection and who is capable under the customary law of Lesotho of becoming Regent, that person (or, if there is more than one such person, that one of them who has been designated as having the first right to be Regent) shall become Regent.

2. If, in any of the circumstances specified in subsection (1)(a), (b) or (c), there is no person who becomes Regent under that subsection, the College of Chiefs shall, with all practical speed and in accordance with the customary law of Lesotho, proceed to designate a person to be Regent and the person so designated shall thereupon become Regent.

3. If the College of Chiefs fails within a reasonable time to discharge the duty imposed on it by subsection (2), the High Court may, upon the application of any person, itself designate a person to be Regent in accordance with the customary law of Lesotho and the person so designated shall thereupon become Regent.

The Constitution does not make provision for a woman to be appointed to the office of King, except if appointed as a regent. Section 45 goes further to state that the occupant of the office of King shall be appointed as per customary law provisions, which relies on the male primogeniture rule as also applied in appointment to chieftainship and in inheritance. In an interview with Nyane, Chief Khoabane, the then chairperson of the College of Chiefs, stated "... it seems our work as the College is to glorify and confirm what is ordinarily a matter of common course under Sesotho law – the first born male child of the previous king will ordinarily succeed."⁹⁴⁷ Custom and customary law are, once again, used as gatekeepers of women's participation in leadership and governance and the Constitution is once again seen to "... relinquish its supremacy to customary law...."⁹⁴⁸

4.3.4.5 Chieftainship

The Constitution of Lesotho,⁹⁴⁹ along with the Chieftainship Act,⁹⁵⁰ facilitated the assimilation of the chieftainship into Lesotho's legally recognised post-independence governance structures.⁹⁵¹ As a result, and also owing to Lesotho's dual legal system, chieftainship still enjoys legitimacy as a leadership model in Lesotho. Succession in chieftainship is still based on male primogeniture, as was the historical position.

⁹⁴⁷ Nyane 2019:17.

⁹⁴⁸ Nyane 2019:21.

⁹⁴⁹ Section 103 and Schedule 2.

⁹⁵⁰ 22/1968.

⁹⁵¹ Juma 2013:202.

Women are, as a result, still barred from the chieftainship as per the Laws of Lerotholi, except as regents and acting chiefs in their husbands' absence. This customary law position is argued to be contrary to the practice during the days of Moshoeshoe I. During Moshoeshoe's reign, there were various ways through which one could become a chief besides birth; such as popular preference or through the process of 'placing', by which Moshoeshoe appointed people he trusted and or favoured.⁹⁵² Jingoos also highlights the fact that the people's endorsement of a potential chief at times took precedence even over customary norms.⁹⁵³ The Bataung, for example, elected Khiba as their chief based on the wisdom and courage he had displayed, despite his elder brother Lekhetho being the legal heir as per customary law.⁹⁵⁴

The Laws of Lerotholi still, notwithstanding, maintain that succession to chieftainship only devolves upon male children,⁹⁵⁵ unless a chief dies leaving a minor heir, in which case the senior widow or the chief's younger brother may act as chief until the heir comes of age.⁹⁵⁶ The Chieftainship Act⁹⁵⁷ has also provided statutory authority to customary law's male primogeniture rule regarding succession to the Chieftainship. The relevant subsections of section 10 of the Chieftainship Act provide:

(2) When an office of the Chief becomes vacant, the first born or only son of the first or only marriage of the Chief succeeds to that office, and so, in descending order, that person succeeds to the office who is the first – born or only son of the first and only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.

⁹⁵² See Kapa 2010:321.

⁹⁵³ See Jingoos 1975:183.

⁹⁵⁴ Ashton 1952:193.

⁹⁵⁵ *Laws of Lerotholi* 1946, Part 1, sec. 2.

⁹⁵⁶ *Laws of Lerotholi* 1946, part 1, sec. 3(1).

⁹⁵⁷ Section 10.

(3) If when an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the Chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority of marriages according to the customary law, that person succeeds to the office who is the first-born or only son of the senior marriage of the Chief or of a person who but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.

(4) If when an office of Chief becomes vacant there is no person who succeeds under the two preceding subsections, the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief, and when that office thereafter again becomes vacant to the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing which an eldest brother, the eldest surviving uncle of that male Chief in legitimate ascent, so in ascending order according to the customary law.

The constitutionality of this section came into question in the infamous case of *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea (Mr. Kolobe) and Others (Masupha case)*.⁹⁵⁸ In this case Masupha, the eldest daughter of the Principal Chief of the Teyateyaneng areas, sought to succeed as the next Principal Chief of the 'Mamathe, Thaba-kubu and Jorotane areas. The court held that on the basis of section 10 of the Chieftainship Act, Masupha could not succeed her father, as that was contrary to custom and customary law. Masupha argued that the interpretation of section 10 excluded her on the basis of sex, which was discriminatory.⁹⁵⁹ It was, however, highlighted that the section could not be construed as discriminatory as section 18(4)(c) of the Constitution legalized discrimination on the

⁹⁵⁸ Constitutional Case No.5/2010 [2013] LSHC 9 (03 May 2013).

⁹⁵⁹ Para. 15.

basis of custom. Masupha's Counsel maintained that "[a]s a citizen of Lesotho, she should be entitled to be considered for the succession to office of principal chief; and any attempt to exclude her would be discriminatory and therefore unconstitutional."⁹⁶⁰ Despite the above arguments, the court held that section 10 did not explicitly prohibit women from succeeding to the chieftainship on the death of a ruling chief, but that it only prioritized the customary preference of male primogeniture.⁹⁶¹ Where there is no heir, the Act does not bar wives from being appointed as chiefs. The Chieftainship Act, rather, provides that if at the death of a chief there is no male issue, then "... the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief."⁹⁶² This provision means women are no longer only allowed to occupy the chieftainship role as regents, but can now also hold it in their own right.⁹⁶³ This was evidenced in *Letele v Letele*, where chief Thota Letele passed on without having a son, the result of which was his wife 'Masera succeeding him as chief in her own right.⁹⁶⁴ In such instances, the Chieftainship Act requires that such appointment receive the King's approval, as advised by the Minister.⁹⁶⁵ It is worth noting, however, that the provision of the Chieftainship Act under section 10 (5) still only opens up the position for women who were wives of the deceased chief, and still leaves out his daughters, other relatives and any other member of society who could successfully occupy the chieftainship. So, women are still allowed into leadership only on basis set by men.

The court's holding on the constitutionality of section 10, coupled with the constitutional endorsement of discrimination against women on the basis of custom evokes a lack of faith in Lesotho's declared commitment to gender equity and equality, more specifically women's improved political representation.⁹⁶⁶ The umbrella protection afforded customary law by section 18(4)(c) of the Constitution continues to

⁹⁶⁰ Para. 25.

⁹⁶¹ Masupha case, para. 50.

⁹⁶² Sec. 10(5).

⁹⁶³ Nyane 2019:14.

⁹⁶⁴ (NULL) [1997] LSHC 90 (30 October 1997).

⁹⁶⁵ Chieftainship Act: sec. 10(8).

⁹⁶⁶ Juma 2013:172.

remain one of the greatest obstacles to the attainment of gender equity and equality in Lesotho.

The African Commission on Human and Peoples' Rights, along with other human rights treaty bodies, highlight their uneasiness with the manner in which Lesotho's Constitution affords protection to customary law, and thus subordination and discrimination of women, stating that this greatly impedes all work towards gender equality.⁹⁶⁷ Not only that, but the Constitution continuously gives and takes rights, more so rights affecting women. An example is seen in section 26(1), which provides that "Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Although this provision speaks to the promotion of equality and justice in Lesotho, a ground on which gender equality may be advocated for, it is negated by the preceding section. Section 25 provides that all principles under chapter three of the Constitution, of which section 26 is one, are non-justiciable and act only as guides to '... authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.'⁹⁶⁸ It was also held by the Constitutional Court in *Khathang Tema Baitsooli and another v Maseru City Council and Others*⁹⁶⁹ that chapter three provisions may not be categorized as rights but only as principles, with principles being defined as simply "a fundamental truth or proposition serving as a the (sic) foundation for belief or action."⁹⁷⁰ Section 25 in essence, therefore, leaves women with no recourse in cases where they are subjected to inequality and injustice, arguably making section 26 a deceptive provision.

