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**IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS AND
LABOUR STANDARDS IN LESOTHO AND THEIR IMPACT ON
BASOTHO WOMEN.**

BY

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DEDICATION

To my mother who spent her adult life as a wife mother and dedicated servant of the public. She was a pioneer of career women as well as a community leader who fought for women's equality in employment.

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ABSTRACT

This study examines the position of women in Basotho society. It examines the position that women occupy in the society both in their traditional and contemporary roles. This is later contrasted to the developments made at the level of the state to effect changes to improve the situation. The data used in the study pertain to the period after 1986 up to 1996, except where it was possible to include more current.

The international community has established norms intended to guide the members of the respective conventions and treaties in making of their domestic laws. These guidelines operate as an indication of the member country's intention to abide by the norms and not to deliberately flout the principles involved. Lesotho has through the years signed and ratified a number of these conventions. There has been quite a significant number of problems encountered in applying equality rights. Women in Lesotho as in the rest of the developing world are faced with discrimination on at least two levels, being female and being a member of the wrong race. The issue is whether they are also as humans, entitled to the benefit of universal human rights, or is it the exclusive preserve of men. It is the purpose of this study to examine the extent to which the international norms and human rights standards have impacted on the municipal law in Lesotho to grant equality rights to women.

Finally, it is concluded that the Government of Lesotho has failed to achieve its obligations under the Conventions and international norms to which it has bound itself. Although legislation has been passed and applauded even at an international level, little progress can be made due to the half hearted attempts by the legislature to grant rights to women while not wanting to disturb the run of things and curtail the power that men have over them. This is likely not to be popular at some quarters especially with traditionalists. If however women are to be given equality in rights, the reforms have to be made.

ABBREVIATIONS

| | |
|-----------------|--|
| African Charter | The African Charter on Human and Peoples Rights |
| BOS | Bureau of Statistics |
| CEDAW | Convention on the Elimination of all forms of Discrimination Against Women. |
| ECJ | European Court of Justice |
| ESAP | Enhanced Structural Adjustment Programmes |
| EU | European Union |
| GDP | Gross Domestic Product. |
| GNP | Gross National Product. |
| GOL | Government of Lesotho |
| ICESC | International Covenant on Economic Social and Cultural Rights. ("Economic Covenant") |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |
| NGO's | Non Governmental Organisations |
| OAU | Organisation of African Unity |
| SACU | Southern African Customs Union |
| SADC | Southern African Development Community |
| SAP's | Structural Adjustment Programmes |
| UK | United Kingdom |
| UNICEF | United Nations International Child and Educational Fund |
| UN | United Nations |
| UNGA | United Nations General Assembly |

CHAPTER I

1.1 Introduction

This study considers the application of International Labour Law and human rights instruments in terms of gender equality in Lesotho. It examines measures taken by the Government of Lesotho to implement the international standards laid down by the Conventions ratified by the country. This will be considered in the light of the government's commitment to implement improvements to the situation of women.

The scope of this chapter is firstly to expose the statement of the problem; the framework of approach follows as the second part. The third part deals with the aims and objectives of the study, while the fourth part of the study defines the terms of the study. Fifthly, it deals with the research methodology and analysis used in the study. Lastly the chapter sets out the plan of the study.

1.2 Statement of the Problem

Lesotho has ratified a number of International Instruments under the United Nations (UN) and its various agencies, such as the International Labour Organisation (ILO). It has ratified the Human Rights Declaration¹ recognising basic Human Rights for all without discrimination. Other conventions find their inspiration from this basic instrument. Hence the labour standards laid down

¹ United Nations: The Universal Declaration of Human Rights, 1948.

by the ILO, and the various Conventions aimed at the protection and promotion of women's rights both at work and in the community at large.

In spite of this commendable development, Lesotho seems to be lagging behind the in the implementation of international instruments. The main culprit for this apparent sluggishness is the Constitution of the country. In all legal systems the constitution is the Grundnorm, the basic law from which all laws flow. When a constitution is weak and ambiguous it offers little or no protection for the rights that it ought to be protecting. The constitution of Lesotho has been particularly lacking in clarity, and its language is plagued with verbosity and double talk. Palmer and Poulter alluded to this characteristic when they observed in regard to the constitution of 1966

*The constitution of Lesotho in Section 17 requires over 650 words in order to establish freedom from discrimination. Sixty percent of this represents extensive savings. If this wordiness means anything it is a warning that Lesotho's problems are not clear-cut.*²

The same can be said of the current constitution of 1993 which on the face of it protects the rights of the downtrodden yet shrouds the rights in so much ambiguity and vagueness that they become worthless.

The domestic law of the country has also faltered in keeping pace with some of the international instruments³, which is understandable since there is no

² Palmer VV and Poulter SM "The Legal System of Lesotho." The Mitchie Company Law Publishers, Virginia, 1972 at p 408.

³ International Covenant on Civil and Political Rights, The Universal Declaration of Human Rights, Most importantly and recently, The Convention For The Elimination of All Forms of Discrimination Against Women.

mandate flowing from the constitution to give effect to the instruments. This is a predicament shared by many other Sub-Saharan African countries. It is easier for the states to ratify conventions but when it comes to implementation that is a tall order. Indeed in some cases where the government has failed to enforce the conventions as signed by the state, the judiciary has dared to step in courageously. *The Attorney General v Unity Dow (1992, unreported)*⁴ in Botswana is a case in point. This is a case where the Appellate Court valiantly stepped in to protect the citizenship rights of children born to Botswana women who are married to foreigners. Few of the courts in the countries in the sub continent are willing to take such robust and innovative decisions. In the Unity Dow case, the judge felt that *'since Botswana was signatory to the instrument in question, the state did not have to wait for the laws and practices to be challenged or for Human Rights tribunals to consider alleged violations of human rights, before moving to protect women.'*

It will be argued here that the same principle could be used by extension to the situation in Lesotho. The country made quite a breakthrough in 1992 when it ratified a number of United Nations Conventions, and became signatory to the Convention Against all Forms of Discrimination Against Women⁵ under military rule. This pattern did not continue for long as the government became preoccupied with preparations for the democratic elections. Work that appeared to be going on in the recognition of women's rights seemed to halt. Lesotho became signatory to the Women's Convention but did not progress to ratify. The ratification without the attendant follow-up

⁴ Botswana Civil Appeal no. 4/91

⁵ Passed by the United Nations in 1979.

implementation leaves one with a sad and empty feeling that nothing was achieved.

This dissertation will thus look at the track record of the country in ratification and implementation. This will also involve looking at the domestic law pertaining to gender issues in employment, and incomes of women relative to those of men.

1.3 Framework of the Study

The bulk of the data collected is secondary material, collected mainly from government publications. The approach will be historical and comparative, with comparisons between some of the countries in Sub-Saharan Africa, especially South Africa, being attempted. An examination of the historical situation of Lesotho will assist in the analysis and understanding of the current situation.

