



**Customary Law and its Implications on the Enjoyment of
Human Rights by Women in Southern Africa: A Focus on
Botswana, Lesotho and South Africa**

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List of Abbreviations

BPC- Botswana Power Corporation

CEDAW- Convention on the Elimination of all forms of Discrimination Against Women

CCA- Customary Court of Appeal

CLA- Customary Law Act

CPD- Continuous Professional Development

CSO- Civil Society Organisation

CSW- Commission on the Status of Women

ECOSOC- Economic and Social Council (of the UN)

ICESCR- International Covenant on Economic, Social and Cultural Rights

LCMPA- Legal Capacity of Married Persons Act

LEAD- Legal Education and Development

LLS- Lesotho Law Society

LSB- Law Society of Botswana

LSSA- Law Society of South Africa

NGOs- Non-Governmental Organisations

NSAs- Non-State Actors

SADC- Southern African Development Community

SADCLA- SADC Lawyers' Association

SALC- Southern Africa Litigation Centre

TCB- Traditional Courts Bill

UDHR- Universal Declaration of Human Rights

UN- United Nations

WLSA- Women and Law in Southern Africa (Research Trust)

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Part 1: A History of Customary Law and Women's Rights in Southern Africa

1.1 Introduction

The Southern African Development Community (SADC)¹ region was colonized by different colonial powers including Britain, Germany, Belgium and Portugal. In relation to the study countries, Lesotho became a British Protectorate in the 1860s and later became a British Colony in 1884 after a revolt against Cape colonial rule. Basutoland as it was then known, had earlier been annexed to the Cape Colony in 1871 without the people's consent.² Botswana was a British Protectorate³ whilst South Africa went through the hands of the Dutch and the British⁴. Before colonialism, these countries followed their own customary laws. The coming in of colonialism superimposed the laws of the colonial states on the customary laws of the colonized countries through a system that was referred to as indirect rule in which traditional leaders played a prominent role.⁵

The indigenous African people were allowed to continue practising their customary law in matters of personal law subject to the repugnance clause⁶ whilst the European legal system was used mainly in criminal matters and in situations where an African was considered to have abandoned a customary way of life. In many instances, however the choice of law was never straight forward leading to the application of

¹ The SADC Region is made up of 15 countries. These are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. In terms of the SADC Treaty, SADC is "an international organisation" and is established in terms of Article 2 of the Treaty.

² See <http://www.bbc.com/news/world-africa-13729501>

³ See <http://www.thuto.org/ubh/bw/bhp1.htm>

⁴ See <https://www.reference.com/geography/colonized-south-africa-f46a30ce6ff61173>

⁵ Crowder (1964:198) notes that "Though indirect rule reposed primarily on a chief as executive, its aim was not to preserve the institution of chieftainship as such, but to encourage local self-government through indigenous political institutions, whether these were headed by a single executive authority, or by a council of elders"

⁶ The repugnance clause was introduced into the African legal system during the 19th century colonization process. The clause and the resultant doctrine emphasised that customary law principles were not enforceable in any courts of law if they were contrary to public policy, contrary to good morals, or justice and equity. The doctrine has often been criticized for measuring African legal standards using an imposed European legal standard (See Taiwo E. A, 2009: Repugnance Clause and its impact on Customary Law: Comparing the South African and Nigerian Positions-Some Lessons for Nigeria)

both customary law and general law for many Africans under the colonial governments and post-independence. This created a system of legal pluralism where customary law and general law existed and continue to exist side-by-side and often used interchangeably, showing the relevance of both general and customary law in the lives of ordinary citizens.

Given the apparent relevance of customary law in contemporary SADC societies, questions have to be asked about the place of customary law in legal education, both at law schools (university level) and post qualification. What role is played by the universities in the SADC region in teaching customary law and what role is being played by the law societies and bar associations in ensuring that customary law remains an important aspect in the teaching and practice of law? Do the law societies'/bar associations' continuous professional development (CPD) courses focus on customary law for example, or they skirt around customary law training to focus more on what are considered as contemporary and more relevant areas of the law. With globalization and the focus on the legal profession as a key facilitator in international trade and commerce, is the CPD by the legal profession increasingly focusing on subjects dealing with international trade, minerals, oil and gas law, business law and other related subjects, which are more financially rewarding areas of specialisation, as opposed to subjects such as customary law? Is the emerging lawyer in many SADC countries as in any other countries in the world therefore more outward looking than inward looking? Has this left a gap in the area of customary law in terms of the general understanding of this system of law, its application and the techniques of handling customary law cases in litigation for example? In addition, what role do our courts play in the interpretation of customary law and in positioning it in the administration of justice, human rights and access to justice in the region? Does the role of key actors in the practice of customary law such as traditional leaders and the family also need interrogation? This research seeks to answer some of these questions with a focus on understanding customary law and its implications on the rights of women in three countries in the SADC region, namely Lesotho, Botswana and South Africa. It will be important in this regard to understand how the various actors have engaged with women's rights and customary law in court systems in particular, and in the administration of justice in general. The research is expected to provide lawyers, the courts, governments and other human rights actors and structures

in the region with the requisite platform to keep customary law on the agenda, discuss its implications on women's rights and how and whether customary law can be used to promote the rights of women in the SADC region.

1.2 Impact of Customary Law on Women and their Rights

It is trite that customary law has a disproportionate discriminatory impact on women when compared to men. This is because customary law promotes patriarchal practices that give more privileges to men than women in many areas of life including in leadership, in society and within the family. In addition, history has shown that customary law has been distorted over time mainly with a view to entrenching patriarchy and suppressing the rights of women. One of the leading scholars in the area of African law has posited that:

“The African law of modern day Africa was born in and shaped by the colonial period...in accordance with the policy of indirect rule, a large portion of the administration of justice was turned over to precisely those people who had reason to define, and more importantly to administer the law in a restrictive and authoritarian way. These definitions form the basis of current African Law” (Chanock, 1976:80)

The assertion by Chanock, calls not only for the restating of customary law in Africa generally and in Southern Africa in particular, but also calls for efforts by various actors to administer and utilise the law with the realisation that the subversion of customary law was meant to stifle the rights of the majority blacks on the continent. In the process, women were the most affected. As such, legislative interventions as well as progressive judicial and legal systems play an important role in ensuring that a version of customary law that respects the human rights of all, including women and that falls within the ambit of the Constitution should be encouraged and applied.

In the three research countries, legislation has played an important role in determining the application of customary law in various facets of life. In both Botswana and Lesotho, constitutional provisions allow for discrimination on the basis of personal law or customary law. It is also a fact that it is on the basis of customary law and personal law that women are mostly discriminated against. These constitutional provisions therefore mean that in essence women can be discriminated against as long as such discrimination can be justified on the basis of customary law or personal law.

The South African Constitution on the other hand does not have a similar limitation but instead emphasises the need for full enjoyment of human rights by all citizens. Except as provided for in the Constitution, no law can be promulgated that has the effect of limiting such rights. In light of these constitutional provisions, the South African courts have made progressive court decisions that have emphasised that women cannot be discriminated against on the basis of customary law, thereby reinforcing the provisions of the Constitution.⁷ The courts in Botswana, despite the existence of the above-mentioned clause allowing for discrimination on the basis of customary law and personal law have used international human rights law to make a determination that women cannot be discriminated against on the basis of customary law⁸. The opposite is however true in Lesotho where the courts in 2014 made a ruling barring a woman from taking over a chieftainship on the basis that at customary law, a woman could not be a chief.⁹ The conclusion that can be drawn from these examples therefore is that the application and place of customary law depends very much on the technical provisions of the Constitution and the extent to which the courts are prepared to use international law to interpret domestic law in such a manner that human rights are respected.

1.3 What is customary law in Lesotho, South Africa and Botswana?

It has been argued that post-colonial legal science must concern itself with evolving and new approaches to law that address the concerns of the post-colonial state and in the process review the legal heritage obtained from the colonial state (Bentzon, 1998: 32). A critical aspect in establishing what customary law is in Southern Africa and in the three research countries is therefore a realisation that the colonial state distorted customary law, leading to the application of a version of customary law that was far removed from the reality practiced by the people on the ground. The outcome was the creation of “State” customary law, which was different from “living” customary law and the lived realities of Africans on the ground. As a result, despite attempts to

⁷ See *Bhe and Ors vs Magistrate Khayelitsha and Ors* Case CCT 49/03 and *Shilubana and Ors vs. Nwamitwa and Ors* CCT 03/07 [2008] ZACC 9

⁸ See *Mmusi vs. Mmusi* MAHLB 000836-10

⁹ *Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others*, Constitutional Case 5/2010

integrate post-colonial states' systems of law, in most African countries, there is still considerable discrepancy between the customary law as practised by the superior courts, the lower courts' interpretation of same and people's customs and practices on the ground which continue to evolve outside the context of court interpretations and decisions (Bentzon, et al, 1998:33). This realisation therefore makes it necessary for legal scholars and lawyers in general to continue to study, explore and seek an understanding of customary law to ensure justice. As Chanock has noted:

“The failure to study historically the changes in African law in the colonial period has led to a confusion of tenses which affects our understanding of customary law.” (Chanock M, 1978: 80).

It is therefore imperative for the African lawyer or scholar of African law to seek to restate the correction version of customary law and seek to establish how customary law as applied by the courts came into being. It is also important for the same scholar and lawyer to establish the role of both State and living customary law in promoting human rights and in particular the rights of women. In the process, it must also be realised that customary law is not applied in a homogenous way within the same country, and more so within the Southern African region. Often practices of different tribes within the same country are different, and in many instances, there are variations in customary law practices within the same tribal community. As such, whilst the broad framework for customary law and its application in Southern Africa and in the three research countries might show similarities, there are shades of fine distinctions that can only be gleaned by understanding “living” customary law and the practices of people on the ground. The section below provides an analysis of what customary law entails in the three research countries.

1.3.1 Lesotho

To try and address some of the challenges that were associated with the “indeterminate” nature of customary law, Lesotho codified¹⁰ its customary laws,

¹⁰ *The codification process has been defined as the reduction of the whole corpus juris so far as possible to the form of enacted law. In the process it has also been suggested that codification removes uncertainties that are inherent in unwritten law (See Bennett and Vermeulen, 1980). There is however debate amongst scholars of customary law on whether or not customary law codification is beneficial to its users, in particular women.*

leading to the development of a customary law code known as the Laws of Lerotholi¹¹ in 1903. Even though the sphere of influence of the Laws of Lerotholi has been encroached onto by:

“piecemeal legislative action, occasional transformative judicial pronouncement by activist judges, and the changing perception of the role of African customary law in multicultural societies, these rules have persisted.” (Juma L, 2011:96).

As a result, the courts have often depended on the Laws of Lerotholi to establish what is custom in the country in a number of cases requiring the application of customary law (Ibid:28). Customary law in Lesotho as interpreted and applied by the courts in the country to date is therefore to *an extent* still determined by the codified laws of 1903 with the necessary amendments that have been made over the years. This is because whilst the laws remain valid and a useful reference point, they have not been elevated to a pedestal above other informal or unwritten customary practices in the country. Juma (Ibid, 34) in explaining this state of affairs highlights three things namely that:

- i) The Laws of Lerotholi do not enjoy any preference above the informal rules of custom.
- ii) The courts of Lesotho will only revert to them when there is no legislation or common law that is applicable; and thirdly that
- iii) Nothing in the current legal system or practice seems to suggest that there might be any change towards enhancing their position.

Effectively therefore, the codification of customary law in Lesotho through the Laws of Lerotholi did not bring about total certainty on what constitutes customary law as the proponents of the codification process in the late 19th and early 20th century Lesotho expected. The Laws still remain a key reference point in determining customary law in the country but other customary practices that are not written down or that have evolved over time are still applicable and considered by the courts in matters that are brought before them and for which customary law is to be applied or

¹¹ *Lerotholi was the Paramount Chief (Morena e Moholo) of Lesotho at the time the laws were codified in 1903. He played an important role in the codification process*

determined. To this end Section 154 of the Constitution of Lesotho, which deals with the interpretation of the Constitution defines customary law thus:

“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”

As such, the place of customary law and its application in the country is also determined by the Constitution as well as a variety of statutes that deal with issues such as land rights, marriage, chieftainship/traditional leadership and succession amongst others. The Constitution of Lesotho in particular is insightful in this regard. Chapter 8 is the Bill of Rights and provides for an array of fundamental rights and freedoms that are to be enjoyed by the citizens of the country. Insightfully, however the enjoyment of many of the rights is subject to various limitations with customary law often tucked in as one of the grounds for such limitations. Section 7 of the Constitution deals with freedom of movement. One of the limitations to this right is based on customary law as provided for in Section 7 (6) which provides that:

“Nothing contained in or done under the authority or 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”.