⁹⁶⁷ CEDAW Committee *Concluding observations of the Committee on the Elimination of Discrimination against Women - Lesotho* CEDAW/C/LSO/1-4.

⁹⁶⁸ Constitution of Lesotho 1993, sec. 25.

⁹⁶⁹ CC/1/2004.

⁹⁷⁰ Para. 27.

As hard a knock as the decision in the Senate case was for women's rights, specifically the right to chieftainship, there seems to still be hope in this area. The Chieftainship Act's section 3 bestows upon it supremacy over customary law or rules. It was held in *Matala v Peete*⁹⁷¹ that "... prior to 1968, succession to chieftainship was governed by Sesotho Law and Custom, as crystallized in Section 2 of Part 1 of the Laws of Lerotholi ... Since 1968 the position is now governed by the provisions of the Chieftainship Act 22 of 1968 as amended."

This strategically positions the Chieftainship Act in such a way that if ever there is a clash between customary law and the Chieftainship Act, the Act prevails. This strategic position of the Act also implies that parliament has the authority to overturn customary obstacles to women's political participation through amendments to the Act that overturn discriminatory provisions of customary law and rules, such as the male primogeniture rule. The Constitution also authorises parliament to amend customary law and rules. Section 154(1) of the Constitution provides "'customary law" means the customary law of Lesotho for the time being in force *subject to any modification or other provision made in respect thereof by any Act of Parliament*" (emphasis supplied).

It is, however, very unlikely that members of Lesotho's parliament would legislate or pass laws that would amend discriminatory provisions of customary law and rules and truly do away with obstacles to women's full and uninhibited political participation. As Juma observes:⁹⁷²

Most members of parliament, apart from the twenty-two Principal Chiefs in the lower house, come from rural areas where the chieftainship has immense influence and the hegemony of traditionalism is inescapable.... Another factor that cannot be discounted is that the King must assent to any new law which he is unlikely to do if a law undermines his authority or is inimical to the rules of custom.

This reality casts a dark shadow on the hope for Basotho women's freedom from discrimination and subordination. Parliament's unwillingness to exercise their powers

⁹⁷¹ 1978 LLR 378 (LSHC) at 379.

⁹⁷² Juma 2013:215.

over discriminatory customary law and rules leaves women having to still battle, amongst other challenges, customary laws and rules, patriarchal beliefs and socializations which greatly encumber their efforts towards either being elected as party representatives or receiving votes from electorates.⁹⁷³

It is worth noting, on the other hand, that some members of parliament have indicated an awareness of customary law and rules being used in a manner that serves patriarchal agendas. Lesotho's former Prime Minister, Pakalitha Mosisili, observed that Basotho customs are often used as a means to exclude girls from succeeding their fathers' chieftainship.⁹⁷⁴ However, the power of this observation by the former Prime Minister and head of parliament was then negated by the sentiments he shared next. He encouraged the Lesotho Congress for Democracy's women's league to "... work hard to ensure that the Laws of Lerotholi, especially where the girl child is denied rights to be a chief after her father, are amended",⁹⁷⁵ a task he clearly had greater authority to influence and initiate. It seems unlikely that customary norms and laws will be done away with in the near future, based on how deeply embedded they are in Basotho's social, customary, and legal fabric, along with their purported relevance and responsiveness to Basotho's everyday lives.⁹⁷⁶

4.4 Conclusion

In this chapter, I investigate the connection between the customary laws of Lesotho, the Constitution and women's political participation in Lesotho. I find in part one that custom is intricately linked with the socialization of society and also possesses a macro-concept nature, which affords it influence that cuts across many spheres of a

⁹⁷³ Ramakhula "In but out in Lesotho: women's representation dilemma", <https://www.africaportal.org/publications/out-lesotho-womens-representation-dilemma/> (accessed on 17 November 2022):2-3.

⁹⁷⁴ Lesotho Times "PM Calls for New Law on Chieftainship", <http://www.lestimes.com/?p=6216> (accessed 2 December 2020).

⁹⁷⁵ Lesotho Times "PM Calls for New Law on Chieftainship", (June 2, 2011), <http://www.lestimes.com/?p=6216> (accessed 2 December 2020).

⁹⁷⁶ Kimane & Ntimo-Makara 2008:238.

person's life, hence one's customs can dictate even their political views. I also uncover that the hold of custom over some people is so deep that they believe they would be cursed if they ever abandoned their customary ways and beliefs. I find that these substantiate why custom and customary provisions survive even in the presence of modernisation and progression from customary ways of life. I observe too that as I highlight the patriarchal nature of customs in chapter three, the same patriarchal nature is observed in the approach to the systemic setup of the public sphere. This is evidenced through the main customary political systems excluding women from either attendance or participation if allowed attendance, to the point of men speaking on behalf of their wives if women have any views to share during such gathering. I highlight how this setup serves to perpetuate hegemony and an episteme in which women are known to be unfit for participation in the public sphere, and specifically in leadership. This I note to also be a contributing factor to even women's confidence in attempting participation or engagement in the political sphere. Of note is also the observation that present day politics are seen to still exude and mimic the customary political system's approach to women's participation, thus also denying women influence in the public sphere through an exercise of their civil and political rights. Finally, I reveal a link between the traditional leadership institutions of Lesotho, stemming from custom and customary law, and how women's absence from political participation is still seen to not only exist, but also enjoy legitimization and perpetuation presently.

In part two, I clarify ways in which the Constitution negatively impacts women's political participation. For one, the adoption of a dual legal system, which essentially carried over and legalised customary laws and systems that have been shown to greatly discriminate against women was not a move that could have been thought to benefit women. This cemented patriarchal customary norms and laws as part of Lesotho's legal system, in essence condemning women to the same equality challenges they faced even before independence. As though this was not a discriminatory enough move, the Constitution further possesses give-and-take provisions in the form of claw-back clauses, regarding women's rights. For instance, section 18 provides for non-discrimination, yet section 18(4)(c) legalises discrimination if such discrimination is on

the basis of customary law – the same customary law that I expose as assigning to women a minor status and excluding them from economic development and leadership. Although the Constitution does contain a proviso that Parliament may make laws which remove discriminatory law, I note how this is an unlikely step to be taken as the members who make up the majority of parliament would not want to promulgate laws that remove the advantages they enjoy over women.

A noteworthy observation is how modern political structures so vividly reflect the same structure, content, and power dynamics as those in place prior to independence. This then makes it clearer why it could not be expected that modern politics not also be as exclusionary and as discriminatory as those established before independence.

In this chapter, therefore, I draw a link between customary law, the Constitution and women's low political participation. In the following chapter I present conclusions and recommendations, based on the overall argument I make in the preceding chapters.

Chapter Five

Conclusions and recommendations

5.1 Introduction

The main research problem that I explore in this thesis is the impact that customary law, and the umbrella protection that the Constitution affords customary law, has on women's subordinate social position and low political participation in Lesotho. I analyse the manner in which section 18(4)(c) of the Constitution of Lesotho, and the provisions of the Laws of Lerotholi, impact the social position that women occupy in Lesotho, and how this also spills over into their political participation. I reflect also on the role that feminist theoretical work can play in unpacking this impact.

By investigating and analysing the relationship between customary law, constitutional protection of customary law, women's subordinate social status, and women's low political participation in Lesotho, I aim to contribute to scholarship on Basotho women's social status and political participation.

I base my research on two hypotheses. First, that the Laws of Lerotholi and the constitutional protection of customary law, among other things, contribute to women's subordinate status in Lesotho society. Secondly, that Basotho women's political participation is negatively affected by the Laws of Lerotholi and the Constitution.

The research questions that I rely on in order to unpack the main research problem of this thesis are:

- i. What are the main concepts and theoretical frameworks that could inform the investigation and analysis of the subordinate social status of women in Lesotho's society and their consequent low participation in politics?

- ii. What is the relationship between the customary law of Lesotho (Laws of Lerotholi) and the Constitution of Lesotho on women's subordinate status in Lesotho's society?
- iii. What is the relationship between the Laws of Lerotholi, the Constitution and women's political participation in Lesotho.