The approach will illustrate the impact of international conventions in Lesotho, and the machinery available to the anticipated beneficiaries. The historical approach will help to place the current situation into perspective.

Though the study will be centred on Lesotho, a comparative approach will be useful to better appreciate developments achieved and advances made in the context of advances in the sub-region, in the region and in other countries

further afield. It will be recommended that it is necessary therefore, to draw from the experiences of the other countries in relevant situations.

1.4 Justification of the Study

The recognition of women's rights and equality is a burning issue throughout the world, more so in the developing countries⁶ where discrimination against women is more rampant and is reinforced by customary practices and common law. In these countries women remain among the most vulnerable and yet they are marginalised. Little if anything has been done to protect their rights. Women's rights continue to be compromised by limitations imposed by legislation. This in spite of the fact that the countries guilty of perpetrating these injustices have accepted the very conventions aimed at protecting women, and recognising their rights. Women comprise a large part of the population in these countries. They not only play the traditional roles as the homemaker, child bearer and child minder, but also fill in as a provider and farmer when the husband is away working as migrant worker. Women also make up the bulk of the labour force since most of them have to work either to supplement their husbands' earnings or to provide income where they are the head of the household. In spite of these important roles women remain among the poorest of the poor in the world. This has the ripple effect as it

⁶ This is true in many African Countries where there are still overt kinds of discrimination based on customary practices and religious practices. Countries practising the Moslem culture in parts of Africa and South Asia are notorious for this.

affects the children who have to be raised in these poor conditions. In a report by Ms Lin Lim⁷, an ILO economist, she states:

“The bottom-line is that while more and more women are working, the great majority of them are simply swelling the ranks of the working poor.”

The government of Lesotho with the assistance of various NGO'S has taken some measures to improve the position of women, both at work and in the society. Some of these NGO'S are under the auspices of the United Nations, and a significant number of them are community based and exist through the initiatives of the women in the community. The former set up societies for lending money to assist women, to create work, and provide for skills training among others, while the latter usually set up co-operatives, funeral services and homemakers societies.

1.5 Review of Related Literature

This part will set out to fit the study into the broad scheme in order to enable the reader to see its importance and its relationship to other studies made in this field. It will also provide the hypothesis. The reader can thus appreciate the importance of the study, why it is worthwhile and why it is justifiable.

⁷ ILO *“Women Swell The Ranks of The Working Poor.”* World of Work, October 1996 4-7

Much has been written on gender equality in Lesotho, particularly in the context of employment.

Kimane et al focus on the Gender Planning Strategy within the public service only⁸. While it is true that government is the largest employer, attention needs to be paid to the other sectors as it is mostly women in these sectors that call for protection against unscrupulous employers. A study which ventures further than the civil service is therefore called for, in order to take account of the multiplicity of women in other sectors.

Matlosa in "The Structural Adjustment and the Employment Challenges in Lesotho" examines the effects of the Economic Adjustment Programmes adopted by the Government of Lesotho on the economy and the employment situation particularly on the public service⁹. He investigates the degree to which the International Monetary Fund (IMF) Structural Adjustment Programmes have increased unemployment in Lesotho and consequently increased the country's challenge of unemployment. The study focuses on the public sector employees and the IMF'S disregard for their situation. Matlosa's approach therefore has a bias towards socio-political actors and variables. He does not pay any particular attention to the effects on distribution and the "plight and penury" of the public sector employees.¹⁰, nor to the Legal environment of his hypothesis.

⁸ Kimane, I, Ntimo-Makara, M, Mapetla, ERM, " *Gender Planning Strategy: Enhancing the Participation and Performance of Both Female and Male Civil Servants in Lesotho*" 1992

⁹ Matlosa, K. " *The Structural Adjustment and the Employment Challenges in Lesotho*" Institute of Southern African Studies", National University of Lesotho, Roma. 1990

Palmer and Poulter¹¹ in their book navigate through the sources of law, customary common law and statutory law. They then turn to look at the constitutional developments in the country, and analyse the constitution as well as the fundamental Human Rights provisions. They also look at the structure of the court system. This as a great achievement since it was the first work of this kind, to treat the law of the country in one book and being relevant and peculiar to the country while drawing from other countries such as United Kingdom as being of persuasive authority.

At the period of their writing, Lesotho had ratified few if any of the International Conventions, mostly having little if anything at all to do with women's rights per se. Many of the Conventions relevant to gender equality had not even been passed. The writers could not therefore place the developments in the context of the International Instruments.

1.6 Objectives of the Study

This study aims to examine the following

- The application of International Labour Organisation standards (referred to as "the standards") in Lesotho.
- Examines the measures that have been taken by the Lesotho Government to implement the standards in the country.
- The status of Lesotho in the international community and its position as a member state of the United Nations Organisation;

¹⁰ *ibid.* at p.5

¹¹ Palmer, V.V, and Poulter, M.S. *supra*

- The standards that have been ratified or signed by the Lesotho Government;
- The application of the standards and their impact on gender equality in the labour market, particularly in the Public Service.
- Whether the administration of justice has become more gender sensitive since the adoption or signature of the standards protecting and promoting the welfare of women.
- The efficacy of the legal system as it is today, and the extent to which it promotes and protects the fundamental human rights of women.
- How customary law, common law and legislation all operate to subject the woman to discriminatory treatment.
- Lastly the objective of the study would be to make recommendations based on the study to improve the position of women at the work place and in the community.

1.7 Outline of Dissertation

The proposed layout of the research will follow the structure set out below:

Chapter I will be the Introduction setting out the parameters of the dissertation and laying out what the reader can expect to read about.

Chapter II: The Context of the Problem. This section introduces and identifies the context and background of the study. The topographic and demographic features of the country in order to put the situation of women in perspective.

Like most African societies, Lesotho's population is largely female, and a good number of approximately 40% are below the age of 15 years. The labour

force does not reflect this characteristic, however. The majority of the unemployed in Lesotho are women.

Discrimination in education and training has traditionally been instrumental to widening the gap between the genders, as it has tended to favour males over females. The inequality of access to education has contributed to unequal starting points for the genders. Equality of pay has been an elusive ideal due to factors including traditional female stereotypes in the family, in the community, and in the workplace. The chapter examines the structure and trends in employment, it looks at the income patterns and the economic infrastructure and other resources that the country can rely upon for creation of employment.

Chapter II: International Conventions Providing for Women's Rights.

This chapter will deal with the International conventions that provide for equality of gender rights. The United Nations has passed various conventions to protect the rights of women. These include the Convention on the Political Rights of Women, passed in 1953; and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") passed in 1979, and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Lesotho is a signatory only to CEDAW. The chapter also looks at conventions passed by other United Nations agencies such as the International Labour Organisation (ILO) and the Organisation of African Unity (OAU)

Chapter III Impact of International Conventions on National Legislation.