Section 18 of the Constitution is the non-discrimination clause, prohibiting discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹² This provision is however overridden by a number of claw back clauses, with discrimination allowed on the basis of customary or personal law. Section 18 (4) provides that the non-discrimination clause shall not apply in situations where a law:

“with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of [certain] persons”¹³ who are subject to that law or “the application of the customary law of

¹² Section 18 (3)

¹³ Section 18 (4) (b)

Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law”¹⁴

Research has shown that it is on the basis of personal or customary law that women in Africa are most discriminated against. Such primacy of customary law is considered problematic for women especially given the patriarchal and patrilineal nature of [African] society (Izumi, 2006:8). The claw back clauses on the enjoyment of human rights in the Constitution of Lesotho therefore provide fertile ground for sex and gender based discrimination in the country, which disproportionately affects women. A determination therefore needs to be made in relation to balancing the promotion and protection of customary law and the promotion and protection of women’s rights as human rights. As will be shown later in this research, constitutions, international human rights law, the courts, families, traditional leaders, the legal profession and communities amongst others, play an important role in ensuring that the practice and application of customary law does not infringe on women’s rights.

1.3.2 South Africa

It is generally accepted that the position of customary law in South Africa greatly improved with the promulgation of the post-apartheid Constitution of 1996. Before then, African people's ways of life, including cultural practices and approaches to their beliefs were denigrated and almost obliterated under apartheid (Gasa, 2011, 23). Rautenbach (2008) highlights that before the new constitutional dispensation customary law suffered various setbacks regarding its recognition. She argues that:

“In spite of customary law being the law of the original inhabitants of this country, there has never been parity between the transplanted [colonial] laws and the indigenous laws. Customary law was initially ignored by the colonials (sic), then tolerated and eventually recognised, albeit with certain reservations and conditions.” Rautenbach (2008:1)

The Black Administration Act of 1927 was the key legal instrument used by the colonial government to give legitimacy to the application of customary law by the courts in relation to black issues in the new dual legal system that followed the

¹⁴ Section 18 (4) (c)

colonisation of the country. The administration of customary law was done mainly by traditional leaders within their communities.

However the 1996 Constitution brought customary law to the same level as common law but clearly articulated that customary law must be subject to the Constitution and other legislation. Sections 39 (2) and (3) of the Constitution dealing with the interpretation of the Bill of Rights state that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”¹⁵ [and that] “The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”¹⁶

When dealing with the institution of traditional leaders, the Constitution once again states that the institution, status and role of traditional leaders is recognised in accordance with customary law but subject to the Constitution.¹⁷ Similarly courts are obliged to apply customary law when it is applicable but, subject to the Constitution or any other legislation dealing with customary law.¹⁸ In essence therefore, whilst customary law is recognised by the Constitution, any customary law dictate that goes against the provisions of the Bill of Rights or the Constitution is invalid to the extent of the inconsistency. The recognition of customary law in the post-apartheid Constitution of South Africa was important in that it helped in ensuring that customary law is not relegated to history or completely abandoned as a system of law in the country. The recognition of customary law is important because there are many citizens of South Africa just like other African countries who still live and are affected by or recognise the autochthonous law in one way or another. Significantly however, the Constitution in the spirit of human rights and constitutionalism ensured that customary law was not given a status above other laws or above the supreme law of the country, the Constitution. It is in line with these provisions that the higher courts in South Africa have developed celebrated jurisprudence dealing with

¹⁵ Section 39 (2)

¹⁶ Section 39 (3)

¹⁷ Section 211 (1)

¹⁸ Section 211 (3)

customary law and its relationship with human rights and non-discrimination including in the area of women's rights.¹⁹

1.3.3 Botswana

Botswana has a dual legal system that recognises both customary law and common (received law). The Botswana legal system recognises the rights of the country's indigenous people to have customary law accommodated within the communities they live in (Kumar, 2009:1.) The Preamble of the Customary Law Act: Chapter 16:01 of 1969 describes the purpose of the Act as:

“An Act to provide for the application of customary law in certain actions before the courts of Botswana, to facilitate the ascertainment of customary law and to provide for matters ancillary thereto”.

This is supported by the Constitution of the country, which states that the anti-discrimination provisions of the Constitution shall not apply:

“with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” or “for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not”²⁰

In essence therefore, both the CLA and the Constitution of Botswana seek to ensure that customary law is recognised in appropriate situations and in cases that may be brought before the courts of the country. The question of ascertainment of customary law however is often a challenge with the Government of Botswana acknowledging that “*customary law is not written and has variations among different communities*”²¹ As a result the courts are often called upon to determine and ascertain what

¹⁹ Some of these cases have been listed above and will be analysed later in this research

²⁰ Section 15 (4) (c) and (d)

²¹ Botswana; National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1; Human Rights Council Working Group on the Universal Periodic Review Third session, Geneva, 1-15 December 2008; A/HRC/WG.6/3/BWA/1 5 September 2008

customary entails. In recent years however, the Court of Appeal in Botswana has emphasised the concept of “living” customary law and the need for customary law to be applied in line with the changing developments in any community. In the Mmusi case, the Court ruled that:

“It is axiomatic to state that customary law is not static. It develops and modernises with the times, harsh and inhuman aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with society’s changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times” (Para 77)

The approach to be taken therefore, the court added, is to ensure that customary law principles conform with prevailing understanding by any community of what morality is and that circumstances may very well change and alter cases, how they are interpreted and how they are understood. This is a positive and progressive interpretation of customary law and helps in ensuring that unresponsive principles of customary law that have the effect of subordinating and discriminating against women in society are abandoned.

However, like in many other African countries that recognise customary law, the core of personal law in Botswana is very much the domain of customary law and is of particular significance for women’s rights. Therefore without adequate “guarantees that equality between men and women takes precedence over custom, traditional practices that discriminate against women may be lawful in some circumstances” (Kumar, 2009: 1).

When Botswana became a British Protectorate in 1885, a dual legal system was introduced and the Roman-Dutch Law of the Cape Colony was introduced as the common law in 1891. This meant that the colonial government continued to recognise customary law for the indigenous people especially in the areas of family/personal law whilst the transplanted law took centre stage in areas such as criminal law and in situations involving the non-indigenous populations. Customary law was mainly applied in the Customary Courts whilst the High Court and Subordinate Courts applied the common law in the exercising of their original jurisdiction (Himsworth,

1972:4). This was to be changed with the promulgation of the CLA, which enjoined *all* courts in Botswana to:

“within the limits of their jurisdiction, apply customary law in all cases and proceedings in which, by virtue of the provisions of this Act or any other law, customary law is properly applied and where it is not properly applied such courts shall apply the common law.”²²

To date, customary law plays an important role in the administration of justice and in the day-to-day lives of the indigenous Batswana.²³ Though uncodified, the Constitution of Botswana, the CLA and other legislation regulate the use and application of customary law in the country. Needless to say, there are variations amongst the different groups in the country in relation to what they regard as customary law.

The CLA of Chapter 16:01 of 1969 made far-reaching changes to the understanding and application of customary law in Botswana and also addressed from a legislative point of view, the choice of law questions in the country. The Act defined customary law as:

“in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice”²⁴

An interpretation of this provision would suggest that in the application of customary law, fairness and justice are an integral consideration. Yet the Constitution of Botswana clearly gives customary law an upper pedestal in relation to other laws and even the Constitution in situations where customary law is deemed to be applicable. Section 15 of the Constitution of Botswana is the non-discrimination clause. Whilst it prohibits discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed, the provision makes exceptions when it comes to issues of

²² Section 3

²³ Generally refers to the indigenous people of Botswana. A single person is referred to as a Motswana. The largest population of the Batswana people are however found in the North-west and Northern Cape Provinces of neighbouring South Africa (see <http://www.sahistory.org.za/people-south-africa/tswana>) and a marginally Namibia (where they form the smallest ethnic group at about 1%, See Minahan (1998:196), and Zimbabwe (See Ndhlovu, 1970: 66-67).

²⁴ Section 2

personal and customary law. It states that the non-discrimination clause shall not apply to any law in so far as that law makes provision for the application of customary law or personal law, thereby effectively giving a higher consideration to customary law in relation to the non-discrimination principles of the Constitution or any other law. Nyamu-Musembi has argued that the application of customary law in itself is not the problem with regards to women's rights. The problem is when the Constitution such as in the case of Botswana shields such customary or personal law from constitutional scrutiny and the lens of acceptable human rights standards thereby giving customary law or personal law "supra-constitutional" status (Nyamu-Musembi, 2013:198) . She argues further that:

"By according supra-constitutional status to personal law, the State privileges the views of those able to assert private power to define customary or religious norms in ways that disadvantage weaker social groups. By closing the avenue of constitutional challenge, the State is overtly endorsing, or at the very least acquiescing in the establishment and preservation of asymmetrical social arrangements by denying some people within a community or sub-group a voice in shaping social norms" (Nyamu-Musembi, 2013:200.)

This argument also stresses the view that in removing customary law and personal law from the rigorous scrutiny of constitutionality, the effect is that some citizens and in particular women under the circumstances will be denied their right to equal protection of the law. This is because even if aggrieved by their treatment, the law would not be in position to impinge the act complained of as long as it is justified on the basis of customary law. This is despite the fact that many constitutions, including the Constitution of Botswana give citizens the right of equal protection of the law. In this case Section 3 (a) of the Constitution of Botswana provides for a right to protection of the law and this right has been interpreted to mean that such protection must be equal. As such any law or act that takes away such protection cannot be viewed as aligning with the provisions of the constitution. In Botswana however, even with the "claw back clause" on customary and personal law in the constitution, the courts have tended to interpret the Constitution and the laws on women's rights liberally and with a view to enhancing as opposed to restricting the rights that women have been accorded over the years. This approach is consistent with the values of human dignity that are inherent in the Constitution of Botswana. In the words of the High Court Judge who presided over the Mmusi Case:

“For me the biggest consideration when applying customary law is whether or not it can pass the test of fairness and justice.”²⁵

The positive role of the Higher Courts in promoting the rights of women in Botswana cannot be over-emphasised. It however remains important for the claw back clauses that place customary law and personal law over the Constitution to be repealed. This ensures that there is clarity that the Constitution is the Supreme law of the country and that even customary law dictates have to conform and fall within the dictates of the Constitution. Leaving this aspect to the interpretation of the courts is not always the best way of serving the human rights needs of women. This is especially true of Botswana as the Constitution does not make any express reference to its own supremacy.

1.4 Research Methods

Three main research methods were used in undertaking this research namely; literature review, individual interviews and key informant interviews as detailed below.

1.4.1 Literature Review

Literature review was important in order for the researcher to be acquainted with the available body of knowledge in the area of women’s rights and customary law in Southern Africa. This helped in identifying existing knowledge in the area, identifying gaps and determining the utility of this research in contributing towards new knowledge to this area of law. In undertaking the literature review, the researcher focused on key instruments and texts that address the issues of women’s rights and customary law, not only in Southern Africa but internationally. The key instruments included primary sources of relevant law (Constitutions, Acts of Parliament and case law) and secondary sources (academic texts, international human rights instruments, research reports and opinion pieces on the issue, amongst others).

²⁵ Judge Oagile Key Dingake during an interview held in Gaborone, Botswana on 9 February 2016

1.4.2 Key Informant Interviews

The literature review was complimented by key informant interviews, which were undertaken in the three research countries, namely South Africa, Lesotho and Botswana. In this report, key informants refers to people who are knowledgeable or have special knowledge in the subject matter under enquiry, that is customary law, women's rights, human rights, access to justice and administration of justice, operations of law societies and the legal profession and the legal system in Southern Africa amongst others. These included judges, professors of law, leaders in the legal profession, legal practitioners, traditional leaders, women's rights advocates and researchers, officers in law development commissions and parliamentarians amongst others. This provided an opportunity for structured conversations with these actors and structures as a way of exploring and understanding the critical issues in greater detail. The interviewees provided their insights and inputs on the history of customary law and women's rights, the place and role of customary law in contemporary Southern Africa as well as what needs to be done to promote customary law and enhance its application in Southern Africa for the benefit of the women of the region. The interviews were held physically, telephonically and via Skype and were semi-structured in nature.