5.2 Summary of chapters

5.2.1 Chapter Two

In chapter two I discuss key concepts and theoretical frameworks that undergird my analysis and discussions in this thesis concerning the subordination and political exclusion of women. Women, I find, face patriarchal obstacles in all spheres of life because patriarchy is deeply entrenched in the socio-legal space of every society. I note that the patriarchal system, which constructs social structures and practices to aid men's dominance, oppression, and exploitation of women, has facilitated many of women's negative experiences. These negative experiences range from the private sphere, in which women are equated to slaves and men to masters, to the public sphere, in which women find themselves having to construct third identities in order to navigate their presence and activity in the sphere. I find too that law, as a system that is actively engaged in the formation of hegemony and epistemes, also plays a central role in the marginalization of women concerning power, power relations, political participation and citizenship. This it attains through stereotypically shaping social perceptions of both sexes. I argue that the fact that normalizing power is at work in all of these spheres, with those in power constantly producing knowledge that secures hegemony, creates a barrier to women's emancipation from the subordinate status they presently labour under.

As I locate Basotho women within both colonial Lesotho and postcolonial theory, a deeper and clearer understanding of the ideologies and objectives that underpinned their silencing and subordination by men, as well as how numerous systems were used to establish and maintain this hegemony, comes to the fore. This then allows for

the engagement of African feminism in order to centre women and uncover the impact both colonialism and their historical experiences had on them. I find in this examination that men were socially positioned and portrayed in a manner that centralised them and portrayed them as the standard to be ascribed to, while women were portrayed as the lesser 'other', thus justifying their subordination and exclusion in social, economic and political spaces. In addition, I unpack the means engaged to enable and sustain this status quo, which include the use of sex as justification for women's relegation to the private sphere, and the weaponization of language in creating dominant epistemes in societies.

5.2.2 Chapter Three

In chapter three I find that the customary laws of Lesotho, both prior to and following their codification, have been weaponized against women's social status and as thus possess a patriarchal nature. As Eldredge posits, '... customary laws were the means for, rather than the cause of, BaSotho women's subordination'.⁹⁷⁷ This weaponization goes as deep and as far back as the historic narrations of the lives, traditions, and customs of the Basotho, where Basotho women were either erased from the narrations or were only stereotypically mentioned and portrayed as active and willing members of the private sphere. In the same spirit, I also note the side-lining of Basotho women during the codification process of the customary laws of Basotho, a process which was key in shaping and dictating the very trajectory of the hegemony and episteme of the nation. The exclusion also served another goal – the establishment of male dominance over women and women's condemnation to the private sphere, away from the public sphere where most empowerment took place. The result was the codification and cementing of laws which discriminated against women and perpetuated their social subordination. The codified customary laws were then, and still remain, instruments of dominance, determining through its provisions who gets power and who does not.

⁹⁷⁷ Eldredge 1991:728.

I find too that the Constitution further cemented these laws and their discriminatory provisions, as well as made them a permanent feature of post-independence Lesotho, through the umbrella protection it affords customary law's discriminatory provisions under section 18(4)(c). The Constitution also possesses claw-back clauses against its provisions that cater for gender equality and non-discrimination. One of the justifications for the Constitutional standpoint is that although Lesotho attained independence from Britain in 1966, the Constitution still retains colonial ideologies that enable and preserve social subordination of women. There still exists, then, significant colonial influence in Lesotho's legal system.

In engaging the work of Foucault concerning biopolitics, I also discover the role that law played and still plays as an ideological apparatus that is engaged in facilitating patterns of thinking and being that fall within the desired context of those in power. This is achieved through pieces of legislation that set a desired norm, for example the exclusion of women from inheritance or chieftainship, as provided for in the laws of Lerotholi, or the discrimination of women and denial of gender equality, as enabled by the Constitution. Society is then set up in such a way as to justify and cement these patterns of thinking and being, for example science is used as rationalization for women's relegation to the private sphere and denial of access to means of economic empowerment, and the educational system uses language that socialises the way men see women and the way women are to see themselves. This in turn puts into play what Foucault terms normalising power – power that imposes particular ways of thinking and being on people, which ways are then internalized by the people and later morph into personal-regulation tools within the people.

I thus find that the patriarchal nature of the customary law of Lesotho, and the covert standpoint concerning women that the Constitution's protection of customary law exposes, coupled with the relationship between law, biopolitics and normalising power, clearly exposes the negative impact that both the Laws of Lerotholi and the Constitution have on women's social status.

5.2.3 Chapter Four

I discover in part one of chapter four that custom has an elaborate connection with the socialization of society, while also exhibiting a macro-concept nature, which two attributes enable it to influence people in a myriad of ways, including dictating and or manipulating their beliefs, perceptions and even actions. This sheds light on the fact that custom can indeed dictate people's political views and expectations. I uncover too how it is not easy for people to escape customary norms, beliefs, or ways of life, as custom is so greatly revered in society that some people believe curses would fall on them if they were to turn from these customary norms, beliefs, or ways of life. The above findings shed some light on why custom and customary law are seen to survive and hold strong even in the face of independence, modernisation, and intentional moves from customary beliefs and or ways of life.

I also find that the patriarchal nature of customs, as I observe and discuss in chapter three, has also been identified in the manner in which the systemic setup of traditional political systems and structures is undertaken. For instance, the two traditional governance institutions *khotla* and *pitso* restrict either women's membership, attendance or participation. Women's restriction from participation is said to be so strict that even when they have an opinion to share, their husbands have to act as middlemen – hearing what their wives have to say and relaying the message to those gathered on the wife's behalf. I argue that this was a strategic perpetuation of hegemony and episteme that projects women as unfit members or participants in political or governance settings or discussions, and therefore always having to rely on men in the area of politics and leadership, as well as projecting men as fitting members and participants in the areas. On a personal level for women, I find that this strategy strips them of confidence regarding making any attempts at taking part in political or governance related undertakings. This I note to be made worse by the discovery that modern politics and political structures and systems still possess and reflect patriarchal customary political systems and setups, which are structured against women's membership or participation. Also of note is the link I make between Lesotho's traditional leadership institutions, originating from and anchored on custom,

and the reality of the present-day perpetuation and legitimization of women's absence from political participation.

In part two I unfold how the Constitution has a negative impact on women's political participation. I focus on two observations concerning this claim – the adoption of a dual legal system and the existence of claw back clauses in the Constitution. I find that Lesotho's post-independence adoption of a dual legal system, as introduced in the nation by colonialists, led to the carrying over and legalisation of the very customary norms, laws and systems which have been proven to discriminate against women and to have been created with the intention of women's subordination. I highlight how the results that followed this move include patriarchal customary norms and laws being cemented into Lesotho's social, legal and political systems, consequently sentencing women to the same subordination and discrimination they suffered under the customary norms, laws and systems before independence. I also show how the presence of claw back clauses in the Constitution are significantly problematic for women. I use section 18 of the Constitution as an example. The section provides that no law may be made which would be discriminatory whether in wording or effect. Section 18(4)(c) then states that this provision will not apply if the discriminatory law is on the basis of customary law. This essentially provides protection against discrimination, then takes it back on the basis of customary law. I argue that this enables discrimination and the subordination of women in different spheres of life to thrive, including in the political sphere.

Of note is also my elaboration on how, consequent to the above discoveries and narrations I make, modern political structures greatly and clearly reflect the identical structure, setup, membership as well as power dynamics as those seen in the pre-colonial and colonial times. This, then, supports my argument in this thesis – the customary laws of Lesotho, and the constitutional protection afforded these customary laws, negatively impact not only Basotho women's social status, but also their political participation.

5.3 Overall summary

In this thesis I investigate the impact that the customary laws of Lesotho, and the umbrella protection that the Constitution affords customary law, have on women's social status and political participation in Lesotho. I utilize desktop study as a research method, as it involves the critical overview and analysis of literature and texts that I undertake in this thesis. I further engage key concepts underlying the issues of women's subordinate position in society as well as those that speak to women's low political participation. I also turn to Postcolonial theory and African feminism as theoretical frameworks that assist me in exposing the problem of women's subordinate position in society as well as their low political participation.