This chapter will examine the implementation of the international standards on national legislation and the impact such application has had on the recognition of women's rights in the country. It also looks at how the Government enforces the policies in line with the International standards, and the success of such enforcement.

Chapter IV- Conclusion.

This chapter will be the summary and conclusion outlining the major findings and observations of the study. Recommendations will be made for further investigation of the topic and possible implementation of some of the recommendations.

CHAPTER II: The Situation of Basotho Women.

2.1 Introduction

Gender inequalities in Lesotho are a consequence of a number of historical, cultural and economic factors and continue to be influenced by structural and cyclical economic developments in the economy¹². This chapter discusses gender inequalities existing in the economy with respect to labour force characteristics, employment, and incomes, in the context of the historical and geopolitical situation.

2.2 The Topography of the Land

The land of Lesotho is situated between 28 and 30 degrees South and 27 and 30 degrees east. It thus lies entirely outside the tropics. It has a high elevation, with all its land more than 1500 metres above sea level. The country is characterised by extreme temperatures in winter and in summer. This has the advantage of the absence of tropical diseases that plague other African countries, particularly those within the tropics. The country itself covers an area of 30 300 square metres, of which less than 9% thereof is arable. It is divided into four geological zones the foothills, the mountains, the lowlands, and the Senqu River valley. It has ten administrative towns. Seven

¹² ILO. "Promoting Gender Equality in Employment in Lesotho". An agenda for action. Final Report of an ILO Multidisciplinary Mission to Lesotho. Interdepartmental Project on equality for women in Employment. January, 1994

of the ten towns are in the lowlands and these contain most of the country's population and are surrounded by the best agricultural land.¹³

2.3 Historical and Political Background

The nation came into being in under the leadership of King Moshoeshe I who forged alliances, and brought peace and stability to this war torn region of Southern Africa in the nineteenth century. Though his Kingdom was originally in the set up in the Maloti Mountains, with its capital at Thaba-Bosiu. History indicates that he was able to extent his kingdom from the mountains to the grassy plains of the present day Free State province of the Republic of South Africa. Much of this land later was lost to the Dutch settlers. To avoid defeat by the Dutch settlers, the King sought protection from the British. Lesotho thus became a British protectorate in 1868. It was three years later that the British passed the rule of the country to the Cape Colony. This was done without consultation of the Basotho nation. The result was rising conflict culminating in the Gun War that was won by the Basotho, and led to the country being dis-annexed from the Cape Colony and being governed as a separate crown colony from 1884. In 1910 when the Union of South Africa was formed, Lesotho along with Botswana and Swaziland argued successfully against incorporation. Lesotho then became an enclave within the larger state of the Union of South Africa. This was made an increasingly unacceptable proposition by the policies of South Africa towards its black population, and

¹³ Government of Lesotho and UNICEF *"The Situation of Children and Women in Lesotho"*, July 1994.

the three states were eventually granted their independence as sovereign states in the 1960's¹⁴.

Following independence in 1966, the country was under democratically elected rule for only a period of five years, under the leadership of Chief Leabua Jonathan of the Basotholand National Party. When the party lost the subsequent general elections in 1970, however, he seized power by force. He refused to hand over to the elected Basotholand Congress Party to assume office. The elections were nullified and the 1966 Westminster model constitution was suspended¹⁵. Lesotho was then ruled by decree until the military took over government in 1986.

Constitutional rule was restored to the country in March 1993, when the new constitution was adopted and elections were held. The BCP won all 75 National Assembly, and the leader of the BCP, Ntsu Mokhehle was installed as the new Prime Minister. There has since been another election and the BCP won again, but Ntsu Mokhehle stepped down for his successor, Pakalitha Mosisili. His rule has been characterised by turbulence caused mostly by the uprisings of the disciplined forces.

¹⁴ *ibid*

¹⁵ Gill, Debby "*Lesotho: A Gender Analysis*". 1992

2.4 Economic Infrastructure

2.4.1 Natural Resources

Lesotho has a limited base of exploitable natural resource endowments. The mineral deposits are few and generally uneconomic, with meagre diamond deposits at Letseng la Terae, which are being mined on an informal basis by individuals.

The most significant resource is water, which is currently being exploited by the Lesotho Highlands Development Authority. The government hoped that the scheme would contribute considerably to creating domestic employment to absorb an estimated workforce of 7500, by 1994¹⁶. This optimism on the side of government was met with cynicism from some quarters that the picture is not as rosy as was being made out by the official sources. It was predicted that a more realistic figure would be 2 500¹⁷, a third of the official figure. The numbers would decline as the project progressed. The scheme would have far reaching consequences on the inhabitants as about 1 700 peasants would be displaced, and 4 000 ha of arable land and 18 700 ha of grazing land would be submersed. These consequences would cost the country far more than be of benefit in socio-economic terms¹⁸.

¹⁶ Matlosa K; supra.

¹⁷ Maime, T. (1988) LHWS: South Africa's Regional Carrot and Stick Policy. (ESARG) Newsletter, May. Quoted in Matlosa Ibid.

¹⁸ Matlosa, supra.

The government thus resorts to human resource development as the key to its future growth and it is investing heavily in human resources. The Government policy is to increase domestic employment opportunities by promoting direct foreign investment in labour intensive industries. This will have a ripple effect on the other areas of concern as health, nutrition, education, for the general betterment of everyone, and their standards of living.

2.4.2 Industry

The strategic position of the cities, and their easy access to markets in South Africa has stimulated clothing manufacture by small foreign owned enterprises. During the 1980's various textile and electronics firms relocated to Lesotho. This sector grew significantly since 1986, and employed mainly women and few men as its work force. It is characterised by very poor working conditions, since Lesotho is often selected for the relocation of light industry because labour costs are low and hence wages often very low. Most women who are not absorbed by the industry go into the informal sector as self-employed street vendors.

Although their contribution to the GNP is has risen substantially the industries are very vulnerable and often rely on the country's preferential tariff regime change. The industrial base is quite small and unable to absorb the large masses of the unemployed labour force.

2.4.3 Agriculture

Due to a number of factors including the mountainous structure of the land and bad environmental practices, less and less of the land is arable. In 1988 only between 9 and 10 percent¹⁹ of the land was arable. Due to the increase in landlessness, only about 67 percent of the households had fields. Agricultural land falls under the rural areas and is governed by traditional and customary law. The chief allocates it to the male, who is regarded as the head of the family, and land only passes to the married woman through her deceased husband or her son etc.

The agricultural sub-sector accounts for about 45% of total employment and women account for a sizeable proportion of these. The economic returns are minimal compared with the effort of labour expended in the sub-sector and the needs of the people involved in it. Employment in the agricultural sub-sector is expected to have deteriorated in 1997 due to below normal rainfall and a pessimistic weather outlook resulting from the presence of the El Nino phenomenon in the Pacific Ocean. The sub-sector's potential for job creation is not only constrained by weather conditions but also by soil erosion.