1.4.3 In-Depth Individual Interviews

In addition to key informant interviews, in-depth individual interviews were held with ordinary citizens in the three countries, both male and female. The main purpose of these interviews was to understand the interviewees' lived experiences and interactions with customary law in the area of women's rights. Litigants who had brought cases before the courts in relation to their rights at customary law were some of the interviewees, whilst others provided general views on the subject of research. Just like the key informant interviews, the individual interviews were semi-structured in nature thereby allowing the researcher to control the flow of the interview whilst at the same time giving the flexibility to explore the issues that emerged from the interview conversations.

1.5 Limitations of the Research

The research was undertaken over a period of one year starting in October 2015 and being finalised in October 2016. There was therefore adequate time to undertake both the literature review and the field research. However, the limited budget that was

available for the field aspect of the research made it difficult to reach more respondents. The researcher spent only five days each in Lesotho and Botswana and therefore this was not enough time to gather enough information and to observe the practice of customary law on the ground in the two countries. For the same reason, most of the interviews were held in the capital cities, Maseru and Gaborone respectively with very limited access to rural areas where most of the customary law in these countries is practised. The furthest that the researcher travelled out of the capital city in Botswana was 90 kilometres to Kanye Village and in Lesotho it was 35 kilometres to Thaba Bosiu. In South Africa physical interviews were only held in Pretoria and Johannesburg and interviewees in places such as Cape Town were reached via telephone. These limitations had the effect of impacting on the field findings and how these findings can be generalised for application in the three countries and in the SADC region as a whole. With adequate resources in future therefore, it is necessary and important to undertake a more in-depth research, especially through a grounded theory approach that allows for an iterative and longitudinal process for an in-depth understanding of the issues on the ground. Future research must also be targeted and seek an in-depth exploration of customary laws issues thematically as opposed to a generalised research.

1.6 Structure of the Report

This report is structured as follows:

Part one outlines the history of Customary Law and Women's Rights in Southern Africa as well as the research methodology used in the study. Part Two goes into further detail by discussing the legislation that has been developed to advocate for women's rights, including judicial precedents. It discusses marriage, access to land and traditional leadership. The third part of the report outlines specific bodies, institutions or individuals that have a role to play in the protection and advancement of women's rights at customary law. As with any legal writing, the fourth part of the report is a discussion of the issues, recommendations are made therein as well as a conclusion that summarises the contents of the discussion.

Part Two: Emerging Legal Developments: Reform through legislation and court decisions

2.1 Introduction

In Part 1, the research briefly touched on some legislative provisions and court decisions dealing with the issue of customary law and women's rights. The constitutions of the three research countries are a key reference point for the research. There are in addition, many other pieces of legislation addressing the issue of customary law and women's rights in the three jurisdictions. The courts have played a critical role in interpreting these provisions in line with national laws, constitutionally protected rights as well as the international human rights frameworks. However, given the various facets of everyday life that are impacted on by customary law in the three countries, this section does not seek to provide an analysis of each and every aspect of customary law in these countries. A sample of issues will be analysed in an attempt to provide a link between customary law and the enjoyment of human rights, or lack thereof by women in the three countries. Three themes will be addressed in this regard namely; traditional leadership, land rights and marriage. These thematic areas have been identified after taking into consideration the high level impact that they have on women and the enjoyment of their rights, the legal reforms on these issues in the research countries as well as the recent decisions that have come out of the courts addressing the identified issues. The research will analyse whether and how both the law reform processes on these issues and the decisions of the courts in the research countries have taken the rights of women at customary law forward or in a retrogressive direction.

2.2 Locating women's rights and Customary Law in a progressive international legal and human rights framework

International concern over the rights and situation of women dates back to the 1940s leading to the establishment of the Commission on the Status of Women (CSW) by the United Nations in 1946. Today, the CSW a functional Committee of the Economic and Social Council (ECOSOC) is:

“the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women [and is also] instrumental in promoting women’s rights, documenting the reality of women’s lives throughout the world, and shaping global standards on gender equality and the empowerment of women”²⁶

Following the establishment of the CSW, many international human rights instruments touching directly and indirectly on the rights and status of women have been promulgated at the UN level, the African level as well as the SADC regional level. Customary law is often addressed in many of these instruments, both as a right and as an impediment to the enjoyment of human rights by women. The protection of customary law is often linked to the protection of one’s cultural rights. The Universal Declaration of Human Rights (UDHR) was the first international human rights instrument to protect one’s cultural rights indispensable for his [or her] dignity and the free development of his [or her] personality.²⁷ This right was elaborated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 15 (1) (a) of the ICESCR enjoins State Parties to recognise the right of everyone “to take part in cultural life.” The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the foremost international human rights instrument on women’s rights makes no specific reference to cultural rights or customary law. It however enjoins State Parties to:

“Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (Article 2 (f))

In addition, Article 5 (a) enjoins State Parties to modify social and cultural patterns of conduct of men and women so as to eliminate prejudices, customary and other practices that are based on ideas of inferiority and superiority of either sexes or the stereotyped roles of women and men. In other words, the CEDAW recognises positive customs and practices and calls for the modification or abolishment of those that have a negative impact on the enjoyment of human rights by women. Through communications procedures using the CEDAW Optional Protocol,²⁸ the CEDAW

²⁶ See <http://www.unwomen.org/en/csw>

²⁷ Article 22

²⁸ *The CEDAW Optional Protocol is an international treaty that provides for a complaints and enquiry mechanism to be used in handling violations of the provisions of CEDAW.*

Committee has also made rulings impugning certain customary law practices as being against the promotion of women's rights.²⁹ In addition the CEDAW Committee in its General Recommendations has also elaborated on the effect of customary, ethnic and religious practices in the enjoyment by women of rights protected in CEDAW. For example in its General Recommendation Number 29³⁰, the CEDAW Committee noted that:

“The constitutions or legal frameworks of a number of States Parties still provide that personal status laws (relating to marriage, divorce, distribution of marital property, inheritance, guardianship, adoption and other such matters) are exempt from constitutional provisions prohibiting discrimination or reserve matters of personal status to the ethnic and religious communities within the State party. In such cases, constitutional equal protection provisions and anti-discrimination provisions do not protect women from the discriminatory effects of marriage under customary practices and religious laws. Some States Parties have adopted constitutions that include equal protection and non-discrimination provisions but have not revised or adopted legislation to eliminate the discriminatory aspects of their family law regimes, whether they are regulated by civil code, religious law, ethnic custom or any combination of laws and practices. All these constitutional and legal frameworks are discriminatory, in violation of Article 2 in conjunction with Articles 5, 15 and 16 of the Convention” (Para 10).

In essence therefore whilst the right to culture and the practice of customary law are regarded in international human rights law as part of many individuals and communities, there is also a growing realisation that customary law, customs and practices if not closely scrutinized can lead to the infringement of human rights, especially women's rights. In line with the position that has been taken by the CEDAW Committee in ensuring that customary law provisions conform with international human rights dictates on the rights of women, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), whilst acknowledging the value of culture, emphasises the need to support “positive contexts” and thus the promotion of positive cultural values. It provides specifically that:

“Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.” (Article 17 (1))

²⁹ See *E.S. & S.C. v. United Republic of Tanzania*

³⁰ *General Recommendation Number 29, 26 February 2013, on Economic consequences of marriage, family relations and their dissolution*

As such cultural practices or customs that are considered as harmful to women and their enjoyment of human rights cannot have a place in modern day constitutional democracies. The SADC level addresses the issue of women and customary law through the SADC Protocol on Gender and Development. The Protocol requires States Parties to ensure “equality in treatment of women in judicial and quasi-judicial proceedings...including customary and traditional courts...” and “equal legal capacity in civil and customary law” (Article 7 (a) and (b)). The common thread in these provisions therefore is the requirement that customary law or traditional practices may not be used as a basis for differential and inferior treatment of women in any country or society. The international human rights framework has set the tone for this approach, and it remains for national jurisdictions to provide the requisite legal, constitutional and practice imperatives that can give life to these principles. In emphasising the importance of international human rights law in protecting and promoting the rights of women, the Chief Justice of Lesotho had this to say:

“The Courts in Lesotho need to be bolder, just like the courts in India and even some in Southern Africa. The Courts in Lesotho can circumvent Section 18 of the Constitution of Lesotho by using international human rights law”³¹

She also underscored the fact that the courts and other actors must realise that international human rights instruments are not there just to be talked about but to be applied for the benefit of citizens.

The following section therefore provides some of the steps that have been taken or that can be taken by the three research countries through legislative and court interventions to breath life into the international human rights provisions and ensure that customary law is a boon and not a bane to the enjoyment of human rights by women. The issues are addressed thematically in order to provide an in-depth analysis of these steps in relation to various aspects of customary law.

³¹ *Interview with Lady Justice Nthomeng Matholoana Majara, Chief Justice of Lesotho on 14 April 2016 in Maseru, Lesotho*

2.3 Traditional Leadership

Traditional leadership is one of the most enduring institutions in Africa. The institution existed in pre-colonial times, survived colonialism and has continued to be relevant in the post-colonial State. Vilified and feared in equal measure by the colonial State, traditional leadership was stifled during the colonial period as the colonial governments regarded the institution as a rallying point and organising system against colonialism in Africa. At the same time, the colonial government used the traditional leadership structures as a governance mechanism, in particular to enforce its unpopular land grabbing and tax laws through the system of indirect rule. Post-colonialism, the traditional leadership institution has become increasingly powerful in Africa, including in the three research countries, which recognise the institution of traditional leadership, either in their constitutions or through other legislative provisions. However, there are variations with regards to the position of women in this institution and in line with whether customary law is subordinate to or above the constitution. In Lesotho, Section 45 of the Constitution deals with the issue of succession to the throne as King. The paramount guiding principle in determining who can be a King in Lesotho is the customary law of the country, which invariably cannot be challenged as discriminatory as detailed above. The King is chosen by the College of Chiefs composed of the 22 Principals Chiefs in the Kingdom.³² Section 10 of the Chieftainship Act on the other hand prohibits daughters from ascending to the throne as Chiefs. A wife can be a chief as a regent or in her own right in the event of incapacity or death of her chief husband but a daughter cannot act as regent or be appointed as a substantive chief.

The jurisprudence in the country has upheld this legal position. In the 2012 case of *Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others*³³, the High Court of Lesotho, sitting as a Constitutional Court upheld that in terms of Customary Law, a daughter cannot succeed her father as a chief. The Court concluded that Section 10 of the Chieftainship Act was not discriminatory or unconstitutional and gave various reasons for arriving at this conclusion. In relation to customary law and in upholding the provisions of Section 18 (4) (c) of the

³² Section 104 (1) of the Constitution of Lesotho provides for the composition of the College of Chiefs.

³³ Constitutional Case Number 5/2010

Constitution of Lesotho which allows for discrimination on the basis of customary law, the Court concluded that:

“Thus there is no conflict between the customary Law of Succession as codified in Section 10 of the Chieftainship Act, and the Constitution. Any doubts in that regard should be removed by the above section, as it is undeniable and common cause that Chieftainship is an institution of the Customary Law. Indeed much could also be said about the equality or inequality aspects of polygamy itself; inheritance in general; and rights to succession to chieftainship. The Constitution is highly protective of the Customary Law rights relating to these practices” (Para 53).

It is notable that in reaching this decision, and whilst upholding the discriminatory customary law practices, the Constitutional Court acknowledged that it may be time for Lesotho to move away gradually from the undesirable outcomes of customary law. The court also intimated that Lesotho as a country could possibly be lagging behind in its policies of equality between the sexes. The Court however made reference to other human rights issues such as the recognition of same sex marriages and the abolition of the death penalty to which Lesotho does not subscribe, adding in essence that it is the responsibility of the Executive and the Legislature to make the necessary laws regarding these issues and not for the Courts to legislate from the bench.

In the same case, the Court also made reference to the fact that when it acceded to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW):

“The Government of Lesotho expressed its reservation and specifically excluded itself from the provisions of that convention or treaty in so far as it concerns the customary practices relating to succession to the throne and to chieftainship” (Para 54).

The court concluded therefore that it could not usurp the powers of the Executive and the Legislature by ignoring this clear intention. The court’s conclusion was that the fact that the provisions still remain in the statute books, including the constitution, and that the country made reservations when acceding to CEDAW in relation to customary law was clear testimony that the provisions were viewed as necessary by both the Legislature and the Executive.