To the best of my knowledge, no study has been undertaken in which a connection is made between the impact that custom, customary law, and the constitutional protection enjoyed by customary law have on women's social status, and how this impact also spills over into women's overall political participation. I therefore connect women's subordinate social status and low political participation with the relationship between custom, customary law, and the constitutional protection of customary law. Further, I engage Postcolonial theory and African feminism as intersecting theories that enable me to undertake a postcolonial feminist analysis of the relationship between women's subordinate social status and low political participation with the connection between customary law and the constitutional protection of customary law. The engagement of Postcolonial theory and African feminism as intersecting theories allows me to unpack the intricate relationship that exists between customary and customary law provisions, beliefs, constructs and more, and how women are perceived socially and also in relationship to political participation, and how this also impacts women on a personal level. Through this thesis, I aim to contribute to discourse around women's low political participation and what obstacles need to have attention paid to them in order to end the status quo.

As shown in the literature I review in this thesis, due to its macro-concept nature, custom was and is still able to weave itself into every sphere of a person's being, thus enabling it to influence the person's beliefs, views of life and themselves and therefore

be able to dictate even the actions they take and don't take. This influence is made stronger by the fact that custom is discovered to also be closely linked to the socialization process of a society and people personally, thus giving it power over the form that a society and its people take. These two discoveries then centre custom in attempts at understanding the way people conduct their lives and the choices they make. The discoveries also indicate how custom can work as a barrier to women's liberation from social subordination and all its consequences, more so as custom was found to be patriarchal in its very nature.

The literature also shows that the customary laws of Lesotho as well as the Constitution of Lesotho, mainly through the umbrella protection it affords customary law, perpetuate women's subordinate status in society, as well as their low political participation. This is initiated and perpetuated through a number of means. For instance, I find that custom was constructed in a way as to cause it to intentionally discriminate against women and thus facilitate their social subordination to men. Following on this, knowledge was produced, and structures put in place in order to uphold the intention behind the customs' contents and goals. In terms of knowledge production, knowledge was produced which portrayed women as weaker, lesser than men, fitting for the home and ill-equipped for the public sphere. Differences discovered between men and women were essentially weaponised against them and used as justification for women's subordination to men, such as the relegation of women to the private sphere on the basis of their biological differences from men. The knowledge produced in order to uphold the hegemony was later ensured preservation through the shaping of the education system and its content on the basis of instilling and perpetuating the discrimination and subordination of women. An example I recount is that of women either being erased from customary narrations or being depicted only within the private sphere, so as to portray their relegation within it as legitimate. Famous female chiefs were also erased from narrations, or only mentioned in passing, as though they had not had significant contributions to the nation during their leadership. All of these were strategic, intentional, and calculated actions that served both to establish and perpetuate desired perspectives about women.

As per the structural exclusion of women, this included exclusionary governance institutions such as *khotla* and *pitso*, as well as the chieftainship. Women's exclusion went as far as their marginalization from both the formation and codification processes of custom and customary law, processes which were key in the shaping of the hegemony and episteme of the nation. Because these structures were the centre of the political sphere of the time and therefore connected even to law making, women's exclusion from them also served to bar them from the legal and political sphere, and thus deny them exercise of their citizenship through taking an active role in national decision-making. This is a key issue, as law has been found to be one of the means by which power is wielded and power relations established and maintained.

Of note, too, is the discovery that patriarchal customary norms have a domino effect when it comes to women's political representation. An example is how women's preclusion from partaking in decision making, from within the home to national structures, has left women and society with the belief that women do not have leadership and decision-making potential. For those with political participation aspirations, low self-esteem becomes a stumbling block. Some women have also been found to opt for succumbing to the patriarchal system and the discrimination it subjects them to, so as not to be ostracized. These patriarchal attitudes and strategies evidently negatively affected women, leaving many unwilling to vie for public offices due to fear of stepping over set boundaries and prohibitions.

This is also found to be a problem that has made its way from pre-colonial and colonial politics, into modern politics. I relate how this has been facilitated by Lesotho's adoption of a dual legal system, incorporation of claw back clauses and affording discriminatory customary law provisions umbrella protection. The result has been patriarchal and exclusionary customs and customary law norms making their way into the modern political system and its political structures such as the Senate and National Assembly. Consequently, Basotho women find themselves having to navigate the same hurdles, barriers, and obstacles as during the pre-colonial and colonial times when it comes to their political participation.

I note too throughout the thesis a number of means employed and centralised in facilitating women's subordination to men as well as their marginalization in the political sphere. I highlight and discuss some of these in a bit more detail below, in order to bring a more specific focus to them and the role they play in initiating and enabling women's social subordination and low political participation.

5.3.1 *The othering of women*

In the same manner that non-European people have been portrayed as exotic or an immoral 'other', women have also found themselves subjected to male-created misconceptions about them as weak, incapable of leadership, subordinate to men and so forth, leaving them marginalized and othered in society and in the political sphere. Men presented themselves as the prototypes, and women as not. Men then used these portrayals as justification for creating the public/private divide, relegating women to the private sphere and excluding them from all forms of public engagement, leadership, or politics. Most customary norms and laws were then framed around these patriarchal and discriminatory beliefs and misconceptions.

These false and misleading projections of women as subordinate and hence inadequate for leadership positions have been found to negatively impact their aspirations towards political participation.⁹⁷⁸ For one, there is a communal mistrust of women and their ability to lead if given the chance, because the propagated belief is that women are incapable of leading. Women also find themselves internalizing this knowledge produced about them, resulting in seeing themselves as men have portrayed them, even despite the presence of numerous examples of women leading excellently in various fields.

Women have also been portrayed as an unqualified other in politics through the structuring and depiction of the political sphere as a masculine domain, placing men

⁹⁷⁸ Kivoi 2014:178.

as preferred candidates for its occupation.⁹⁷⁹ I also note that the male leadership style has been depicted and accepted as the poster styles for leadership, to the exclusion of women and their own leadership styles.⁹⁸⁰ This production of knowledge around who qualified for leadership and who does not, was a power play, as I highlight relying on Foucault. As I show, Foucault posits that it is those in positions of power who dictate knowledge production - what is known and what is taken as true.⁹⁸¹ Men's patriarchal domination of women gave them the power to decide what would be known as true, and what would be discarded as untrue. For example, women were projected as supposedly inclined towards being 'emotional' and labelling this inclination as a dangerous and undesirable attribute for leadership.⁹⁸² This enabled Basotho men to ignore or discard numerous examples of Basotho women's excellent leadership⁹⁸³ and simply label them as incapable of any form of leadership. The othering of women and the focus it places on women's supposed inability to lead, actually seeks to hide the reality that Lesotho's politics are deeply patriarchal and exclusionary of women.

Patriarchy, on whose foundation most customs are based, also adopts a number of tools aimed at safeguarding the public sphere against the entry of women and maintaining male dominance therein, such as discriminatory laws and masculine standards.⁹⁸⁴ As Tamale articulates, "[m]asculine standards operate as a delicate "glass ceiling" that stops many women from entering the public world. In that world the female becomes the 'other' who is constantly confronted with obstacles that impede her access to and control of other resources."⁹⁸⁵

Kiamba advances that this has, in turn, led to a continual underrepresentation of women in leadership positions, despite efforts aimed towards increasing women's

⁹⁷⁹ Kiamba 2008:8.

⁹⁸⁰ Kiamba 2008:8.

⁹⁸¹ See generally Foucault 2008.

⁹⁸² Bauer "Gender stereotyping in political decision making", <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-772?rskey=OruyZV&result=1> (accessed on 17 November 2022).

⁹⁸³ Such as how Basotho women excellently took over leadership of their families and agricultural production while Basotho men had migrated to South Africa for mining jobs.

⁹⁸⁴ Tamale 2004:52.