2.4.4 The Informal Sector

About 20% of the labour force are engaged in the non-formal sector engaged in activities primarily consisting of micro- and small-scale

¹⁹ Schmidt, G and Rooyani, F. *Lesotho: Geology, Geomorphology, Soils*. Roma Lesotho: National University of Lesotho, 1987. Cited in WLSA Lesotho and SARDC-WIDSA.

enterprises. Needless to say that this sector is dominated by women. engaging in menial activities such as selling fruit and vegetables on the street, beer brewing and selling, making and selling of handicrafts, cooking and selling food; hawking of clothes, and other activities. Many of these activities do not give women much economic power.

The participation of women in the informal sector is usually an extension of their role as homemakers²⁰. Sometimes and indeed in the majority of cases the activities are additional to the responsibilities of raising children and agricultural duties.

2.4.5 Migrant Labour

Migrant labour comprised 13% (about 110 000) of the labour force in 1994, though the sector has shown a sharp decline of up to 11% (estimated at 100 000 in 1996), from the high of 1994. 1997 was a year of turbulence in the South African mining industry. The weak Gold price coupled with escalating costs resulted in lower profits and job losses. The aggressive introduction of the automation process, as well as a policy to increase recruitment of South Africans for mine positions heightened this trend²¹. Approximately 45 000 miners lost their jobs during the year. For Lesotho this translated into a drop in employment from 101 237 in 1996 to 93 243 at the end of 1997. The rising levels of unemployment in the country were a direct result of the continuous retrenchment of workers from South African

²⁰ WLSA Lesotho and SARDC-WIDSA, "*Beyond Inequalities: Women in Lesotho*", WLSA/SARDC, Maseru and Harare, 1997.p17

²¹ WLSA Lesotho and SARDC-WIDSA, *supra*

goldmines, with a concomitant high growth rate in the labour force that could not be absorbed by the local job sectors. .

2.5 Population and Labour Force structure

The Bureau of Statistics estimated the population to be 2 133 742, which would imply an increase of 33% (527 742) over the 1986 *de jure* census figure²². Lesotho's population is estimated to be growing at the rate of 2,6% per annum. By the year 2020, it is projected the population will have grown to 3,3m²³. The age distribution of the population is skewed towards the very young with a median age of 19 years, and some 41% of the population below the age of 15 years²⁴. This implies an impending increase in the birth rate calling for immediate measures to check the population growth. There are, however, currently a few signs of slowing down in the growth rate, especially as aids is projected to have a significant impact on the death rate.²⁵

The number of females in the population is unusually high compared to the male population, with sex ratios of 76 males per 100 females in 1976 and 83 males per 100 females in 1986²⁶. This is however not reflected in the 1986 labour force of 593,189, of which 49% were male and 51% female. Estimates indicate that 62% of the economically inactive population are women and only 38% to be men.

²² Labour Force Survey, 1997.

²³ The results for the 1996 census have not yet been released and therefore data and projections from the 1986 census have been used in the 1997 Labour Force Survey of 1997.

²⁴ Santho, S. "Overview of Gender Equality in Employment in Lesotho". Paper presented at the Workshop on Gender Equality in Employment in Lesotho. 25-27 February 1998

²⁵ UNICEF, "The Situation of Children and women In Lesotho" page 5

²⁶ Labour Force Survey .Supra

The mission report identified the major characteristics of the population of relevance to gender differentials in employment and income to be, first, the primarily rural nature of Lesotho; (about 84% of Basotho still live in rural villages).²⁷ "This is attested to by the extensive under-employment and increasing work burdens for women especially"²⁸. The population was also found to be characterised by its relative youthfulness, which aggravates the dependency burden of households and the concomitant demand for social services like education and productive employment. This situation is heightened by the dependency ratio that increased from 80% in 1976 to 85% in 1986; and is estimated to have increased to 86,1% in 1996. The population density per acre is increasing, thus aggravating the non-viability of household agriculture. Most significantly is the increasing proportion of female-headed households caused by the extent of migrant labour and urban migration. Women head about 25% of the total number of households.

2.5.1 Employment and Income

The Mission Report noted that the structure of employment in Lesotho is inextricably linked to the structure of production in the economy as a whole and to its relationship with South Africa. It is therefore influenced by policy

²⁷ UNICEF. *Supra.* (Executive Summary.)

²⁸ ILO/UNDP Background Report Update. *Supra* page 2.

decisions on labour and recruitment of migrant labour of the neighbouring country²⁹.

According to the labour survey of 1998, there were 25 000 new labour market entrants into the labour market. Of these the domestic economy could only absorb less than 25%. The bulk of these jobseekers have had to expand their sights further afield to the South African mining industry. However as mentioned in section 2.3.5, with the current "down-sizing" and "shutdowns" in the industry the job opportunities for Basotho in this sector are declining.

The Mission noted a shift towards primary and secondary production in 1995. This was appreciated as a healthy trend since much job creation takes place in these sectors, especially when coupled with an expanding GDP³⁰.

2.5.2 Income Patterns.

In its findings, the mission found that the males tend to have higher incomes than females in agriculture; In services males earn more than females in a majority of sectors and the earnings differentials are relatively huge.

²⁹ Ibid, page 2

³⁰ Ibid page 3.

In the financial services and public sector (including government) males earn more than females in about a quarter of the sub-sectors but males are generally under-represented since less of them are absorbed in these sectors than females. Women tend to be engaged at the lower levels in greater numbers. In general, in the traditionally female industries and in the industries that tend to employ professionals, females tend to earn more than males but this is often less than the male dominated professions.

2.5.3 Structure of Employment

Although the formal sector is responsible for much of the growth, it only accounts for about 12% of employment. The figures indicated in 1992 were 97 000, and this is projected to have increased to 119 000 in 1996.³¹ The de jure population of the country was projected at 2.17 million in 1997. The population from which the labour force was drawn was estimated at 1.46 million and approximately 35% of these were aged between 10 and 19 years indicating a rapidly growing youth and spelling an unemployment crisis³².

Approximately 23 000 new jobs are being created every year. This still falls short of the rate of growth of the labour force, which is about 24 000 a year. In 1988 37% of the population aged between the ages of 21 to 60, was economically active in 1988³³. This indicates a high dependence ratio.

³¹ UNDP, 1996

³² Central Bank of Lesotho 1998

The distribution of women through the various sectors of employment is uneven. Firstly women are over represented in agriculture, partly, because of traditional roles assigned to them, and partly because of the immigration of males to the mines in South Africa. The second factor is that women are also over-represented in the informal sector although they are increasingly becoming involved in more lucrative ventures and small-scale activities. Government, by bilateral international agreements, as well as non-governmental organisations are promoting such small-scale activities. Thirdly, women are well represented in the formal sector.