As such the current position with regards to Chieftainship and Kingship in Lesotho is that a daughter cannot succeed her father. Whilst this has been the customary law position, and has been in the statute books of the country for a long time, the above-mentioned high profile case worked to cement this position. A clearly significant aspect of this case is that in a way the courts deferred the issue of girl child succession to the Legislature and the Executive, thereby paving way for a potential opportunity to change this customary law position. At the time of undertaking fieldwork³⁴ in Lesotho for this research, the country was discussing the issue of constitutional reforms whose focus was on addressing political and security challenges that had led to instability in the country. The Deputy President of South Africa, Mr Cyril Ramaphosa was leading the process under the auspices of SADC. Whilst political leaders were focusing mainly on political and security sector reforms through the constitutional review process, wider civil society were of the view (and were hopeful) that the process would be comprehensive and all-encompassing enough to address wider constitutional issues in the country.³⁵ The Masupha case and related gender-based discrimination at customary law was one of the issues that the women's human's rights organisations insisted must be addressed through constitutional reform.

It is interesting that subsequent to the decision in Masupha referred to above, the High Court in Botswana in the case of Geoffrey Khwarae vs. Bontle Onalenna Keaikitse and Others³⁶ had the occasion to remark as follows:

“it appears to me, with the greatest of respect, that its was possible for the courts in *Magaya* and *Masupha* to have interpreted the derogatory clause restrictively and in the process affirm that discrimination on the basis of gender or sex is impermissible as it strikes at the heart of the right to human dignity- suggesting in effect that women are inferior to men. The right to dignity is the fundamental reason why there is a right to equality and/or freedom from discrimination. In my view, factoring human dignity in interpreting the derogatory clause is intellectually and jurisprudentially more satisfactory” (Para 187)

³⁴ 11-15 April 2016

³⁵ Interview with Ms. Libakiso Matlo, National Coordinator, Women and Law in Southern Africa Research Trust (Lesotho), 15 April 2016, Maseru, Lesotho

³⁶ MAHGB 000291-14

In essence therefore, whilst the courts in Lesotho were of the view that it was the role of the legislature and the executive to remove the discriminatory customary law provisions from the statute books, the courts in Botswana in the case above were of the view that courts could do more to address the negative effects of discrimination against women at customary law.

In South Africa, constitutional and legislative provisions also play a significant role in reinforcing and restating customary law provisions relating to women's position in traditional leadership. The Constitution of South Africa recognises the institution of traditional leaders. Section 211 (1) of the Constitution provides that:

“The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.”

The provision is important in that the Constitution remains supreme and that the institution of traditional leadership and all the actors therein can only exercise their roles and functions subject to the constitution. Considering that the Constitution of South Africa prohibits discrimination on the grounds of sex and gender³⁷, it therefore means that women's rights are protected at customary law. Any customary law practice, including one related to traditional leadership that discriminates against women can therefore not withstand the constitutional scrutiny.

The Traditional Leadership and Governance Framework Act of 2003 in its preamble clearly affirms that in coming up with the law, the State seeks to assert the place for traditional leaders and the role of the traditional leadership institution in line with the dictates of a democratic dispensation and the provisions of the Constitution. It also seeks to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices. Of interest is the fact that the Act makes strong reference to democratic governance and the need for traditional leadership to be aligned with the Constitution thereby underscoring the important role that the State in this regard places on democratic governance and constitutionalism in law making and in the day to day lives of the citizens. With regards to gender equality and women's rights specifically, the preamble of the Act affirms that the act seeks to

³⁷ *South Africa, Constitution of South Africa, Section 9 (3)*

ensure that “gender equality within the institution of traditional leadership may progressively be advanced” and that the institution of traditional leadership must “promote freedom, human dignity and the achievement of equality and non-sexism.” The Act also refers to “*progressive* advancement of gender equality” an acknowledgment of the fact that as it currently stands, the institution of traditional leadership on the ground and in reality is highly patriarchal and therefore requires reform. However whilst acknowledging that the issue of gender equality in the traditional leadership structures of South Africa may not be immediately achieved, the concept of “progressive realisation” of this right does not imply that the State must drag its feet in seeking as far as practically possible to ensure that this right is enjoyed in the country. In this regard, the Limburg Principles³⁸ state that:

“The obligation ‘to achieve progressively’ the full realization of the rights requires States Parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States Parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.” (Para 21)

The realisation by the State of the gender disparities in traditional leadership is therefore the first step and the progressive realisation of gender equality in these institutions would therefore be realised through commitment and political will by the State to ensure compliance.

The Act uses very progressive language, referring in its body to “kings and queens”³⁹ and “headmen and headwomen”⁴⁰. This is a significant and symbolic acknowledgement of the fact that a traditional leader can be either a man or woman. In the case of Lesotho, the legislation only refers to King and headmen, an approach that is taken by many Southern African countries. New constitutions such as the Constitution of Zimbabwe use neutral words such as “headperson” or “village head” in reference to traditional leaders. Though neutral and in essence implying that both

³⁸ *The Limburg Principles on the Implementation of the International Covenant On Economic, Social And Cultural Rights, 1997 [Un Doc. E/Cn.4/1987/17]*

³⁹ *Sections 9 and 10*

⁴⁰ *Section 11 and 12.*

men and women can be appointed as traditional leaders, such legislative provisions do not convey as strong a message as the ones that explicitly acknowledge women as traditional leaders. This is important especially when realising that the patriarchal nature of traditional leadership has been entrenched over centuries and would therefore take open support for gender equality to achieve meaningful transformation in the institution. The South African legislation therefore goes a long way in achieving this, at least on paper.

The jurisprudence from the courts in South Africa on the issue of women's right to take up traditional leadership since the dawn of democracy has traditionally mirrored the country's constitution. In the celebrated case of *Shilubana vs. Nwamitwa*⁴¹, the Constitutional Court emphasised the position that discrimination against women on the basis of customary law has no place in a constitutional democracy. The case centred on a woman who was appointed as a chief despite her previous disqualification based on her gender. The disqualification had happened when her father died in 1968 and before the democratic dispensation and the promulgation of the new constitution. When another opportunity came for the woman to be appointed a chief in the democratic dispensation, she was duly appointed, much to the chagrin of the first respondent and some groups of community members who supported the chieftainship of Nwamitwa, a man. They argued that the applicant could not be appointed as chief because she was a woman. The Constitutional Court in upholding the right of the applicant to succeed her father as the Chief and not to be discriminated against on the grounds of gender emphasised that customary law deserves respect and that it is a body of law that regulates the lives of millions of South Africans and therefore must be treated accordingly. However, most importantly, the Court ruled that customary law is subject to the dictates of the Constitution (Para 43) and stated thus:

“It must be held that they [the authorities] have the authority to act on constitutional considerations in fulfilling their role in matters of traditional leadership. Their actions, reflected in the appointment of Ms Shilubana, accordingly represent a development of customary law” (Para 75).

⁴¹ CCT 03/07 [2008] ZACC 9

Despite the progressive South African jurisprudence on ending gender-based discrimination in traditional leadership, the situation on the ground remains fluid, with women continuing to face discrimination and resistance when it comes to traditional leadership. On 2 September 2016, the High Court in Venda interdicted the coronation of the Vhavenda King, one Tony Mphephu after a legal challenge to his kingship based on the fact that the late King's daughter had been sidelined in the succession to the throne on the basis that she was female.⁴²

The sidelining of the daughter was despite the fact that the courts have already ruled on the issue and stated that daughters can succeed their fathers as traditional leaders. The sidelining was also despite the fact that the constitution and the relevant legislation address the issue clearly and adequately. The changes that are being seen at jurisprudential and legislative levels therefore need to be complemented by education to change attitudes and patriarchal mindsets that are entrenched within the generality of the public. The role of civil society, the legal profession, human rights organisations, research institutes and academic institutions, is particularly important in this regard. For example the Traditional Courts Bill (TCB) was introduced in 2008 and immediately faced resistance from civil society and women's rights organisations for undermining the constitution, including the rights of women, who were given no platform to participate in the court system except as parties to a case or as witnesses. The Bill was one of the most controversial pieces of legislation⁴³ to be introduced in South Africa and also one of the bills to face the most resistance from civil society.⁴⁴ The vibrancy of civil society as well as an engaged Parliament helped in bringing to the fore the discriminatory aspects of the bill and the fact that customary law and traditional leadership could not be used as an excuse to infringe on the rights of women in the country.

In Botswana, the patriarchal nature of the institution of traditional leadership is also being slowly challenged. In 2003, Mosadi Seboko was installed as the first female paramount chief in the history of Botswana. This was despite resistance from family

⁴² See <http://allafrica.com/stories/201609051656.html>

⁴³ See *Daily Maverick*, 16 October 2016 "Traditional Courts Bill: Rural people won't give away their rights to seal pre-election deals"

⁴⁴ Telephone Interview with Ms. Phephelaphi Dube, Director, Centre for Constitutional Rights on 18 July 2016

members, who insisted that succession to the throne should be based on patriarchy. Although she was the firstborn child, after the death of her father, the Chief of the BaLete in 1966, the chieftainship went to her uncle, then to her younger brother in 1996. When the younger brother died in 2001, family members put forward the name of a cousin to succeed as the chief. However Mosadi Seboko fought this arrangement this time around, and with the support of women's rights advocates in Botswana, succeeded to the throne. Earlier in 2000, Rebecca Banika had been installed as the first Chief (but not paramount chief) in the country. The developments were significant in that even though the Constitution still subordinates itself to customary law, society in Botswana is showing signs of change and often getting ahead of legal provisions in accepting women as traditional leaders. In recognising the fact that society can change from within, Matemba (2005) argues that:

“It is perhaps to say that today in Botswana traditional norms and attitudes are fast changing. Because *bogosi*⁴⁵ is an institution that is made up of the very people accepting these changes, it is inevitable that while the core elements of traditional culture are preserved, attitudes about the leadership of *bogosi* are becoming more liberal. The changing attitudes about tradition should also be seen in light of how modernity has impacted generally on the status of women” (Matemba, 2005: 4)

As such, even though the law and constitutional provisions play an important role in the progressive interpretation of customary law and its application, societal changes and attitudes are equally important. This is because often it is this change of attitude on the ground that determines the acceptability of any changes and ultimately the level of implementation on the ground. For example, in contrast to the changing attitudes in Botswana in relation to female traditional leaders, the generality of the citizenry in Lesotho is of the view that the country is not ready for female traditional leaders.⁴⁶

⁴⁵ *SeTswana* term for chieftainship

⁴⁶ *The Chief Justice of Lesotho* however had a different view. *Herself the daughter of a chief and granddaughter of a principal chief, she insisted that there was no basis for denying women the right to succeed as traditional leaders. She argued that in many instances, people argue about the logistical challenges of a woman taking up a position as a traditional leader before they think about the attendant human rights issues. She stated that one argument that is often advanced is that the woman will get married and will therefore leave the area where she is a traditional leader to join her husband's family. But she argued that in today's Lesotho, even male chiefs are not always staying with their communities, as many of them are based in urban areas.*

The biggest bone of contention is in relation to the position of the King, which many believe must remain steeped in patriarchal succession lines.⁴⁷ This view confirms the findings of a survey by Afrobarometer, which concluded that:

“Even though three-fourths of women say that women should have the same chance as men of being elected to political office, a majority still support the law that allows only sons to succeed to chieftaincy in Lesotho”⁴⁸

Legislative changes under such circumstances will therefore do only so much but will not be able, at least in the short term to address attitudes and ensure implementation. The process of change would inevitably need to start with mindsets and the creation of attitudes that support the equality of women in all aspects of life.

2.4 Access to Customary Land

Access to land by women remains a major challenge generally in all the three research countries. Access to customary land is an even bigger challenge when compared to land held under title. This is because customary land is regarded as belonging to families and communities and not individuals and as such access to such land is based on one's position, standing and membership within that family and community. Women are often viewed as transient both within their natal families and if they get married within their husband's families. In their natal families, the perception of transiency results from the view that the girl child will get married and go to her husband's family, which will be expected to then look after her and provide her with the requisite economic resources, including land. Yet after getting married, the husband's family does not view a woman as part of the family for certain purposes, including access to and allocation of land in her own right. If she needs land, she is expected to access it through her husband or some male authority within the family. The result has been a push from post to pillar as women have failed to secure recognizable rights to land under customary law, both within their natal

⁴⁷ In an interview with a senior female lawyer (who requested anonymity) in Lesotho on 11 April 2016, she indicated that many Basotho, including herself were not ready for a woman to take over as the Queen in the Kingdom. She also reported that when the current King Letsie III had two daughters in succession many Basotho were anxious and the birth of the King's third child, a son in 2007 brought the much-needed relief.