⁹⁸⁵ Tamale 2004:52.

representation in governance structures.⁹⁸⁶ Women with political aspirations consequently find themselves having to adapt to the masculine model that the public and political sphere demand, if they are to succeed.⁹⁸⁷ This model of the political sphere, shaped after masculine patterns, has also been found to be a deterrent to a number of women desiring political participation or hoping to pursue political representation.⁹⁸⁸ The political arena, as well as its leadership styles, rules and standards, have consequently been found to remain dominated by men.⁹⁸⁹

5.3.2 Denial of women's citizenship

Since women's customary subordinate status denies them full recognition, membership, and participation in all spheres of society, it also essentially denies them full citizenship and enjoyment of citizenship benefits. This is because citizenship can only be enjoyed by those perceived as *full* and *equal* members of a society.⁹⁹⁰ If one is not recognised as a full and equal member of a society, hence a citizen, they cannot legitimately take part in activities such as legislation, voting, decision-making and paying taxes.⁹⁹¹ Since women are neither recognised as full and equal members of society, nor have formal and informal obstacles to their full attainment of citizenship removed, it goes to show that Basotho women are not earnestly considered citizens in Lesotho under customary law.⁹⁹² I explain this further and accentuate how Basotho women cannot be said to truly possess citizenship by reiterating three points I highlight in chapter two as composing what can be described as citizenship - the full recognition of a person, bestowing on them rights equal with those of other citizens and creating an environment that enables their full and uninterrupted enjoyment of such rights.

⁹⁸⁶ Kiamba 2008:9.

⁹⁸⁷ Tamale 2004:52.

⁹⁸⁸ Kassa 2015:5.

⁹⁸⁹ Shvedova 2002:34.

⁹⁹⁰ Marshall 2009:149-150.

⁹⁹¹ Tamale 2004:54.

⁹⁹² Nyamu-Musembi 2007:177.

First, the subordinate status assigned to Basotho women, coupled with being deemed perpetual minors, does not in any way imply their full recognition as persons and members of society. Secondly, the denial of many rights equal with those of men, such as the right to equality, non-discrimination, inheritance, and bodily autonomy, also reflect the absence of a desire to place women at an equal citizenship standard as men. Finally, the lack of creation of an environment that enables women's full and uninterrupted enjoyment of rights accruing to other citizens speaks to the absence of the desire to see women possess and enjoy full citizenship. What is rather observed concerning this final point is the protection and preservation of institutions and environments that hamper women's full and uninterrupted enjoyment of rights accruing to other citizens, such as customary law and other patriarchal institutions. There is a clear "... absence of protection for women's rights in crucial areas, systemic failure to implement the rights they do possess as citizens, and failure to recognize their contribution (for instance, to the national economy)".⁹⁹³ Evidently, women's difference from men has essentially been weaponised against them and been used to hamper their full enjoyment of their right to participate in politics.⁹⁹⁴

5.3.3 The use of language in sustaining or undermining power dynamics¹⁰⁰

I highlight language's impact on how people think about varying issues such as women's presence in politics, even going as far as creating political realities.⁹⁹⁵ I show too that it has the ability to shape and/or distort perception.⁹⁹⁶ Children are, for example, taught from young ages that women belong at home and boys belong outside. In adult life, this translates to an inability to see women as belonging to the public sphere, more so in leadership capacity but rather to more male-supporting roles such as secretaries. In cases where women excel in leadership capacities, especially roles they have been projected as unable to excel in, they are often erased from

⁹⁹³ Nyamu-Musembi 2007:176.

⁹⁹⁴ Teg 2015:39.

⁹⁹⁵ Pérez & Tavits 2019:16785-16786.

⁹⁹⁶ DeFranza et al 2020:3.

narrations of those roles. An example is the infamous book *Lithoko tsa Marena a Basotho*, a historical book containing poems praising former Basotho chiefs. Although Lesotho has had a number of remarkable female chiefs as I narrate in the preceding chapters, no poem praising a female chief is found in the book – as though they never existed, or they never did anything worthy of praise.⁹⁹⁷

I also note how language can be gendered, thus weaponizing it to reinforce gender stereotypes, further leading to a mistrust of women for leadership.⁹⁹⁸ Gendered language operates as a social programming tool, used to mould girls into categories that serve the male narrative of women as ill-equipped for participation in leadership.⁹⁹⁹ Standards, such as the ability to be assertive, are set as benchmarks for participation in society and leadership, then girls are actively taught and trained to shy away from these very benchmarks, with social ostracization for those who dare aspire to or pursue them. Evidence towards the impact of gendered language shows that women have higher obstacles when trying to enter politics in nations where gendered language is used.¹⁰⁰⁰ This weaponization of language against women's political participation, through using it to fuel and sustain gender stereotypes and erase women from historical and present leadership roles, acts against Basotho women's political participation.

5.3.4 Gender hybridity

Homi Bhabha's concept of hybridity is adapted to gender, and the discussions in this thesis, as gender hybridity – the merging of the cultural concepts of femininity and masculinity and the muddling of the borders between gender and sexual identities.¹⁰⁰¹

⁹⁹⁷ One argument justifying women's absence from these famous poems is that the poems were often composed after wars of different natures, so since women did not take part in wars, no post-war poems were ever composed about them.

⁹⁹⁸ DeFranza et al 2020:7.

⁹⁹⁹ Lakoff 1973:47-48.

¹⁰⁰⁰ DeFranza et al 2020:7.

¹⁰⁰¹ Karkulehto 2012:203.

With the public sphere, hence political sphere, being constructed along patriarchal male standards, women find themselves having to constantly move between the two poles of the gender binary, femininity and masculinity. Women are trained from birth to internalize and embody gender stereotypes of femininity, then called on to reflect desired male attributes as they enter the public sphere. This necessitates that women become gender hybrids if they are to survive in the public sphere, limiting the extent to which women are able to perform freely and effectively. Although Lakoff's highlights this with a focus on language, his observation rings true even in this case. He posits:¹⁰⁰²

First, if a girl must learn two dialects, she becomes in effect a bilingual. Like many bilinguals, she may never really be master of either language, though her command of both is adequate enough for most purposes, she may never feel really comfortable using either, and never be certain that she is using the right one in the right place to the right person.

Having to navigate, almost always simultaneously, both femininity and masculinity reduces women's capacity to engage and participate successfully in the public sphere. The result is often the creation of the third space of enunciation, where women create a revolutionary new identity that is neither masculine nor feminine, to enable them to maintain feminine traits yet also take on masculine traits that afford them acceptance and the ability to function in the public sphere. Despite women's ability to master gender hybridity, I still argue that it negatively impacts them in the public sphere, more so when compared to men who have essentially been trained to function in the public sphere since birth.

¹⁰⁰² Lakoff 1973:48.

5.3.5 Gender roles and women's socio-economic exclusion

I find that gender roles also form part of the many strategies through which women are subjected to socio-economic exclusion, which exclusion becomes a hurdle against attainment of women's social status that is equal to that of men, as well as the ability to fully participate in politics. Gender roles are constructed and advanced under patriarchal value systems that deny women any form of power or authority.¹⁰⁰³ The roles are formed around perceptions of women as belonging only to the domestic sphere due to biological differences from men, which are believed to incapacitate them from taking part in the public sphere, thus also in political matters.¹⁰⁰⁴ These beliefs and perceptions create within the political sphere an environment that is not only hostile to women's attempts at participation but is also bottlenecked in terms of structure, to the point of frustrating women's attempts at entry.¹⁰⁰⁵

I indicate how customary socialization was adopted to restrict women to the domestic sphere and give men open, encouraged and often mandated access to the public sphere and politics.¹⁰⁰⁶ The result has been the power in and leadership of society being left in the hands of men, relegating women to subordinate positions.¹⁰⁰⁷ Mikkola does, however, highlight that since gender roles are taught and learned, they may also be unlearned, thereby creating more equal societies.¹⁰⁰⁸

The customary exclusion of women from inheritance rights and means of production such as the ownership of land and cattle were also in play when it came to women's social status and political exclusion. Access to finances and means of production is key in women's political participation, as it affords them the financial backing to enter the political sphere, stand on an equal participation platform with their male

¹⁰⁰³ Kassa 2015:3.

¹⁰⁰⁴ Kassa 2015:3-4.

¹⁰⁰⁵ Mataga "Women, politics and the public sphere in Lesotho", http://www.codesria.org/IMG/pdf/Jesmael_Mataga (accessed on 17 November 2022):2,4.

¹⁰⁰⁶ Such as the expectation that after initiation all boys were to start attending *khotla* gatherings.

¹⁰⁰⁷ Mataga "Women, politics and the public sphere in Lesotho", http://www.codesria.org/IMG/pdf/Jesmael_Mataga (accessed on 17 November 2022):4-5.