2.5.4. The Feminisation of Poverty in Lesotho.

The decline in Lesotho's economy has meant that the people have become poorer. In 1993 it was found that poverty (defined as households with less than M50.00 per member per month) had risen by 31% in Maseru and 15% in the rest of the country since 1990. The poorest households were found to be those headed by women³⁴. A Poverty Mapping Survey held in 1993 revealed that roughly 65% of the population in Lesotho was below the M50.00 poverty line and was barely surviving. Poverty is disproportionately high in the almost 40% of Basotho households that rely on farming, herding, informal and survivalist activities or casual labour for most of their income. By contrast the incidence of poverty is below half the national average in households relying mainly on mine wage remittances from South Africa³⁵. Two factors are identified as responsible for the increasing number of households below the M50.00 cut-off point. Firstly, there is the

³³ Ibid

³⁴ UNICEF, P40

failure of wages to keep pace with the inflation rate, resulting in a decrease in the buying power of money. Second is the uneven increase in the GDP, resulting in the rich getting richer and the poor getting poorer. The increase in job creation has been cancelled out by the matching growth in the population. Gustafson and Makonnen are quoted to have said the following of the position *"Poverty in Lesotho is feminised in the sense that female headed households account for a disproportionately high share of total poverty"*.³⁶

There is no doubt that female-headed households are among the poorest in Lesotho. They are poorer than the male-headed households, and are less likely to have a wage earner (29% as compared to 55.8%). They are less able to afford the basic services like health-care, and education of their children, thus the children who live in them are at most risk.

2.6 The Administrative Framework.

As a result of historical process, the life of Lesotho's citizens is controlled by a series of parallel institutions: those which were traditionally part of Basotho society, and those that have been transplanted from outside. Both these systems militate against equality for women, and neither treats women as equal to men. For some persons, the transplanted system may dominate certain aspects of their lives, while for others the traditional system may be of paramount importance. Attempts may be made to create

³⁵ Santho, Supra p30.

a fusion of the two systems, but generally they remain separate in their organisation, resulting sometimes in the advantage of providing choice, but often also becoming the basis for conflict. The following are examples of the co-existence of the two institutions in the society:

1. Health: Traditional medicine still holds its supremacy in the lives of many Basotho even when they have access to western medicine and have in fact already consulted a physician.
2. Education: Initiation schools co-exist with secular schools. Primary school education is often interrupted by a call to initiation school.
3. Religion: Though the majority of citizens belong to religious institutions, particularly the mainstream churches, for many of them, traditional belief and ancestral worship, still play a major role in their lives.
4. Law: The law in the country is dual in nature, common law, which was received in 1884 when the British passed colonial administration of Lesotho to the Cape of Good Hope and customary law existing side by side. Of special significance to women and children are laws relating to marriage, divorce, seduction, maintenance, adoption and inheritance³⁷.
5. Government dual administration exists with village level government being controlled through the hierarchy of chiefs, alongside modern democratic structures of parliament and cabinet representatives.

³⁶ Gustafson, B. and Makonnen, M. "Poverty and Remittances in Lesotho" *Journal of African Economics*. vol 2, no 1. 1993

³⁷ UNICEF, p6

2.7 Legal Issues From Gender Perspective.

Women have suffered subordination under both the traditional and the modern systems. This subordination has been effected through societal values and attitudes and reinforced by the law, whether customary, common law or legislation. The Constitution of the country has also been guilty of incapacitating women's empowerment. The law has had the effect of subjecting women not only to legal limitations as minors under guardianship, but also to societal subordination in terms of their status in the community. This fundamental issue underlies many others affecting women in Lesotho. Indeed the laws of the country have served to formalise discrimination and inequality, with implications particularly for women in employment. As observed by the Mission:

"In Lesotho today, legal contradictions affect gender equality, possibly because there is no uniform policy on the matter or because the commitment to an equality policy is uncertain".

The 'subordination of women' is defined as the degree of control which men have over the way women conduct their lives, as well as over the intra-household allocation of their tasks³⁸. "Patriarchy" on the other hand describes the state when men socially control the property, resources and income of the household. This usually extends to the labour time of women, their freedom of movement and their levels of consumption." Apart from income, as such, women have only very limited access to and control

³⁸ Gameson, T 'The Gender issue in the Third World and the Constraints of Economic Theory'. In "Gender, Environmental Degradation and Development: The Extent of the Problem." Discussion paper. June 1991. London Environmental Economics Centre.

over credit, land, education, training and information³⁹. This is the situation as it stands in Lesotho, women have on the whole little or no control over the means of production though they are the ones most vulnerable and left responsible for the management of the household. It has now been realised that *"Equality of opportunity cannot be achieved until these impediments to equality are removed."*

The legal disabilities of women in Lesotho are further discussed below as they apply to different aspects of their lives.

2.7.1 Employment and pensionability in the Government Sector

In the public service married women have always been employed on temporary terms. This meant that they could not claim pension and other benefits that accrue to other employees. A justification for this position could have been that their incomes were considered to be supplemental to those of their husbands and they were not considered to be breadwinners. Women who got married after being employed were deemed to have changed not only their status but also their terms of employment. The Public Service Rules and Regulations of 1969, and amendments confirmed this position thereto. This was made law by the passing of the Public Service Order NO. 21 of 1970.

An attempt to remedy this situation was made by the passing of the Pensions (Amendment) Order of 1992. By this law all female civil servants

³⁹ Dankelmann, I and Davidson J, (1998), *"Women in Environment in the Third World"*; Earthscan cited by Gameson T.

were entitled to pension rights whether married or not. The Oder operated retrospectively to cover those married prior to August 10, 1984. Women may elect to be either pensionable or to be on contract and be eligible for pension every ten years.

Women who resigned or were dismissed due to political pressure have not benefited from these amendments and cannot therefore claim either a gratuity or a pension, notwithstanding the legality or otherwise of their termination. The test of their situation would be in bringing the matter before the Labour Court.

2.7.2 Land Tenure

In terms of the Deeds Registry Act of 1967, no immovable property, bonds, or other fixed property may be transferred, or ceded in the name of a woman married in community of property, except with her husband's prior consent⁴⁰. This provision does not however extend to donations and bequests, or where a woman is married out of community of property and marital power has been excluded. The Land Act 14 of 1979 was in the next decade. It confirmed customary law position and the Deeds Registry Act. On the death of the allottee all interest in the land passes to the first male issue of the deceased allottee, or in his absence to a person nominated by the surviving member of the family as heir of the deceased allottee's land. The widow was only entitled to remain in occupation of the land during her lifetime as a usufructuary, or until she remarried. She had no full title or rights over such land⁴¹.