⁴⁸ See <http://afrobarometer.org/press/basotho-support-womens-political-leadership-oppose-allowing-traditional-leadership-role>

families and within their husbands' families. It must however be realised that this position is at variance with customary law as practised by Africans in pre-colonial states, where women were able to access land in their own right both within their natal families and within their married families. The colonial state's perception of women as perpetual minors at customary law is what led to the erroneous view that women could therefore not hold rights to land in their own right. Kalabamu in this regard makes reference to research which shows that in Southern Africa, women were regarded as children throughout their lives. She notes that before marriage, women were the children of their fathers, in marriage, they were the children of their husbands and upon the death of their husbands, they became the children of their sons or some other heirs to their husband's name and property (Kalabamu, 2006:237.) This state of affairs meant that women could not access or control land in their own right but could only do so through some male family member. Only male siblings had the right to be allocated land from their father's holdings (Ibid: 239). Today, women in the three research countries continue to experience discrimination in access to customary land as will be detailed below.

The *Mmusi* case in Botswana, has shown that although there have been improvements in women's land rights over the years, including at customary law, such rights are highly contested with many disputes ending up in courts. Improvements that have been seen in Botswana include the Tribal Land Act, which took the powers of land allocation from the traditional leaders and vested such power in the Land Boards.⁴⁹ A key issue to note is that although the land is in the hands of the Land Boards, the land still has to be used in line with the dictates of customary law. The reality however is that on the ground, women still find themselves affected by customary law and its dictates in relation to access to land. Law reform and the creation of policies that recognise the rights of women in this area may therefore often run ahead of the lived realities of women. The result is that whilst the policy and legislative reforms may provide a perception of progress, the reality on the ground for women is often different. Richardson in this regard notes that:

“Official efforts to remedy discriminatory inheritance laws have typically taken place at the statutory level. These statutory changes generally have no

⁴⁹ Section 13

practical effect on the great majority of the population, who are governed, in family and personal matters, by customary law...To develop systems of inheritance that truly respect women's rights, laws must be written and implemented in ways that recognize and respect the cultural traditions in which these systems are based" (Richardson, 2004:1)

Whilst the above was in reference to customary laws of inheritance, the same can be said in relation to many aspects of customary law reform. As a result, often the changes that are made at a statutory and policy level are resisted by communities with women continuing to suffer as a result. Participatory and consultative law reform processes that recognise the evolving nature of customary law whilst being sensitive to the grounded realities of the affected communities can play an important role in ensuring the creation of practical, implementable, enduring and more acceptable laws and policies.

The long running Mmusi case brought these challenges to the fore, with women's rights to customary land being the locus of the battle. The case has been celebrated as one of the most important to come out of Southern Africa in recent years with regards to the protection of women's land rights.

The case involved a dispute over the inheritance of family land between four sisters (a fifth sister refused to participate in the law suit) and their nephew, Molefi S. Ramantele (a son to their half-brother.) In 2007, the Lower Customary Court ruled in the application in favour of Molefi, who sought to have the first applicant in the High Court case (Edith M. Mmusi who was his father's half-sister) evicted from her father's house. Edith Mmusi took the matter on appeal to the Higher Customary Court which ruled that the family home belonged to all the children of the deceased and that the family must sit down to determine who amongst the children would "look after" the family home on behalf of all the siblings. Unhappy with the decision that the family should determine the person to occupy the house, Molefi took the matter before the Customary Court of Appeal (CCA), which ruled against Edith Mmusi and stated that in the Sengwaketse culture and traditions:

"if the inheritance is distributed, the family home is given to the last born son" (MAHLB-000836-10: Para 9).

Mmusi took the matter on review to the High Court of Botswana where upon her success at that level, Ramantele appealed to the Court of Appeal and lost. The highest courts in the country therefore ruled in favour of women's rights to inherit land at customary law.

According to Edith Mmusi⁵⁰, she had used part of her pension to build a house on her father's piece of land and for a long time had stayed on that property without any disturbances. She started staying at the property after her retirement. She had worked as a teacher and subsequently as a matron/ boarding mistress at a teacher's training college. It was only when she went to the Ngwaketse Land Board to request a letter confirming her ownership of the property that problems started. The letter of confirmation of ownership was required by the Botswana Power Corporation (BPC)⁵¹ before they could connect electricity to the property. To get this letter, she required cooperation and confirmation from other family members so that the Land Board could provide her with the letter. It was upon approaching the other family members for this confirmation that her nephew Molefi Ramantele opposed this process and claimed that he was in fact the rightful owner of the property. When the family failed to agree, the matter was taken before the courts. The matter took more than six years to be finalized, from the time it was lodged with the Lower Customary Court to the time it was finalized by the Court of Appeal (2007-2013). The High Court and Court of Appeal in ruling in favour of Edith Mmusi in essence disagreed with the dictates of a customary law provision, which stated that upon the death of parents, the family homestead (and attendant land) would be inherited by the youngest son of the deceased. The High Court in its ruling stated that:

“The Ngwaketse Customary law rule that provides that only the last born son is qualified as intestate heir to the exclusion of his female siblings is *ultra vires* Section 3 of the Constitution of Botswana, in that it violates the applicants' rights to equal protection of the law”

whilst the Court of Appeal noted that there was no such rule in the Ngwaketse Customary Law. It stated that:

⁵⁰ Interview with Edith Mmusi at her home in the village of Kanye on 10 February 2016.

⁵¹ The state electricity distribution entity

“It is declared that the Ngwaketse customary law of inheritance does not prohibit the female or elder children from inheriting as intestate heirs to their deceased parents’ family homestead.”

Both the High Court and the Court of Appeal sought to protect women’s rights to inheritance and access to customary law though using different arguments. The High Court based its ruling on equality and non-discrimination principles, whilst the Court of Appeal based its ruling on the fact that there was misapplication of customary law as the rule used to deny a girl child the right to inherit family land at customary law was non-existent. Both positions provide important bases to argue for the protection of women’s rights. On one hand, principles of equality and non-discrimination play an important role in protecting women’s rights because of their rooting in international law, constitutional provisions and internationally accepted norms of all human beings born equal in rights and dignity, including at customary law. The Court of Appeal’s position on the other hand was equally important in that often, non-existent customary law provisions are invoked to protect male privilege and the exclusion of women. As with the approach taken by the colonial governments in Africa to “invent” customary law, such strategies are often employed by males within families and communities to ensure their access to resources such as land at the expense of women. It therefore becomes important for courts, lawyers and other actors to scrutinize and understand customary law to ensure that it is not used to improperly disadvantage women.

The Mmusi case in Botswana was preceded by the 2007 case of *Masusu vs. Masusu*, CAHLB-000001-07. In that case the High Court rejected the Customary Court of Appeal’s (CCA) decision denying a woman the matrimonial home because it was located in the husband’s ward (village). The CCA also denied the woman the home on the basis that she had failed to remain resolute in the matrimonial home despite her husband’s philandering, which the CCA seemed to condone as part of Tswana culture. The CCA had reasoned thus:

“According to the entire Tswana culture, when a woman gets married, she is married into the man’s clan; likewise, if a man divorces a woman, that woman is effectively divorced by the man’s clan. Similarly, if a woman divorces a man, she is in essence divorcing the man’s clan. Even if a couple has built its homestead outside the ward of the man’s clan, to all intents and purposes, that

homestead is an integral part of the man's ward...Even if Ivy were to own the homestead, that would be dangerous to her for, as a woman, she was going to lure another man into that homestead. That would certainly prompt Michael to intervene regardless of whatever consequences...In terms of Tswana culture, if a woman divorces, she quits the ward of her husband. How come that while Ivy divorces Michael, she should be given a house which belongs to the Masusu family?...Who among the Masusus would visit her since she has divorced them?... According to Tswana tradition, if a husband chooses to run around with women and stay away from his marital home, the wife resolutely remains in her marital home with the children; since in this case it is Ivy who divorces, what should obtain”

The High Court, per Dow J rejected this reasoning stating in particular that the Constitution remains supreme and any decision of the courts regardless of law used must conform with the dictates of the Constitution and principles of justice, fairness and equality before the law. The Court also made extensive reference to the 1991 seminal case of *Attorney General vs. Dow*⁵² in which the Botswana Court of Appeal impugned the Citizenship Act because amongst other things, the law's provisions discriminated against women on the grounds of gender. The Courts in Botswana have therefore long held a position that recognises the right of women to be treated on the basis of equality with men and not to be discriminated against regardless of the applicable law.

In Lesotho, the Land Act, No.8 of 2010 played an important role in harmonizing land access and ownership regimes in the country. The Act was especially instrumental in subordinating customary land rights to the Act and emphasizing that where customary law is inconsistent with the provisions of the Act, then the Act would prevail. The new Act did not abolish customary practices in relation to land management, access and utilisation but sought to ensure that such customary practices are in tandem with the dictates of the new Act. The Act also provides for presumption of joint title to land where the parties are married whether under customary, civil or any other law. The recognition of joint title to land in relation to customary marriages helps in ensuring that women are not disadvantaged in land ownership on the basis of customary law. Before the promulgation of the 2010 Act, land was vested in the King and allocation of land was done by traditional leaders, using customary law procedures. The new Act vests land in the “Basotho Nation” with the King holding

⁵² 1992 BLR 119 (CA)

the land in trust for the nation. This has helped in opening up the land allocation and ownership system and allowed the customary approach to land allocation to have a subordinate status. Not only has this assisted in giving commercial value to land, thereby increasing agricultural productivity, it has also allowed women and other people that were otherwise disadvantaged by a customary law land allocation system to access and benefit from the country's land on the basis of equality.

According to the Lesotho Law Reform Commission⁵³, the new Land Act has met with support and resistance in equal measure from the people of Lesotho. Rural communities and traditional leaders have been at the forefront in resisting the Act. Their concerns are that the liberalization of the land sector will lead to the rich and multinational corporations grabbing land from the poor. Traditional leaders are also concerned that the land allocation powers have been given to “an allocating authority” which only needs to “consult” the chief in the land allocation process.⁵⁴

The communities' and traditional leaders' fears of land grabs are genuine and it is important for the State to ensure that in the process of opening up land to business, the customary land rights of communities are not infringed upon. At the same time, the new allocation procedure, which is more inclusive and transparent, helps in ensuring improved access to land for the disadvantaged, including women.

In South Africa, the issue of customary land rights has been a challenge especially in relation to the legislation governing the issue post 1994. The focus of the State has been on ensuring that communities that were affected by unfair apartheid land dispossessions get back their land in the new constitutional dispensation. To this end, the Communal Land Rights Act was passed in 2004 with the aim of securing the tenure of the indigenous people of South Africa following their apartheid era land dispossessions. The Act was however declared unconstitutional by the courts in 2010, mainly because the correct procedure was not followed in the enactment of the law. Similarly the Restitution of Land Rights Amendment Act of 2014 was struck down by the Constitutional Court in 2016 after the Court concluded that the Amendment Act

⁵³ *Interview with Nnoko Masopha, Director of Research, Lesotho Law Reform Commission, on 14 April 2016 in Maseru, Lesotho.*

⁵⁴ *Section 14, Land Act, No. 8, 2010*

was passed without proper consultations. The result has been a programme of land restitution that has been implemented in fits and starts, much to the disadvantage of the potential beneficiaries. In addition, the general “restitution” approach to the restoration of land rights has meant that women have been disadvantaged. This is because:

“Since restitution is about restoring former rights, it is men – as former owners – who are entitled to make claims and likely to be key beneficiaries.” (Meer, Undated: 11)

This is normally the approach on the ground, despite the existence of a legal, policy and Constitutional framework that recognises the rights of women to be treated on the basis of equality with men.⁵⁵ The South African Green Paper on Land Reform (2011) for example clearly states that land allocation and use must be democratic and equitable, across class, gender and race. The application of the formal gender equality principles are however met with gendered realities on the ground and lack of substantive equality. Women are therefore not normally regarded as equal beneficiaries under the land restitution programme as the land is viewed as ancestral land, which must therefore be accessed along patrilineal lines.

2.5 Marriage

There is a general perception that women that are affected, impacted on or whose lives are governed by customary law are less educated, poor and live in rural areas. Whilst in the majority of cases, such women are often unable to claim their rights when affected by customary law due to their situations, the reality is that most women in Southern Africa are affected by customary law in one way or another regardless of class, location or level of education. Practices such as the payment of lobola and attendant ceremonies/rituals upon marriage and divorce are a phenomenon that is present in most African/black families in the region regardless of level of education, position in society or whether they stay in urban or rural areas. In Botswana, lawyers interviewed indicated that they deal with customary law cases involving highly educated women, with some of them in the middle and upper classes of society.⁵⁶ The

⁵⁵ Skype Interview with Sifiso Dube, Alliance Manager, GenderLinks on 21 July 2016

⁵⁶ Interviews with lawyers N.M on 11 February 2016, T.R on 11 February 2016 and B.M on 25 February 2016.

difference is that often the educated women have the resources and the knowledge to use in defending their rights if such are infringed upon both under customary law or common law.