¹⁰⁰⁸ Mikkola "Feminist perspectives on sex and gender. Stanford Encyclopedia of Philosophy", <https://plato.stanford.edu/entries/feminism-gender/> (accessed on 14 November 2022).

counterparts and stand a higher chance at success. Thus, depriving women access to finances as well as excluding them from means of production has a direct correlation to their low political representation.¹⁰⁰⁹ For instance, the fact that women cannot easily own land in their personal capacity and possibly use such land for financial gain to fund their political aspirations, places them at a disadvantage against their male counterparts who can do the same.¹⁰¹⁰ Exclusion from finances also left Basotho women dependent on their husbands for their financial livelihood, thereby greatly limiting the economic endeavours they could venture into. The practical impact of this economic dependence on men is that women could only enter the political participation race if the men to whom they found themselves dependent were willing to not only allow them to enter the political sphere but to sponsor these aspirations as well. For Basotho women, based on the perpetual minor status under which they labour customarily, this meant they would need either their father, husband, or son's approval for them to participate in politics at any level. Attaining this approval was not easily granted for most women, as custom has assigned them sex and gender identities and roles which are viewed as not befitting the political sphere or leadership roles.¹⁰¹¹

Women were, through a number of customary beliefs and practices, also restricted to the domestic sphere through gender role expectations such as home keeping, care work and childcare, all roles which restricted their access to and engagement with the public sphere and as a result, politics. Women were thus burdened with unevenly distributed family and care responsibilities. Andersen argues that the restriction of women to the domestic sphere served, amongst other goals, to cut them off from the outside world and deny them access to any external stimuli that would fan their desire in the public sphere and politics.¹⁰¹² It is also argued that the care duties that mainly fall on women have also subjected them to the payment of what has been termed a 'motherhood penalty'.¹⁰¹³ This refers to time constraints that women face as a result

¹⁰⁰⁹ Kivoi 2014:179.

¹⁰¹⁰ Kali 2018b:55.

¹⁰¹¹ Kivoi 2014:178.

¹⁰¹² Andersen 1975:440-441.

¹⁰¹³ Kassa 2015:5.

of the responsibilities that come with pregnancy, childbirth and childcare, hence isolation from the political sphere.¹⁰¹⁴ Since women bear the greater portion of these responsibilities, they find themselves at a greater disadvantage than men in navigating between their care responsibilities and their aspirations in the public sphere.¹⁰¹⁵ This leaves women with less time than their male counterparts to dedicate to their political aspirations and campaigns. This also means women struggle to avail time to form networks and partnerships that would grant them access to necessary funds for political campaigning. As a result, women, who are already marginalised in the political sphere, fall to an even greater disadvantage.

On a national scale, the degree of development that a society enjoys has been found to have a direct correlation with the extent to which women's representation exists and thrives in such society.¹⁰¹⁶ More directly to the present discussion, economic development facilitates societal transformation in how it breaks down customary norms and strongholds and enables women's access to different spheres such as the educational, labour and political spheres.¹⁰¹⁷ This is a significant factor, as women suffered and continue to suffer economically as a result of customary laws and norms, such as gender roles that keep them away from the economic sphere and the development and empowerment it may afford them.¹⁰¹⁸ In Lesotho's case, it was only in 2006, through the Legal Capacity of Married Persons Act that married Basotho women were granted legal capacity to, amongst other activities, enter into employment contracts, as well as own property in their personal capacity. This means Basotho women have only had unfettered legal right to acquire economic wealth for about 20 years. It is important to bear in mind that even following the 1966 Independence as well as their entry into the employment sphere, Basotho women have been found to be the majority occupants of low-paying positions in the labour and employment

¹⁰¹⁴ Kassa 2015:5.

¹⁰¹⁵ Hewlett & Luce "The hidden brain drain: Off-ramps and on-ramps in women's careers". Harvard Business School Press, <https://hbr.org/2005/03/off-ramps-and-on-ramps-keeping-talented-women-on-the-road-to-success> (accessed on 14 November 2022).

¹⁰¹⁶ Maitland 1998:114.

¹⁰¹⁷ Maitland 1998:114.

¹⁰¹⁸ Karuru 2001:43

sphere¹⁰¹⁹ as well as being paid less than their male counterparts.¹⁰²⁰ These realities contribute to their financial dependency on the different men in their lives, with the degrees of dependence varying with each case.

Appointed chiefs were also granted power to allocate land to their male subjects.¹⁰²¹ Land was and still remains one of the greatest sources of power and economic liberation. The exclusive authorisation of chiefs as the only allocators of land, as well as the pronouncement that such land was only to be allocated to male subjects and not female subjects, served a number of purposes. First, it securely centralised the national source of power and economic livelihood in the hands of chiefs and men.¹⁰²² Secondly, through the first strategy, it cemented chiefs' and men's social, political and economic power over women, by excluding women from access to this social source of power.¹⁰²³

This financial status quo that Basotho women find themselves labouring under negatively contributes to their political representation aspirations in that it hampers their ability to fund their political campaigns.¹⁰²⁴ This is a status quo faced by women in many societies and states, including Basotho women. This directly impacts women's presence and success in the political campaigns, more so with campaign costs having been rising with the years.¹⁰²⁵ The above illustrations evidence the link between women's political participation and them having access to, amongst others, means of production, property and access to highest employment and fair pay. Poor socio-economic status therefore significantly incapacitates women who vie for political office in more ways than one.¹⁰²⁶

¹⁰¹⁹ Government of Lesotho 2019:19.

¹⁰²⁰ Government of Lesotho 2019:4.

¹⁰²¹ Ashton 1952:144.

¹⁰²² Polasi et al 2015:56.

¹⁰²³ Polasi et al 2015:57.

¹⁰²⁴ These are campaign costs which include transportation costs for travel to different constituencies, remuneration for all campaign support or management staff, the purchasing and gifting of political party merchandise to constituency members, taking on campaign projects such as buying groceries for needy constituency members and in some cases incentivize voters who turn up for campaigns.

¹⁰²⁵ Shvedova 2002:41.

¹⁰²⁶ Kivoi 2014:179.

In light of the above, a number of strategies and efforts such as gender quotas and legislative transformations were adopted over the years. These were in an attempt to empower women and counter the negative customary efforts that keep them subordinated to men and excluded from spheres such as political leadership. What has become evident, however, is that customary beliefs and norms counter these efforts and leave the historical status quo holding strong.¹⁰²⁷ This is due to the patriarchal social norms and practices having become so deeply ingrained in society, to the point of overpowering even legislation that purports to increase women's rights and position in society.¹⁰²⁸

Of note is also the observation that historical perceptions of women's social status, as well as customs and norms formed around these beliefs, are hostile towards women's political participation and a number of strategies were adopted to ensure this participation did not come to pass, such as women's confinement to the home through gender roles as I highlight above.¹⁰²⁹ The result has been women being denied a say in issues and decisions that affect them as well as shying away from participating where a platform to speak out is created.¹⁰³⁰ The results presently evidenced include women being in the numeric majority in states, yet dominantly voting men into power, as well as Lesotho having only eight female-led political parties within a total of 65 political parties. This, Chwarae Teg argues, is because women in Lesotho are empowered on paper and not in practice, with the norms that cause women's subordination left unaddressed.¹⁰³¹

A significant point I also note is that the key institutions from which Basotho's governing rules and norms came to be developed were clearly the exclusive purview of men, strictly keeping women on the periphery. The exclusion of girls and women from these empowerment and socialization platforms served to further disempower

¹⁰²⁷ Teg 2015:5.

¹⁰²⁸ Teg 2015:3.

¹⁰²⁹ Kiamba 2008:12.

¹⁰³⁰ Teg 2015:7-8.

¹⁰³¹ Teg 2015:8,12.

them and secure their subordinate position in society, leading to their perpetual dependence on men.¹⁰³²

This state of affairs is, for one, a result of the influence that historic socialisations still have on present day political models,¹⁰³³ more so when Basotho are still predominantly rural-based and heavily influenced by customary law and norms.¹⁰³⁴ As per 2016 statistics, Lesotho's total population stood at 2,007,201, with 34.17 percent living in the urban area and 65.83 percent living in the rural areas.¹⁰³⁵ The concentration of Basotho in rural areas is a significant element when considering custom and its impact on women's political representation, as custom still heavily influences social perception of women's status and role in rural areas.¹⁰³⁶

Against this background it is evident how Basotho's political system and traditional democracy approach continue to subordinate women to men and exude discriminatory and patriarchal attributes that exclude women from national governance structures and political participation. This has led to the suspicion that women's presence in Lesotho's political sphere has been promoted merely as a 'window-dressing' strategy and not genuine interest in women's political participation and integration into political leadership and decision-making.¹⁰³⁷

¹⁰³² Ambunda & De Klerk 2008:52-54.