⁴⁰ Section 14 (3) Deeds Registry Act, no12 of 1964.

⁴¹ Section 8(2).

A later amendment to the Land Act in 1992 purports to remedy the situation by giving full title rights to the widow, even though upon remarriage the land still reverts to the family of the deceased aillottee. The amendment has been rendered ineffective by the provisions of the Deeds Registry Act, which does not allow land to be registered in the name of a woman.

2.7.3 Succession

Generally women have no claim to inheritance of real property under customary law. They are only entitled to the right to use and occupy, and cannot therefore dispose of the property she receives as usufruct. Under common law however, women can inherit under a will.

The Inheritance Act of 1873 applies to the inheritance of spouses (both men and women) married under the common law. This situation is narrowed down by the Administration of Estates Proclamation of 1938⁴² which stipulates that the Inheritance Act will only apply to estates of Basotho who have abandoned the customary way of life and adopted the western way of life. The lifestyle of the persons involved is used as a test ("*Mode of Life Test*" or "*Environmental Test*"). The court focuses its attention on the way in which a person lives and tries to reach a conclusion that fit the law to the man.⁴³ The test takes into account such standards as whether the person sleeps on a bed; or he drives a car; or operates a bank account.

⁴² Section 3 (b)

⁴³ Palmer, V.V. and Poulter, S.M. *supra*.

2.7.4 Commercial Transactions

Traditionally married women have had limited access to commercial transactions due to their position as minors. They were not entitled to open accounts at the bank, without the assistance of their husbands. In cases where the woman was married in community with husband's marital power, it was impossible to raise collateral without the husband's prior consent. This is a serious obstacle given the migrant nature of the male labour force, and the fact that women are the ones who have to remain at home to look after the family and the homestead. The problem is a direct spin-off of the land and the succession systems in Lesotho.

2.7.5 Citizenship

A situation exists in Lesotho where the Constitution fails to protect the rights of all its citizens. Section 37 of the Constitution reflects the position under the citizenship order no. 16 of 1971(as amended). The order says that any person should become a citizen of Lesotho by birth or descend if at the time of birth, that person's father was a citizen of Lesotho, or in the case of a person born out of wedlock that person's mother was a citizen of Lesotho. This in effect excludes legitimate children born to Basotho women married to foreigners. This provision appears to be unconstitutional to the extent that the Constitution provides that every person born in Lesotho shall be a citizen, the only exception being provided under s38 (2) which refers to diplomats and to enemies of the state.

A similar situation existed in Botswana, but was resolved by the *Unity Dow* case and the constitution was reviewed as a result⁴⁴. An observation was made that this could in fact lead a trend in Botswana where women bore children out of wedlock before getting married to their foreign men just so that their children could qualify as citizens.

2.8 The Constitution of Lesotho

The Bill of Rights is encapsulated in the provisions of the Constitution under Chapter II, titled the "Protection of Fundamental Human Rights and Freedoms." Every person in Lesotho is entitled to these rights and freedoms. They are similar to the ones contained in the Constitution of 1996. At face value it would appear that the Constitution is the protector of women's rights. A closer look reveals weaknesses in the manner in which it is expected to operate. For instance, in chapter one⁴⁵ it guarantees freedom from discrimination.

" ... [No] person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or authority."⁴⁶

The Constitution defines the word 'discriminatory' as

"affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, (etc...) whereby persons of one such description are subjected to disabilities or restrictions to which persons of another

⁴⁴ ILO Final Report, p45

⁴⁵ S 18

⁴⁶ Ss (2)

such description are not made subject or accorded privileges or disadvantages which are not accorded to persons of another such description. "

All these generous guarantees are counterbalanced by a clawback a provision⁴⁷. Sub section 18 (4)(b) excludes the application of the guarantee to any persons covered by Subsection (3) with respect to adoption, marriage, divorce, burial devolution of property on death or other like matters which are governed by the personal law of persons of that description. Sub-section 18(4)(c) exempts all laws making provision for the application of customary law of Lesotho, and (d) refers to the appropriation of public funds.

A further guarantee that the subsection *'shall not prevent the making of laws in pursuance of the principle of state policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory laws'* seems hollow. Most of the law relating to women relates to personal law, property and customary law. It is also this area of the law that raises concern for reformists. This kind of protection over the provision nullifies whatever good intention the legislature might have had in passing the section.

Women's rights are thus left open to abuse, at the whims of the chauvinist males at the top. The Constitutional protections of the fundamental rights are therefore self-effacing. The Chapter falls short of protecting labour relations as a right for women. Mention is made of this in Chapter III that

deals with Principles of State Policy⁴⁸; even then, work is mentioned as an opportunity rather than as a right. It aims at the idealist Human Rights, and states that:

“Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work, which he freely chooses or accepts.”⁴⁹

In this provision the Constitution gives Government an opportunity to pass up responsibility: What it gives with one hand it makes sure it takes away with the other. It states that the principles in the Chapter shall not be enforceable by any court, but are subject to the limits of the economic capacity and development of Lesotho. The principles shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, their full realisation.

2.9 Lesotho in the International Community.

2.9.1 Southern African Development Community.

Lesotho is a member of Southern African Development Community (SADC). It is an economic grouping of twelve countries in the sub-region of Southern Africa. The member states are Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. While its predecessor SADCC focused on *regional co-ordination*, SADC reinforces *regional integration*. This involves the political

⁴⁷ Ss. 18(1) provides that the whole section is subject to Ss (4) and (5)

⁴⁸ The chapter provides guidelines to authorities and agencies in the exercise of their functions

⁴⁹ S 29(1)

and the geopolitical entities, as well as the various categories and strata of society. The Community was formed on the 17 July 1992, in Windhoek⁵⁰, and it was ratified in Mbabane in 1993. Its objectives are, among others⁵¹:

-To achieve development, and economic growth, alleviate poverty, enhance the standard and quality of the people of Southern Africa, and support the socially disadvantaged through regional integration;

-To promote self-sustaining development;

To encourage the peoples of the region to take initiatives to develop economic, social, and cultural ties and participate fully in the implementation of SADC programmes and projects;

-To promote the development of human resources.

Many of the member countries have similar characteristics: Since independence of many of the members in the 1960's, the countries have undergone impoverishment through a number of factors. These include the depreciation of their currencies, exploitation of their mineral resources⁵² accompanied by the lowering of the market values for the minerals. Another factor has been the global warming phenomenon ('*El Nino*') in recent years. This has led to crop losses and unpredictable climatic changes that prevent commercially sound farming.

⁵⁰ "About The SADC" <http://196.33.84.232/about.html>

⁵¹ SADC: *"Environment and Land Management Sector. A Framework for integrating Gender issues and concerns in the implementation of the Convention to Combat Desertification (CCD) in the SADC Region."* Maseru, April 1998.