Many of the women are also in unregistered customary law marriages or unions despite their high levels of education. This is because they believe that the payment of lobola and the attendant ceremonies are adequate in order for them to be recognised as married to their spouses. Whilst this may be true and for as long as there are no problems in the marriage, this research has shown that often women do not pay attention to the details of these ceremonies, focusing mainly on the payment of lobola. They only realise when there are challenges in the marriage that they were not properly married even at customary law because certain procedures or ceremonies were not performed. The case study below illustrates one such situation.⁵⁷

Box 1: Customary law processes and their impact on the validity of a customary marriage

The case was still pending before the courts at the time of the interview on 25 February 2016. The dispute related to a deceased estate. The man had been married to three women during his lifetime and at the time of his death was living with his third wife. The second wife came back after the death of the husband to claim part of the estate, stating that she was never divorced because the correct procedures for divorce at customary law were never followed. A son from the first marriage came to claim his rights as the heir considering that he was the eldest son. The elders in the family of the deceased man claimed that they did not recognise the 3rd wife who was staying with the deceased at the time of his death because other than the payment of lobola, there was no *patlo* ceremony for her and as such the marriage was invalid. The *patlo* ceremony involves the “delivery” of the woman to her husband’s family by her own family and is accompanied by feasting and partying. Often this ceremony has to take place in the man’s rural village, although in modern day Botswana it can also take place in an urban home. The matter had now been placed before the courts for a determination on whether or not there was a valid customary law marriage in the absence of the *patlo* ceremony. The lawyer’s concern was that often expert evidence in such cases is required from the elders of the family and since they had already declared that the marriage was invalid, they were likely to present this same position before the courts and the woman was going to lose out as a result.

This dispute shows that in the absence of a subsequent civil law marriage, women must ensure that all the customary law processes for marriage and divorce are followed in order for their legal positions to be clear and unambiguous. In addition, there is need to realise that customary law differs from place to place and tribe to tribe

⁵⁷ As narrated by a female legal practitioner in Botswana in relation to a case that she was handling. She requested to remain anonymous in order to protect the privacy of her client.

in Botswana. There is therefore need for women to be conversant with the customary law of the tribe that they will be marrying into in addition to their own, if different, in order to be certain about their position.

In Lesotho, similar challenges have been experienced by women. In order for a customary law marriage to be valid, certain procedures and rituals must be followed. In terms of Section 34 (1) (a) Part II of the Laws of Lerotoli⁵⁸, the basic requirements include but are not limited to:

- a) Agreement between the parties intending to marry;
- b) Agreement between the parents of the parties or between those who stand in *loco parentis* to the parties to the marriage and as to the amount of *bohali*; and
- c) Payment of part or all of the *bohali*.⁵⁹

In addition to the above, there are various other procedures and rituals that have to be followed and which differ from place to place and from family to family. These include the slaughter of a goat and the ritualistic consumption of the meat as well as the renaming of the new bride by the husband's family.⁶⁰ In addition, the agreement between the two families must be reduced to writing by the two families, and then must be stamped by the Chief as authentication. Experiences in Lesotho however show that in many instances, families reduce the agreement to writing but never proceed to have the agreement signed by the Chief.⁶¹ This has often seen many women getting surprised many years later when they learn that their customary law marriages were invalid. The courts have also been reluctant to confirm the existence of customary law marriages regardless of the period of time that the parties would have stayed together unless the requisite procedures that confer validity have been followed. In the case of *Mokhothu vs. Motloha & 3 Ors*,⁶² the court stated:

“He invited the Court to view the length of the stay together by these parties as strengthening the existence of marriage between them. But such a view would, if entertained, undermine the fundamental principle with regard to such matters that “not cohabitation but consent constitutes marriage”

⁵⁸ Quoted in the case of *Moromoli vs. Ramokhitli and Ors*, High Court of Lesotho CIV/APN/431/2011

⁵⁹ *Sesotho for Bride price*

⁶⁰ Interview with Ms. Nkoya Thabane, a lawyer in Maseru on 15 April 2016.

⁶¹ Interview with Ms. Nkoya Thabane

⁶² High Court of Lesotho, CIV/APN/222/93

Effectively therefore, a relationship would be viewed as cohabitation as long as the customary law dictates for a valid marriage have not been followed. This is despite the length of time that the parties would have stayed together. Education about customary law marriages, what it entails and the rights and entitlements of the parties therein therefore remains important. In Lesotho, the Women and Law in Southern Africa Research Trust (WLSA) and the Federation for Women Lawyers (FIDA) have been playing an important role in providing this much needed education. In Botswana, an organisation that seeks to promote the rights of widows has been providing information. The organisation indicated that they provide such information so that when their husbands die and they become widows, women should not be met with unpleasant surprises. They would be having enough challenges to deal with anyway as widows.⁶³ During the field work, it also came out clearly that research plays an important role in ascertaining customary law and providing the empirical evidence that is required in order to determine and advocate for the removal of discriminatory customary law practices. WLSA and the Law Development Commission (LDC) in Lesotho provided the much needed research in this area. Subsequent advocacy efforts using their research had seen the promulgation of laws such as the Abolition of Marital Power Act (in 2006) and the Children's Protection and Welfare Act (2011)

Justice Dingake however emphasised that whilst civil society organisations are doing tremendous work in educating citizens about their rights, the primary responsibility to provide such a service lies with the State. He indicated that a pro-rights government would provide such information through various forms and media such as simplified pamphlets, radio and television programmes as well as public gatherings/meetings. He indicated that despite their good intentions, programmes that are led by Non Governmental Organisations (NGOs) and other Non State Actors (NSA) could only do so much because of lack of resources and attendant sustainability challenges. Other than providing members of the public with the requisite knowledge and information, such initiatives by Government will also help in providing certainty on the Government's position regarding the issues of women's rights, gender equality, customary law practices and other issues and this will help in guiding decision

⁶³ *Interview with a widows' organisation in Botswana on 9 February 2016*

making structures, including the courts⁶⁴ when they make their decisions. Legal Aid systems and Law Reform Commissions play an important role in providing free legal services and guiding the country in law reform respectively.

⁶⁴ *Without necessarily constraining the courts' independence*

Part Three: The Actors and Structures: A Role for Everyone

3.1 Introduction

The issue of customary law and women's rights is complex, often involving various actors and structures as well as varying practices and applications at different levels, thereby creating a state of pluralism⁶⁵. As such it takes a variety of actors to ensure that customary law is practiced in a manner that does not infringe on the rights of women or any other individuals in society. In many instances, the positions of the various actors are different and in conflict and it therefore takes considerable effort to harmonise views and reach common ground. During the field research, it became clear that the application of customary law can be a source of conflict, with some actors questioning its relevance, whilst others support its application without reservation. This section will provide an analysis of the various actors and structures that were engaged with during field research and those identified during desk research, their position on the issue of customary law and its implications on women's rights and how the practice can be streamlined to address the rights of women along the way. The section will also explain how individually held views on the subject have the potential to change policy on the ground in both positive and negative ways.

3.2 Traditional Leaders

Of the three research countries, Lesotho is the country that still practices deep customary practices and therefore has extremely strong traditional leadership structures in place. The country has a King as the Head of State and Government and the King's ascendancy to the throne is through succession and not an election. The Senate, which is the Upper House of Lesotho's bicameral Parliament is made up of 22 hereditary Principal Chiefs and 11 other Senators appointed by the King on the advice of the Counsel of State. Section 55 of the Constitution of Lesotho in this regard states that:

“The Senate shall consist of the twenty-two Principal Chiefs and eleven other Senators nominated in that behalf by the King acting in accordance with the advice of the Council of State”

⁶⁵ Griffiths (1986) defines Legal Pluralism as “the presence in a social field of more than one legal order”

The Senate of Lesotho therefore epitomises patriarchy and is an institution that plays an important role in the preservation of cultural practices, some of which may not be in consonance with widely accepted human rights standards and norms. The patriarchal nature of the Senate arises from the fact that the majority of members are Principal Chiefs and therefore mainly men⁶⁶ given that the law in Lesotho only allows males to succeed as Chiefs in the country. Yet the Senate plays an important role in the country's legislative processes as the Upper House of Parliament and ultimately a key role on whether or not a law will see the light of day. During fieldwork in Lesotho, respondents reported that when the *Masupha* case was in court, most members of the Senate were against the ascendancy of girls to chieftainship. There was however one Chief who was an exception and publicly proclaimed his support for Senate Masupha to take over as chief. His name was Chief Khoabane L.K Theko, a Senator, Chief Whip in Senate and Principal Chief of Thaba-Bosiu. The researcher had the opportunity to interview the Chief and his views were clearly in support of women's rights and the fact that customary law should not be used as an excuse for discriminating against women. He gave narratives of how women in his family and community were at the forefront of leading families, often without support from men and he therefore wondered why such leadership could not be fully embraced when it comes to chieftainship or any other high level position. Most of the women's rights and human rights activists as well as lawyers that were interviewed portrayed Chief Khoabane Theko as a progressive traditional leader and indicated that with more leaders like him, the situation of women in Lesotho would be different and better.

An interaction with a different traditional leader however evinced a different view and strong support for customary law and an insistence that customary law doesn't necessarily impact on the rights of women.⁶⁷ In relation to the position taken by the Courts in the *Masupha* Case, the Chief had this to say:

⁶⁶ In an interview with Justice Sekoane Sekoane, a High Court Judge, he indicated that some of the Principal Chiefs/Senators are female. Gender Links explains that "These women are acting for either husbands (who for different reasons are not exercising chieftaincy functions) or their minor sons." (See *Lesotho Women in Politics: Parliament and Cabinet*: Available at: genderlinks.org.za/wp.../13419_womeninpoliticsfactsheetlesotho.doc)

⁶⁷ Interview with Chief Borenahabokhethe Sekonyela in Maseru, Lesotho on 11 April 2016. Chief Sekonyela is a lawyer by training, a former lecturer in law at the National University of Lesotho and the time of the meeting was the Principal Secretary in the Ministry of Home Affairs in Lesotho and a Commissioner in the Law Development Commission.

“Lesotho is deep into customs and has not been influenced by the Western system. The judicial system is careful not to change customary law by the stroke of a pen. The courts should not be quick to change practices that society strongly feels about. There are serious social, political and economic ramifications if such changes are made without undertaking adequate research to understand people’s views and attitudes.”

Despite his general reluctance to admit that customary law impacts on women’s rights, the Chief made a strong case for research, arguing that there has been limited research in the country to try and understand customary law, its implications on women and whether or not there was any real need for changes to existing customary law practices. He also argued that in many instances, the problem was not with customary law *per se*, but with the wrong interpretation that was given to customary law, leading to erroneous conclusions that customary law discriminated against women. He highlighted as an example the fact that initiation schools were often viewed negatively and as out-dated but emphasised that it was in fact the only form of education that allowed a boy or a girl to graduate into manhood or womanhood with values such as respect, the need for self-sufficiency and respect for sustainable development. The initiation school, the Chief argued taught boys to respect girls and women. On alternative years as part of the initiation process, the different genders were put in charge of communities. This entails that the gender in charge during a particular year is responsible for discipline in the community. As such if it is women’s year, they would be responsible for disciplining boys and they can whip them for any misdemeanours and the boys have to respect that. The Chief also highlighted that in terms of customary law, it is a taboo for a man to abuse a woman, especially physically and when such abuses happen, it is the responsibility of the other men in the community to discipline the abusive man. He said:

“If you are man and you abuse your wife, in terms of our custom, the other men in the community will take you to the mountain and discipline you⁶⁸”

He also argued that often it is the uninitiated men that are abusive and assault their wives because they have not gone through the educative processes of the initiation

⁶⁸ *The discipline involves giving advice on respecting women/wives and physically assaulting the offender.*

schools. In the final analysis, Chief Sekonyela concluded that various actors must put their heads together and undertake in-depth studies and researches on customary law to ensure that what they say about customary law is informed by empirical evidence. He insisted that negative views about customary law are not informed by facts on the ground.