¹⁰³³ Yates & Hughes 2017:103-106.

¹⁰³⁴ Mataga "Women, politics and the public sphere in Lesotho", http://www.codesria.org/IMG/pdf/Jesmael_Mataga (accessed on 17 November 2022):7.

¹⁰³⁵ Lesotho Bureau of Statistics "Population statistics", <http://www.bos.gov.ls/2016%20Summary%20Key%20Findings.pdf>.

¹⁰³⁶ Sadie 2005:22.

¹⁰³⁷ Mataga "Women, politics and the public sphere in Lesotho", http://www.codesria.org/IMG/pdf/Jesmael_Mataga (accessed on 17 November 2022):3.

5.4 Recommendations

5.4.1 Stereotyping

One of the issues that I find to have been and still be key in the subordination of women, is stereotyping and knowledge production that serves to sustain these stereotypical projections of women. Speaking on stereotyping, López-Sáez and Lisbona highlight that trait stereotyping points to the psychological and behavioural traits that are socially assigned, while role stereotyping points to the beliefs we have concerning which activities we deem to be better suited to men and which we deem better suited to women.¹⁰³⁸ They go on to point out that since trait stereotyping is the starting point of stereotyping, efforts towards eradicating stereotyping should begin first with trait stereotyping.¹⁰³⁹ This means, essentially, that in order to obtain substantive change in cases of stereotyping, the main focus and emphasis should be aimed towards the transformation of the system of values that underpins stereotyping.¹⁰⁴⁰ The law is, unfortunately, not the answer in this case, as the law has been found to be inadequate when it comes to eliminating the social practises and influences that perpetuate stereotyping.¹⁰⁴¹ The law has, on the contrary, been found to first tend to reproduce rather than change existing social power relations.¹⁰⁴² Secondly, the law has also been discovered to police actions and interactions between people, by projecting acceptable modes of being and judging those who diverge from or desire to reinvent themselves outside of these modes.¹⁰⁴³ It is advised, therefore, that the law not be the focal point in the attempt at transforming existing social stereotypes.

¹⁰³⁸ López-Sáez and Lisbona 2009:363-379.

¹⁰³⁹ López-Sáez and Lisbona 2009:364.

¹⁰⁴⁰ López-Sáez and Lisbona 2009:364.

¹⁰⁴¹ Cunningham & Macrae 2011:598.

¹⁰⁴² Marius 2014:362.

¹⁰⁴³ Marius 2014:362.

5.4.2 Caution in the reliance on/application of custom/culture

Having highlighted the numerous ways in which custom has been structured in such a way as to disadvantage women, I call for caution in its application or in reliance on it and its provisions. I rely on Okin and Phillips for this argument. Okin points out how appeals to culture have been used as justification for many cases of violation of women's human rights.¹⁰⁴⁴ She highlights how these discriminations against women, justified by reference to culture, have also been passed off in most societies as 'natural, inevitable and more benign than other grounds for distinction'.¹⁰⁴⁵ This, she argues, has led to many people being oblivious to how significant the inequalities between the sexes are, as well as the fruits of these inequalities.¹⁰⁴⁶ The discriminatory nature of culture is made more evident by how the 'sanctity' of culture is often claimed in instances where issues that affect women to a greater extent than men are on the table.¹⁰⁴⁷ Okin goes on to highlight how culture has its greatest hold in the private sphere. The importance of this observation lies in how culture has often succeeded in evading legal scrutiny and human rights attention through appealing to its 'private' nature.¹⁰⁴⁸ This, she argues, is contrary to women's rights as it is the very experiences of the private sphere which have a significant bearing on women's active enjoyment of their rights.¹⁰⁴⁹ She does, however, point out that human rights activists have also played a role towards the 'invisibility' of the human rights violations that women are subjected to in the private sphere on the basis of culture.¹⁰⁵⁰ This, she argues, has been through their neglect to have human rights talks that includes conversations involving the private sphere.¹⁰⁵¹

¹⁰⁴⁴ Okin 1998:32.

¹⁰⁴⁵ Okin 1998:33.

¹⁰⁴⁶ Okin 1998:37.

¹⁰⁴⁷ Okin 1998:36.

¹⁰⁴⁸ Okin 1998:36.

¹⁰⁴⁹ Okin 1998:39.

¹⁰⁵⁰ Okin 1998:36.

¹⁰⁵¹ Okin 1998:36.

Phillips holds that codifying cultures¹⁰⁵² sometimes runs the risk of only presenting one side of a culture as legitimate, to the exclusion of other, often more fluid, elements of such culture.¹⁰⁵³ She also argues that it is often the most hierarchical and misogynous elements of cultures that make it into codification, to the exclusion of egalitarian elements of such cultures.¹⁰⁵⁴ She posits that when most cultural elements are put forward as the authoritative features of such culture, this is often tainted with hidden political agendas reflecting internal power struggles.¹⁰⁵⁵ This then means most cultures are more of people's productions and not genuine reflections of true cultures of different societies, especially when such cultures were codified as a result of government initiatives.¹⁰⁵⁶ She does, however, employ Baumann's work to caution that this does not justify a disregard of cultures, no matter how 'analytically wrong' they may appear.¹⁰⁵⁷ This is because once people live their lives and find their identities in 'folk reifications' of cultures these become substantively woven into their social lives.¹⁰⁵⁸

5.4.3 Umbrella protection of customary law

As I highlight earlier, it is commendable that the Constitution sought to preserve the customs and customary laws of Lesotho through retaining the dual legal system as introduced into Lesotho by the colonialists. However, umbrella adoption, coupled with umbrella protection, was not a wise choice. There should have been a revision of the laws, in order to allow discriminatory provisions to be removed, as well as room left for a review of the laws over time, to ensure they remain relevant and responsive to the

¹⁰⁵² In this chapter, Phillips uses Tylor's definition of culture as '... that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits required by man as a member of society.' (Tylor:1871). For purposes of this thesis, culture will refer to customs of different societies.

¹⁰⁵³ Phillips 2007:43-44.

¹⁰⁵⁴ Phillips 2007:44.

¹⁰⁵⁵ Phillips 2007:45.

¹⁰⁵⁶ Phillips 2007:45 & 49.

¹⁰⁵⁷ Phillips 2007:51-52.

¹⁰⁵⁸ Phillips 2007:51-52.

people they govern. I therefore recommend a removal of the umbrella protection of customary law provided by the Constitution. This removal of the umbrella protection would enable scrutiny of negative customary law provisions, thereby empowering women to challenge infringement of their human rights without being barred by the current justification of discrimination of women on the basis of customary law. Some scholars like Nyamu-Musembi argue for the same approach, stating that the problem lies not so much in customary law and its application, but rather in the umbrella protection provided to it by the Constitution, which safeguards it against scrutiny from either a constitutional, human rights or statutory angle.¹⁰⁵⁹ Examples on the viability of this option can also be drawn from other nations, such as South Africa, where though varying cultures and customs are afforded due recognition and respect,¹⁰⁶⁰ the Constitution¹⁰⁶¹ still calls on courts dealing with the interpretation of customary law to do so with the objects, purpose and spirit of the Constitution as their benchmark.¹⁰⁶² As Nyane highlights, this is what sets the South African Constitution apart from that of Lesotho – In South Africa, customary law’s validity is drawn from the Constitution, and not vice versa.¹⁰⁶³ Lesotho should, therefore, strive to have the Constitution govern customary law, and not the other way around.

5.4.4 Human rights approach to custom and customary law

Feminist legal discourse often depicts culture and rights as opposing concepts, which then creates a framework that is fraught with extreme restrictions for the women who wish to work within it to challenge domination and power dynamics.¹⁰⁶⁴ Tamale is of the view that culture is a “... neglected pathway to women’s justice...” which has emancipatory potential for women in Africa.¹⁰⁶⁵ She argues that the general view of

¹⁰⁵⁹ Nyamu-Musembi, 2013:198.