⁵² This has been seen in Zambia with its rich copper deposits and more recently the drop in the price of the gold bullion resulting in job losses to thousands in South Africa, and the closure of mines and disinvestments in the sector.

In general women comprise at least half of the total population. Poverty is rife and poor female-headed households are increasing as men migrate to urban areas in search of employment. Women are largely concentrated in the rural areas in the subsistence agricultural sector where their main role is food production, food processing, and preparation; they have restricted access to resources such as land, labour, capital, agricultural services and technology.⁵³ Women are either under-represented or excluded altogether in the administration of land at the village level. They lack decision-making powers over agricultural production activities and how to spend income derived from such activities. Relatively few women are employed in the formal sector in the SADC countries, 30% or less and even these are concentrated in the lower paid domestic and service sectors. Many more are concentrated in the informal sector.

In nearly all SADC countries there is in operation a dual legal system of common law and customary law. The customary law invariably operates negatively against women especially in terms of Land rights, inheritance, Children guardianship, property rights, and access to credit. On the whole, the ongoing processes of democratic transition have not brought any significant or positive changes for women in Southern Africa who are still under-represented in political decision-making in the formal sector (public or private). Women remain largely ignorant of their rights, and reform laws, where these have been enacted, have had little impact on their situation. While the basic policy of most SADC governments is that both men and

⁵³SADC. *Supra*.

women are equally entitled to income, education and health care, including the right to shape their own lives and participate in discussions and decisions on development, women still remain largely marginalised in Southern African Society.

The SADC mandate includes consideration of the needs and concerns of women. In recent years SADC has realised that the attendant challenges transcend an exclusively women's only approach, to one that incorporates gender as an integral part of equity-led growth for sustainable development.

In May 1996, a SADC standing committee on Gender was established. In September 1997, the SADC Heads of State and Government at their summit in Malawi adopted a declaration for placing gender on the agenda for SADC's programmes of action and community building strategy. They also recommended the establishment of a policy framework for integrating gender considerations into all sub-regional activities, which strengthens the initiatives of member states for gender equity.

2.9.2 Ratification of International Standards.

The period between 1970 and 1992 was characterised by undemocratic rule imposed by the government of Chief Leabua Jonathan and followed by the two successive military juntas. The said Governments had no pressure to ratify any of the international human rights instruments, as they had no mandate from the electorate. It was only during the second and last military Government and preparation for democratisation process that

some international instruments were ratified.⁵⁴ The following instruments were ratified:

The International Covenant on Economic and Political Rights (1966); "the Economic Covenant"

The African Charter on Human and People's Rights (1981) "the African Charter"

The Convention on the Rights of the Child.

The newly elected government under the leadership of the late Ntsu Mokhehle, adopted a more gender-sensitive social policy which indicated the government's commitment to:

- (a) Safeguard the interests of women by ensuring that the socio-economic practices of Basotho do not impinge on the rights of women, as a way of promoting equality of men and women in all sectors of life.
- (b) Review all laws and statutes which discriminate on the basis of gender, and
- (c) Open up employment and educational opportunities to men and women alike, in order to afford women full participation in the decision making process⁵⁵.

In its policy, the ruling party recognises that Lesotho's society is made up of both men and women who are entitled to participate in the social, political,

⁵⁴ "Lesotho (Draft) National Report." Presented at the fifth Regional Conference on Women, Dakar, Senegal 1994.

and economic development of Lesotho. Dr. Ntsu Mokhehle is quoted to have said that in Basotho culture, women are not inferior or subservient to men, and are referred to as "Balekane" (Equals). The goals of the policy are the adoption of a non-sexist approach to the production and development of human resources. It is also aimed at safeguarding the interests of women by ensuring that the socio-legal practices of the Basotho as a society, do not impinge on the rights of women as a way of promoting equality of men and women in all sectors. The government has set out to achieve these goals through the review of all laws and statutes, which discriminate on the basis of gender, and by opening up employment opportunities to both men and women.

2.10 Structural Adjustment Programmes

The 1970's were a period of financial stability and relatively high growth in the real GNP and GDP of Lesotho averaging 7.8% pa. This blissful state of events did not last long. It was followed hard on its heels by a period of decline. The five-year plan period between 1984/85 - 1987/88 was a period of low growth of GNP, rising fiscal deficits and deterioration in the external current account as well as the overall balance of payments. GDP grew at less than one percent per annum as worker's remittances fell in real terms. The emergence of these macro-economic imbalances brought into sharp focus the structural weaknesses of Lesotho's economy, including weaknesses in the planning and budgeting systems of the Government of

⁵⁵ *ibid*

Lesotho (GOL) and the vulnerability of the economy in South African Customs Union.

In an effort to reduce the imbalances and the vulnerability of the economy, and also to lay a basis for the achievement of durable growth and a viable balance of payments, the GOL adopted a three-year regime of Structural Adjustment Programmes (SAPs) from 1988/89 to 1990/91. The IMF in consultation with the World Bank and the GOL designed these programmes, which included policies to reduce governmental spending, increase government revenue and improve productivity⁵⁶. This was followed by the Enhanced Structural Adjustment Programme (ESAP), which ended in 1995/96⁵⁷. The overall objective of the programmes was broadly aimed at reducing the government budget, and balance of payments deficits, achieving price and monetary stability, diversifying the production and export base and enhancing the role and effectiveness of the private sector

The high degree of labour mobility and the continuing wage pressure fuelled by efforts to match South African wages posed a threat to Lesotho's competitiveness and economic viability. As a result, the GOL took a firm position against unsustainable wage increases, which were occurring in the public sector and filtering through to the commercial and industrial sectors. In general wage increases have now been pegged in line with inflation. In the fiscal year of 1997/98 the increase was 8%, following a 12% increase

⁵⁶ UNICEF p38

⁵⁷ *ibid*

offered in 1996/97⁵⁸. The wages Advisory Board was established for the purpose of setting the minimum wage for all sectors, including the commercial and industrial sectors. It is hoped that these will have a spin-off effect on the informal sector

2.10.1 The Social Effects of Structural Adjustment Programmes.

Adjustment measures have concentrated on the modern sector through reductions in civil service employment, income tax changes, and sales tax increases on so-called luxury items. Although the SAP's were successful in reducing government expenditure and borrowing, This has been at a considerable cost to services provided and to employment, particularly the employment of women in government⁵⁹. Education and health services are provided at a high cost recovery due to reduced state subsidies. The net value of incomes has declined substantially as a result of spiralling inflation, against the freezing of increments, increased income tax and sales tax. The increasing number of retrenchments in the public sector exacerbates this problem. Though retrenchments have become a critical tool in the implementation of the SAP austerity measures, it is sometimes argued that this flies in the face of the IMF's mandate to promote and maintain a high level of employment and real income and to contribute to the productive potential of all its members⁶⁰. The most vulnerable of the social sector are the lower classes. The most vulnerable of the lower classes are among

⁵⁸ Central Bank of Lesotho, 1998

⁵⁹ Matlosa. p17.