The two traditional leaders above had different views of customary law with one acknowledging that it is discriminatory against women whilst the other insisted that it is simply misunderstood. An acknowledgement of the fact that customary law is discriminatory against women is however a starting point in ensuring that the challenges that women face in reality when it comes to its application are addressed. A view that insists that customary law is good but misunderstood on the other hand fails to appreciate that the lived reality is that women are discriminated against on the basis of customary law on a daily basis. The fact that the discrimination is caused by misinterpretation or misapplication does not remove the reality of the discrimination. As such whilst research is important in order to ascertain customary law, its interpretation and how it should be applied, it is also important to address the challenges that women face in reality with regards to the version of customary law that is applied on a day-to-day basis. With traditional leaders leading the way, the protection of women's rights at customary law can become entrenched as a result.

3.3 The Legal Profession

Lawyers are often viewed as the panacea to human rights violations faced by citizens in any country. Similarly when women are discriminated against on the basis of customary law, whenever possible, the first thought is to find a lawyer who can address the problem. As a result lawyers have played an important role in addressing some of these challenges, particularly through litigation. The researcher spoke to lawyers that were involved in both the *Mmusi*⁶⁹ case in Botswana and the *Masupha*⁷⁰ case in Lesotho, who highlighted the roles that they played as lawyers for the two women who challenged customary law and its discriminatory implications in Botswana and Lesotho respectively. According to the two lawyers, lack of resources often inhibits many women from taking matters before the courts because in many

⁶⁹ *Mr. Tshiamo Rantao*

⁷⁰ *Mrs. Itumeleng Shale*

cases they cannot afford the legal fees. As a result lawyers who take up such cases do so on a *pro bono* basis and there aren't many that are prepared to do so. In the cases of both *Mmusi* and *Masupha* however, other well-wishers⁷¹ stepped in to assist with basic legal costs. Lawyers that are willing to offer their services for free for the greater public good and in the interest of protecting and promoting human rights are therefore an important cog in the determination of women's rights at customary law by the courts. Without the litigation and the pronouncements by the courts, the positions of women in various aspects of customary law often remain uncertain with women being the losers at the end of the day. According to Mr Tshiamo Rantao:

“I receive a number of such cases, and it is difficult for me to turn away the people on the basis that they cannot pay my fees. I therefore simply take up the cases and hope that I will get a paying client at some point”

The hope therefore is that many lawyers would adopt such an approach, work in the public interest and provide *pro bono* legal services when necessary and in the process protect the rights of many who cannot afford to pay legal fees. The people that receive such services are also often extremely grateful and begin to see the legal profession in a different light.⁷² In many instances lawyers are viewed as self-serving and only interested in the money that comes with the practice of law. This may not be always the case. However the legal profession through the law societies and bar associations must play a more visible role in providing *pro bono* legal services to the needy and deserving members of society. In both Botswana and Lesotho, at the time of the research, there were no structured mechanisms in place to ensure the provision of *pro bono* legal services by lawyers and those doing so were doing it out of their own personal persuasions and a drive to assist society. In South Africa, lawyers are required to provide a minimum of 24 hours of free legal services per annum to

⁷¹ According to the lawyers, in both cases, the Southern Africa Litigation Centre (SALC) provided both technical and financial assistance and in the *Mmusi* case, the Botswana Teachers' Union assisted with the costs when the case was in the High Court

⁷² When the researcher interviewed Mrs. Edith Mmusi, she indicated that she would one day invite her lawyer Mr. Rantao and representatives of the Southern African Litigation Centre to her home in Kanye and slaughter a goat to show her gratitude and celebrate her victory.

deserving members of the public. Such members of the public are required to undergo a means test in order to qualify for free legal services.⁷³

A challenge that was identified by some of the lawyers however was that customary law is not an easy area of practice and that as a result, most of the lawyers are not conversant with it.⁷⁴ They are therefore often reluctant to take up customary law cases because they do not have the requisite competency to handle such cases in courts of law. According to a professor of law at the University of Pretoria in South Africa⁷⁵, this is a common challenge and it starts from law school. He stated that:

“There is inadequate knowledge and skills amongst lawyers in interpreting customary law. As a result, it scares lawyers to practise in this area of law. The law school is the main obstacle to the development of customary law because it is a subject that is taught at a very basic level and in many cases in reference to other law subjects. What are taught are aspects of customary law in relation to Family Law, Land Law, etc. If its taught for three weeks in a year, that’s a lot. The lack of knowledge of customary law amongst the lawyers is then extended to the judges. It is therefore important to strengthen the teaching of customary law at law school as a means of strengthening customary law and its understanding by the legal profession.”

Chief Sekonyela echoed this view. He indicated that during his fifteen years as a law lecturer at the National University of Lesotho, Customary Law was just a one-year course, which was supposed to address all issues relating to customary law. Yet the western laws were given prerogative and more time. He indicated that although the subject was compulsory, its teaching was flimsy and could not have been regarded as equipping the students with a proper understanding of customary law given the little time allocated to the subject. He indicated that as a Customary Law lecturer, he taught the subject with passion because he was properly grounded in the subject, not only from law school but also from his experience at initiation school.

⁷³ Interview with Ms. Lizette Burger, Professional Affairs Manager, Law Society of South Africa in Pretoria on 5 October 2016.

⁷⁴ Interview with Mr Gibson Mabulu, a Gaborone lawyer on 11 February 2016 in Gaborone, Botswana.

⁷⁵ Interview with Professor Michelo Hansungule, Professor of Law at the University of Pretoria on 22 July 2016 in Pretoria, South Africa.

In addition to law schools, the law societies must also play a role in teaching customary law as part of their CPD programmes. This will ensure that lawyers that are interested in the subject but fail to get adequate training at law school are able to improve their skills and understanding of the subject. The Law Society of South Africa (LSSA) through its Legal Education and Development (LEAD) offers courses in Customary Law. The LEAD programme indicates that after going through the four months online Customary Law course:

“Participants will gain understanding of customary law rules (written and unwritten) which have developed from the customs and traditions of communities. Furthermore, participants will learn the extent in which customary law is recognised by the South African Constitution; and the application of customary law by the courts.”⁷⁶

This is an important initiative by the LSSA and helps in ensuring that post law school, lawyers that are interested in pursuing customary law as an area of practice have a facility and opportunity to hone their skills in the subject. At the time of the research, the LLS had no active CPD programme and the LSB had never offered a CPD course on customary law, with their flagship CPD programme being on Trial Advocacy.⁷⁷

3.4 The Traditional/Customary Courts

This research has elaborated the role played by the courts in the research countries in addressing women’s rights at customary law. The courts that have been discussed above however are the higher courts, including the High Court, Constitutional Court and Court of Appeal. It has also been established that the courts have both facilitated and hindered the enjoyment of women’s rights at customary law in the three countries, with some being progressive and others being retrogressive. However in addition to the higher courts, it is also important to analyse the role of the lower courts, and in particular the traditional/customary law courts in addressing women’s rights at customary law.

⁷⁶ www.lssalead.org.za/upload/CustomaryLaw2016b.docx

⁷⁷ Telephone Interview with K Phele, LSB Legal Officer on 4 October 2016.

In South Africa, it has been argued that:

“Traditional courts are responsible for administering justice in the majority of cases involving the majority of South Africans, who cannot access the formal courts” (Soyapi, 2014:1443)

It is also important to note that in South Africa as in many other SADC countries, including Lesotho and Botswana, the majority of citizens that use traditional or customary courts are rural dwellers, the majority of whom are women. According to Judge Dingake, in relation to Botswana,

“Many women still prefer to use the customary courts and the customary law system because the procedure is simple, it is cheaper when compared to litigating in higher courts and its is also faster when compared to higher courts”⁷⁸

The operations of the courts and the application of customary law have however been known to infringe on the rights of women. In South Africa, opposition to the TCB was partly due to its failure to recognise gender equality and the rights of women to participate in the traditional court system on the basis of equality with men. The Bill was regarded as exacerbating current practices where women in “many traditional courts are not allowed to speak or represent themselves, but have to rely on male relatives to represent them.”⁷⁹ In Lesotho, although the Legal Capacity of Married Persons Act (LCMPA), 2006 removed the minority status of women, “traditional culture still holds strong” (Chwarae Teg, 2015: 5) and men are still regarded as heads of households and therefore entitled to represent their wives and other women within the family in traditional courts and other traditional settings. An interesting observation is that whilst the LCMPA removes minority status of married women at customary law, it does not remove the same minority status from unmarried women at customary law, regardless of their age. As such a woman is only saved from the perpetual minority status at customary law through marriage.

⁷⁸ During an interview held in Gaborone, Botswana on 9 February 2016

⁷⁹ See <http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/>

In Botswana customary courts are more receptive of women. In her grounded research on the *Kgotla*⁸⁰ system in Botswana, Moumakwa concluded that:

“However, although there might be insignificant number of women sitting in the *Kgotla* as leaders, most women use *Kgotla* for conflict settlements. They do attend *Kgotla* meetings in large numbers. Most women in the community, regardless of their age, do report cases at the *Kgotla* while few men do so” (Moumakwa, 2010:50)

As such women in Botswana rely on traditional leaders, that is the Chief and Headman (who preside in the *kgotlana*⁸¹) in the resolution of their disputes. The challenge however remains in that fewer women are leaders in the *kgotla* and *kgotlana* but according to Moumakwa, even this is changing. In her field research, she noted that a woman was participating in the *kgotla* discussions as a leader and that:

“This would not have been the case in the olden days. This arrangement is at variance with the view that in the traditional Setswana culture women were regarded as socially inferior to men, treated as minors and under customary law “women were subject to guardianship throughout their entire life which could be their fathers or their spouses” (Ibid, Page 50)

The trend in Botswana is therefore clear to see. From the highest courts in the land, to the customary law courts and the attendant practices, there is increased recognition of the rights of women, and a move away from the patriarchal practices that discriminated against women and regarded them as perpetual minors. This is a classic example of “living” customary law at play, and recognition of the fact that customary law is not static but is informed by changing developments and attitudes of the people on the ground. Increased participation by women in traditional/customary courts is therefore important in ensuring that issues affecting women are addressed at that level and that their rights are protected and promoted.

3.5 The Family

The *Mmusi* case in Botswana demonstrated that the family plays an important role in whether women enjoy their rights at customary law or are discriminated against on that basis. This is because in many instances, the disputes that arise at customary law

⁸⁰ Meeting place for the tribe in Botswana

⁸¹ Lower level meeting place, normally at ward level.

arise within the family context. A family that recognises that men and women, boys and girls are equal before the law and in their dealings as a family is more likely to respect the rights of all within both the nucleus and the extended family. Progressive men in particular are a key element in dislodging discriminatory customary practices and embracing those that advance the rights of women and all other people within a family. In the *Mmusi* case, Edith Mmusi's nephew, one Silabo was instrumental in ensuring that the case got the attention it deserved. He told the researcher in an interview in Kanye that when the matter first went to the *kgotla* and her aunt, Edith Mmusi lost the case, everyone believed that it would end there because she was an elderly woman and did not have the resources to pursue the matter with the higher courts in the country. He also indicated that most male members of the extended family were against the stance taken by Edith Mmusi to challenge what they believed was a long held tradition which allowed the last born male child to inherit the family home after the death of the parents. According to Silabo however, "it was not a male or female issue, it was about what is fair and just." With this approach, he broke ranks with other men in the family and decided to support Edith Mmusi, taking her to Gaborone to look for lawyers that would take up the matter. As the matter was presented in the higher courts and with the help of the lawyer, Mr Rantao, it also attracted national and international attention because of its precedent setting potential on the inheritance rights of women at customary law. Resources were made available from both national and international sources who believed the matter would help in defining the inheritance rights of women in Botswana at customary law. The matter took six years to be finalised from the time it was heard at the lower customary court to the time it was finalised in the Court of Appeal. Silabo supported Edith Mmusi throughout the way. She was already in the mid 70s when the matter was first heard and therefore needed the kind of support that was offered by her young nephew.

The Judge who presided over the *Mmusi* case⁸² at the High Court level was to be confronted with a similar situation in his own family, a few years after he handed down judgment in the case. When his parents died, he was, as the last born, expected to inherit the family home. However because of his pro-human rights approach, gained initially as a WLSA Research Officer and subsequently in his work as a judge,

⁸² Justice Oagile Key Dingake

he insisted that the inheritance of the family home should not be based on this customary law approach but on what was fair and just under the circumstances.

The family and in particular progressive male family members who are not bent on protecting male privilege under the guise of customary law are therefore an important element in changing mind-sets and ensuring the protection of women's rights in the process.