¹⁰⁶⁰ See for example the *Constitution of the Republic of South Africa*, 1996: sec. 31.

¹⁰⁶¹ Constitution of the Republic of South Africa: sec. 39(2).

¹⁰⁶² Rautenbach 2008:119.

¹⁰⁶³ Nyane 2019:20

¹⁰⁶⁴ Tamale 2008:47.

¹⁰⁶⁵ Tamale 2008:55 & 48.

culture as a negative element of society obscures us from the potential culture has to enhance and support women's rights.¹⁰⁶⁶ She contends that it was the colonialists who termed most of African culture as repugnant, as far as it did not align with their own norms and customs.¹⁰⁶⁷ This she combines with a call to a review of our perception of culture in line with women's rights, so as to enable us reap the vast potential for women's emancipation that is presented by culture.¹⁰⁶⁸ Relying on an approach by legal scholars such as Abdullahi An-Na'im, with examples from the Baganda of Uganda and the Zapatista women of Chiapas (Mexico), Tamale then advocates for an 'internal cultural transformation' approach. The approach is based on a belief that '...culture has a significant impact on human rights paradigms around the world and as such, culture is the best-suited vehicle for protecting rights.'¹⁰⁶⁹

Tamale's advised point of departure is an understanding that culture '... is not static but constantly changing and responding to shifting socio-economic and political conditions'.¹⁰⁷⁰ This then means that customary laws, especially those codified as is the case with Lesotho, are to undergo constant review to read them alongside questions such as "Does this section reflect the current societal reality?", "Is this section speaking to the direction sought to be taken by society?" as an assessment of their validity in present-day realities. She then proposes that the most successful activism would be that which is founded on an understanding that bottom-up approaches that have their anchor in local cultures and traditions would stand a higher chance of success in cultural transformation towards being more human-rights reflective.¹⁰⁷¹ This would be achieved through a careful and creative employment of traditional values and practices in overcoming the control that patriarchy yields.

Whitehead and Tsikata caution that before a 're-turn' to culture is undertaken, there should be knowledge and an understanding of how customary processes actually

¹⁰⁶⁶ Tamale 2008:49.

¹⁰⁶⁷ Tamale 2008:50.

¹⁰⁶⁸ Tamale 2008:49.

¹⁰⁶⁹ Tamale 2008:56.

¹⁰⁷⁰ Tamale 2008:49.

¹⁰⁷¹ Tamale 2008:64.

work.¹⁰⁷² This, they point out, will prove an important precursor to the discussion around the possibility of customary systems proving crucial in the delivery of gender justice.¹⁰⁷³ They also argue that women do not per se struggle with which of the legal systems to choose pertaining law and their rights, but rather "...how to maximise their claims under either, or both".¹⁰⁷⁴ One of their highlighted obstacles to this maximisation of claims is the language of custom. They call attention to how the language of custom is often used to challenge women's rights claims, arguing that such rights claims are contrary to custom.¹⁰⁷⁵ It is this language that has proven restrictive to the work of feminist lawyers, limiting the room available for them to manoeuvre within.¹⁰⁷⁶ They then advocate for a change of the language of custom in order to achieve success in women's rights claims. They couple this with advice to engage the state and modern legal systems in attaining equity for women in rights attainment, as an anti-state approach will prove problematic to their endeavours.¹⁰⁷⁷

Ndulo suggests that one of the best strategies would be one that does not attempt to impose Western philosophy of human rights on all cultures.¹⁰⁷⁸ This he argues in line with Africans' nostalgia pertaining African customs and customary law and their significant part in their identity as Africans.¹⁰⁷⁹ He thus advocates for discovering homoeomorphic equivalents of human rights in different cultures.¹⁰⁸⁰ This he suggests achieving by way of amending the idea that African society has always been against women's rights and rather highlighting how it has always been in understanding of and compliance with many human rights norms.¹⁰⁸¹ He claims that this will lead to a realisation that African society, in their own manner, have in fact been aware of and

¹⁰⁷² Whitehead & Tsikata 2003:94.

¹⁰⁷³ Whitehead & Tsikata 2003:94.

¹⁰⁷⁴ Whitehead & Tsikata 2003:102.

¹⁰⁷⁵ Whitehead & Tsikata 2003:99.

¹⁰⁷⁶ Whitehead & Tsikata 2003:99.

¹⁰⁷⁷ Whitehead & Tsikata 2003:102-103.

¹⁰⁷⁸ Ndulo 2011:91.

¹⁰⁷⁹ Ndulo 2011:117.

¹⁰⁸⁰ Ndulo 2011:91.

¹⁰⁸¹ As I highlight in chapter three, there actually exists evidence that in earlier years, Basotho women occupied a 'contingent and independent, subordinate yet oddly powerful' social position. (Hlalele & Letsie 2011:159.)

respectful of what are now termed international human rights norms.¹⁰⁸² Not oblivious to the manner in which some customary laws and norms still discriminate against women and infringe some human rights, he also advocates for a review and development of African customary laws.¹⁰⁸³ He argues for such development on the basis that the traditional, social, economic and political relations on which traditional customary laws and norms are founded have faced radical transformation and no longer reflect or speak to present day African societies.¹⁰⁸⁴ With customary law not being static but having to continually evolve alongside changing social, economic, scientific and technological developments and possibilities, Ndulo argues that traditional customary laws have become irrelevant to the societies they govern. He therefore strongly advocates for a review of traditional African customary laws and norms in order to realign them with the needs of the societies they govern.¹⁰⁸⁵

Regarding Constitutional protection of customary law, Ndulo suggests that even as Constitutions acknowledge and protect customary law's validity and application, this should not be done through blanket cover of customary law.¹⁰⁸⁶ He suggests that, first and foremost, contradictions between customary law norms and human rights provisions should be resolved before they are protected in Constitutions.¹⁰⁸⁷ He argues that blanket cover of customary laws immunizes them against human rights scrutiny and consequently perpetuates customary discrimination against women.¹⁰⁸⁸ He goes on to highlight that:¹⁰⁸⁹

It is important to evaluate customary norms in the context of human rights because... [w]hile African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities, human rights norms

¹⁰⁸² Ndulo 2011:118.

¹⁰⁸³ Ndulo 2011:116.

¹⁰⁸⁴ Ndulo 2011:92-93.

¹⁰⁸⁵ Ndulo 2011:97.

¹⁰⁸⁶ Ndulo 2011:89.

¹⁰⁸⁷ Ndulo 2011:89.

¹⁰⁸⁸ Ndulo 2011:97.

¹⁰⁸⁹ Ndulo 2011:90.

typically enjoin state parties to treaties to respect human rights and take all appropriate measures to eliminate discrimination against women.

He follows with examples of nations that have dealt with inconsistencies between their Bills of Rights and customary law norms, such as the Kenyan Constitution which provides that its Bill of Rights clauses trump customary law norms which are in conflict with Constitutional provisions.¹⁰⁹⁰

For codification to be said to have been carried out well, Ubink points to the importance of modification in the codification process, where laws having undesirable effects such as gender inequality are modified and adapted to the needs of a modern society.¹⁰⁹¹ She continues "... the development of a codification involves painstaking research, sifting and recording. It involves legal drafting and definite and positive overruling of contrary customary laws."¹⁰⁹² This arguably did not happen during codification of most African customary laws.

What becomes clear, as illustrated throughout this thesis, is that there are a number of systems and structures that have existed and been put in place for the goal of women's subordination under men. These include the law, traditional and modern political institutions, social norms and even the language of education. The effects of these systems and structures have not only affected women socially but have also spilled over into other areas of their lives, such as their political participation. Looking beyond just the laws and statistics and into other variables such as the customs people grew up in and the language of education has, therefore proven valuable in discovering and bringing to the fore other factors that are affecting not only women's social status, but also their political participation.

¹⁰⁹⁰ Ndulo 2011:98-100.

¹⁰⁹¹ Ubink 2011:3-4.

¹⁰⁹² Ubink 2011:4.

The recommendations made, though not exhaustive, provide a glimpse into approaches that may be opted for in the continuation of the study and analysis of women's social status and their political participation.

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