Part IV: Discussion, Recommendations and Conclusion

4.1 Introduction

This research has shown that customary law impacts on many women in Southern Africa regardless of their level of education, social and economic status, whether they stay in urban or rural areas or any other differentiating factors. The impact might be different for different women, but many still have to contend with the dictates of customary law at various stages of their lives. Often women lack adequate knowledge about what customary law entails, only for them to realise later in life that failure to follow certain customary procedures has an impact on the validity of their marriages for example. In addition, customary law and customary practices often have a negative impact on the rights of women as men in society and communities use customary law to maintain male privilege and constrain the enjoyment of human rights by women. The distortion of customary law by the continent's colonisers also means that what is regarded as customary law in modern day Southern Africa is different from customary law as practised by our forebears. Researchers have often shown that customary law as practised by our ancestors provided a lot of protection for women, and gave women a prominent position in society as leaders in social, economic and political circles. History is replete with pre-colonial women that were political leaders of note and feared warriors.⁸³ The distorted version of customary law is however what is often practised, especially at State court level as colonial governments promulgated legislation, which often cemented the position of this distorted version as the one to be followed. The Court system has however gained from the international human rights framework, and the development of modern constitutions that recognise the rights of women to be treated on the basis of equality with men and not to be discriminated against on the grounds of gender. Progressive courts as in the case of Botswana and South Africa have used these provisions to ensure greater protection for women's rights at customary law, whilst conservative

⁸³ Chief Sekonyela gave an example of the Great Queen Manthatisi (1781–1836) who was a well known and feared warrior as well as political leader of the Batlokwa (in present day Free State Province of South Africa). She took over the Batlokwa chieftainship as a regent chief after the death of her chief husband Mokotjo because at the time of the Chief's death, their son was too young to be the chief. During her reign, she established herself as one of the fiercest and well-known leaders of Southern Africa

courts like those in Lesotho have found it more difficult to break from a past that places customary law above constitutional and human rights imperatives.

4.2 The Legislative and Judicial Interventions

The Legislature and the Judiciary in the three countries have been shown to play an important role in determining whether or not women are able to enjoy their rights at customary law. It is trite that the responsibility of the Legislature is to make law and that of the judiciary is to interpret the law. It is on that basis that the Courts have often been reluctant to use the cases that are brought before them to change long-standing but discriminatory customary law practices with the argument that the Legislature should take up the matters and make the necessary legislative changes instead. The cases of *Masupha* in Lesotho and *Mmusi* in Botswana showed the differences in approach between the two jurisdictions in relation to statutory interpretation and the separation of powers between the Legislature and the Judiciary. In both situations, the courts were seized with the claw back clauses in their Constitutions that allow for discrimination on the basis of customary law. The Courts of Botswana have sought to give the provision a purposive interpretation, which emphasises that even though customary law is given a higher status in terms of the Constitution, its application must not amount to an unfairness or injustice⁸⁴. The Courts of Lesotho on the other hand have given the provision a restrictive interpretation, emphasising that as long as the provision is provided for in the Constitution, the Courts will interpret it as such and leave the law making duty to the Legislature. As such the position of the Courts is that there will only be a different interpretation of the customary law provisions and the “claw back” clauses in the Constitution when Parliament makes the necessary legislative changes. In the *Bhe* case in South Africa, the Court acknowledged that law-making is best left to the Legislature but where there are delays and the possibility that the rights concerned will continue to be infringed, then the courts must

“facilitate the cleansing of the statute book of legislation so deeply rooted in our unjust past, while preventing undue hardship and dislocation. The Court must accordingly fashion an effective and comprehensive order that will be operative until appropriate legislation is put in place” (Para 116)

⁸⁴ See *Mmusi vs. Ramantele and Attorney General vs. Dow above*

In the final analysis therefore, separation of powers is important and the Legislature often takes a cue from the judiciary regarding statutes that need to be revisited in order to ensure the protection of fundamental rights and freedoms. However progressive courts will also seek to ensure that whilst the relevant legislation is being crafted, the human rights violations complained of do not continue to happen.

4.3 The Complimentary Role of Various Actors and Structures

From education, financial support, provision of free legal assistance and advocacy, various actors and structures have a role to play in Southern Africa in ensuring that women's rights are protected at customary law. During fieldwork, various respondents⁸⁵ insisted that customary law remains relevant and necessary in the region, and in Africa as a whole. They therefore argued that any suggestions to abolish customary law must be dismissed with the contempt that it deserves. Focus rather must be on ensuring that there is proper understanding by various actors of what customary law is, and in the process ensuring that "living" customary law that adapts to the reality of women, communities and other people affected by it is encouraged. In addition, there is need to ensure that customary law dictates fall within the ambit of international human rights law and national constitutional provisions relating to human rights, equality and non-discrimination.

This research has shown that customary law has been distorted from the colonial days, that it is often misinterpreted (sometimes deliberately) to maintain male privilege and that it can have a negative impact on the rights of women. The underline this issue, the Chief Justice of Lesotho stated that, "men use culture and customary law simply to win an argument." It therefore becomes important for the various actors and structures to ensure that the practice of customary law is not used to undermine the rights of women in Southern Africa. These actors and structures can work as individuals but can also work collaboratively to ensure that this objective is met. Whilst in many instances, civil society has taken the lead in providing research, advocacy, legal and financial resources required to litigate and provide guidance on the issue of women's rights and customary law, the State must step up its efforts in light of its role in protecting women's rights and the fact that it has more resources

⁸⁵ For Example, Professor Michelo Hansungule, Phephelaphi Dube, Chief Sekonyela, Chief Khoabane L.K Theko etc

compared to those that are available to civil society. In Lesotho and South Africa, the Law Development Commissions have taken a leading role in law reform and in Botswana and South Africa, the State's Legal Aid systems help in providing free legal aid to citizens despite challenges.

4.4 Key Findings and Recommendations

A number of key findings have emerged from this research. As the findings relate to different actors and structures, this section will organise the findings according to the actors and structures to which they relate and proffer some recommendations. If implemented, the recommendations can help in improving women's rights at customary law in Southern Africa.

4.4.1 The State

1. Customary Law is recognised by the majority of citizens in the research countries as an integral part of their lives. Governments through the Executive and the Legislature must therefore ensure that customary law is used to enhance and not impede the rights of women in these countries by ensuring that negative customary law provisions are removed from the countries' statute books, including the Constitutions.
2. Customary Law is often misinterpreted, sometimes deliberately to maintain male privilege in society. To address this, Governments must invest in research to ascertain the correct versions of customary law and make this information available to decision makers and communities so that there are clear reference points for the protection of women's rights. In this regard Governments must adequately fund the Law Reform/Law Development Commissions and recognise their importance in research and law reform in their countries so that they are able to effectively perform their mandate. The research and ascertainment of customary law must not be equated to codification, bearing in mind the challenges that are associated with a codification process.⁸⁶

⁸⁶ Major challenges experienced in previous efforts to codify customary law include the fact that it is often difficult to include all aspects of customary law during a codification process. This is because customary law is different from place to place, including within the same country or tribe and that "living" customary law is not static, but often changes from time to time as dictated by circumstances and the people that use it. In Lesotho for example, although customary law is codified

3. In many instances, women are unable to assert their rights at customary law beyond the utilisation of customary/traditional courts. It is therefore important for Governments to ensure that such courts are presided over by people with the requisite training in order for justice to be served. Whether these officers are traditional leaders or ordinary presiding officers, training in what customary law entails, in the administration of justice and in human rights (including women's rights) is important to ensure that these courts play a role in the proper administration of justice and do not perpetuate discrimination and inequality. In addition to capacitating the traditional/ customary courts, Government must also ensure that ordinary courts such as Magistrate's Courts are easily accessible. This will give citizens a choice on whether to use customary/traditional courts or the conventional courts in seeking justice.
4. Taking up cases on appeal is often a lengthy and expensive process for most women, and without legal aid and financial resources, they often decide not to appeal against the decisions of the customary/traditional courts. Governments must therefore avail legal aid to citizens and provide adequate information on where and how such legal aid can be accessed.

4.4.2 The Courts

1. Both conventional courts and traditional/customary courts are critical in justice delivery for women affected by customary law. Courts must therefore emphasise a human rights based approach in determining matters relating to women's rights under customary law. In this regard, in interpreting the law, constitutional dictates of equality and non-discrimination must override customary practices that have the effect of undermining women's rights.
2. The research evinced that it often takes long for matters to be finalised by the courts. In the *Mmusi* case, it took six years for the matter to be finalised. Often it is difficult for women to pursue a case for a lengthy period of time, and as a result, they often give up before the matter is finalized. The courts and the justice delivery system are therefore encouraged to speed up the finalisation of cases because "justice delayed is justice denied"

through the Laws of Lerotholi, these laws are viewed as one of the reference points and not the end all of customary law in the country.

4.4.3 Traditional Leaders

1. Progressive traditional leaders are an important cog in the promotion of women's rights at customary law, as shown by the approach taken by Chief Khoabane L.K Theko in Lesotho. As such traditional leaders in the three research countries and in Southern Africa are encouraged to shun the dogmatic approach to customary law that views women as unequal to men and adopt a human rights based approach in addressing the rights of women at customary law.

4.4.4 Civil Society

1. Civil Society Organisations (CSOs) in the research countries were at the forefront in advocating for women's rights at customary law, including on issues of marriage, inheritance and succession as traditional leaders. CSOs also led litigation efforts through the provisions of both legal and financial services. CSOs are therefore encouraged to continue with this work, but also to embrace cooperation and complementarity with other CSOs, the State and Traditional Leaders.
2. In addition, civil society must be encouraged to bring test cases before the courts as one way of realising rights by urging the courts to embrace international and regional human rights norms in their jurisprudence
3. Civil society must also mount constitutional literacy campaigns in communities to promote ownership of human rights culture.

4.4.5 Family

1. The disputes that are brought before the courts on the rights of women at customary law often emanate at the family level. Often such disputes are fuelled by the desire to maintain male privilege and access to resources whilst keeping women within the family in subordinate and disadvantaged positions. Families that embrace equality between women and men and the need for women to be treated on the basis of equality with men are more likely to pursue a pro-rights and pro-equality approach in addressing the position of women at customary law. The family unit is therefore encouraged to embrace these tenets for the benefit of the women and girls within the unit.

4.4.6 The Legal Profession

1. The legal profession plays an important role in justice delivery and the promotion of women's rights through litigation. However, the research showed that customary law is not a popular area of practice for lawyers in the region and not one that many lawyers are familiar with. The Law Societies in the three research countries and in the SADC region must therefore play a role by ensuring that customary law is an integral part of their CPD programmes, thereby providing lawyers with the requisite skills to tackle customary law cases.

4.4.7 Law Schools

1. The research evinced that customary law is not given prominence as a subject at law schools in the research countries. It is therefore important for the law schools in the research countries and in the SADC region to prioritise the teaching of customary law to ensure that lawyers are properly equipped to practise in this area of law.

4.5 Conclusion

There is often a misconception that customary law affects people (and women) who stay in rural areas, have low levels of education or belong to lower social strata. Whilst the said women are negatively affected by customary law to a greater extent, when compared to women who stay in urban areas, are more educated and belong to a higher social class, this is mainly because the former have limited access to resources that they can use to claim their rights. The latter often experience similar challenges but are able to use their resources to challenge discriminatory practises in courts and in other fora. Senate Masupha who challenged the chieftainship issue in Lesotho was described as a former Lesotho diplomat to Italy and highly educated⁸⁷. Mrs Edith Mmusi who challenged discriminatory access to customary land by women in Botswana was equally educated, having worked as a teacher and subsequently as a matron at a teacher's training college. These experiences show that customary law affects women in various ways, but it is how they respond to the discrimination that differs.

Where women are unable to effectively respond to discriminatory customary law practices, other actors have often stepped in to assist. These include NGOs, family

⁸⁷ Interview with Ms. Libakiso Matlo, National Coordinator, WLSA Lesotho, 15 April 2016, Maseru, Lesotho

members and the legal profession amongst others, showing the positive role that these actors can play in advancing the rights of women.

As there is a growing realisation that customary law is an integral part of the lives of many women (and men) in Southern Africa, it is important that this area of law is properly understood, and is placed within a human rights context in order for it to be beneficial to the citizens of the region. Research in customary law is an important part of this equation and Law Reform/Development commissions must be given the necessary support and tools that will make it possible for them to research in this area of law. Other structures such as the courts, the law societies, law schools and the legal profession must also play a role in research and in educating actors such as lawyers, traditional leaders and presiding officers in courts to better understand customary law and ensure its proper application. These efforts will help in ensuring that positive customary law and related practices are embraced in the region, and negative ones discarded. In turn such a development will help in the preservation of customary law as citizens will embrace it more and accept it as a system that can help in the social, economic and political development of all citizens, including women.

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