⁶⁰ Korner, P. " The IMF and The Debt Crisis" London (1987) p 142 Cited in Matlosa, K. supra.p 17

others, single mothers who are unemployed, small-scale traders, and lower level bureaucrats. It is a consequence that will have to be accepted that if the state cannot guarantee social welfare due to the IMF austerity package then welfare will have to rest entirely on the people. In a context where social security is not an established right in Africa, SAP costs translate into mass poverty and marginalization of the lower social classes from the means of production⁶¹. It was expected that any burden on women and children arising from the implementation of these SAP measures would be largely limited to the urban population, which was relatively better off. It is a common criticism of the SAP implemented by the IMF is the disregard of the human factor and the resultant deterioration of the human condition in Africa. As long as these issues take the back seat on the priority list of the IMF, there cannot be any growth and development in Africa. As concluded by the Special session of the United Nations General Assembly on International Economic Co-operation, the SAP has in many instances exacerbated social inequality, often without restoring growth and development. Today, even political stability is directly threatened in some countries despite the fact that these are some of the ills which the IMF 'therapy' ought to cure "Human beings and their often desperate plight and penury are not considered important variables in IMF programmes".⁶² The Institute of Development Studies, in Sussex, United Kingdom had this to say about the SAP of the IMF:

⁶¹ Matlosa, K. p18

⁶² Ibid

“Since People represent both the means toward and the justification for policy change, this is not a trivial gap... The short-run effects have been harsh. Employment has fallen... basic services have often been cut sharply... Those who seek the success of stabilisation measures need to incorporate explicit political analysis within the framework they use in order to derive locally appropriate policy reforms.”

The SAP mentioned no direct policy measures concerning child welfare. It did however consider women in the agricultural sector. Changes to the 1979 Land Act are recommended to give female headed households more security of tenure by allowing leasehold title to women, that makes it easier for them to obtain credit. It is hoped that through these concessions women would be better equipped and empowered to deal with their economic and social status.

2.10.2 Employment and Wages under Structural Adjustment.

Lesotho has been a member of the World Bank since soon after independence in 1968. It was through the joint consensus of the World Bank and the Government of Lesotho that the SAPs were adopted. The SAPs have set strict limits on the growth of the wage bill in the public sector. Salaries and personal emoluments have fallen more rapidly in real terms during the SAPs period than before. This is quite significant since the GOL is the largest single employer in the formal sector. At the end of 1997 public sector employment

was estimated at 34 660. At this level, it was estimated to be growing by 3.5% annually of which more than a third reflected an increase in the number of teachers.⁶³

Hiring of staff, and high vacancy rates primarily due to shortages of skilled managerial and technical staff, have long persisted in government. The Structural Adjustment Committee has to approve newly established posts and the filling of vacancies. Limitations also affect the recruitment of essential support staff. These personnel have undergone job specific training, usually with the support of donor finance. The number of daily paid workers has been reduced, with a freeze on recruitment of new staff and laying-off of existing personnel.

In terms of employment in the public sector, grades 1-7 were frozen for several years under the SAP. As women occupy most of these posts, it follows that the number of employed women has declined. In addition there is also the problem of the services provided by government. Services were not expanded, or they were simply allowed to deteriorate, and in some cases they were cut off. Women and children were again hardest hit, as they are the main users of these services.

The freezing of posts under the SAP was bound to have a constraining effect on public service recruitment procedures, and have the undesirable result of having the educated and trained staying unemployed for long

⁶³ Central Bank of Lesotho Annual Report for 1997. Maseru, March 1998 P16

periods of time, or seeking employment outside the country and adding to the brain drain. The other foreseeable outcome was that, in the absence of a social security network, there would be a sustained period of hardship. It goes without saying that women, as a larger portion of the public service labour force, were hardest hit. Since it is the woman's salary that is primarily used for child-care, these reductions create pressing family budget constraints that may well affect the child's overall health⁶⁴. The problem presented by the SAP was compounded by the common practice of dismissing women before men when it comes to retrenchments and lay-offs.

Given its economic and geographic position, Lesotho has to fight a difficult battle against mounting unemployment and poverty. Women continue to be among the poorest of the poor and any symptoms of poverty and deprivation affect them more because of their position in society. They tend to be worst off in terms of unemployment. Women not only have to fight against patriarchal attitudes in the society against giving them equality with men, but also have to overcome the legal barriers placed in their path of achieving full equality. While the country may be seen to be taking its position internationally among progressive nations supporting equality of rights and eradication of discrimination against women by the signing of certain instruments, they should be translated into reality by implementation of these noble intentions.

⁶⁴ UNICEF, p40.

CHAPTER III

THE INTERNATIONAL CONVENTIONS

PROVIDING FOR WOMEN'S RIGHTS.

3.1 Introduction

The United Nations has through its various bodies and agencies passed several conventions, which provide for the equality of gender rights, and more specifically for the protection of women's rights. The most significant of these conventions so far have been CEDAW; the Beijing Declaration and the Platform of Action, and the Economic Covenant. There are other agreements and covenants reached under the auspices of regional and sub-regional bodies under the United Nations, namely the OAU and SADC.

Since its admission to the ILO in 1966 up to 1971 when it withdrew, and then again from 1980 to the present day, Lesotho has ratified only eleven ILO conventions⁶⁵. Lesotho has also ratified fifteen international human rights and humanitarian instruments, some of which cover gender equality issues.⁶⁶ The vast majority of Conventions and Recommendations apply equally to both men and women workers though a number of them are of specific concern to women, and have influenced the new economic and legal norms affecting women.

⁶⁵ The Underground work (Women) Convention 1935 (No 45) is the only standard which directly touches on gender issues and it has come under international criticism as being overly protective.

⁶⁶ ILO. Final Report. p 54

The scope of the application of the principle of equality between men and women has continued to broaden with the realisation that equality in one area can only be achieved through the attainment of equality, dignity and respect in all aspects of life. In addition to being legal instruments, International Standards should be viewed as support tools to further safeguard women's right to equal opportunity and treatment in working and social life.

3.1.1 Nature of the Conventions.

Most standards apply equally to women and men workers without making any distinction. There are however a number of standards which apply specifically to women. These can be classified into two major types:

The ILO initially aimed to protect women from arduous and dangerous work, to safeguard their reproductive function. It was only at a later stage that the need to protect women from disadvantages suffered due to their sex attracted attention and was captured in the instruments, made in the 1950's concerned specifically with eliminating discrimination between men and women workers.

a) Promotional Standards:

Those standards that guarantee *equality of opportunity and treatment* in access to training, employment, promotion, organisation, and decision-making. They also secure equal conditions of remuneration, benefits, social security and welfare services provided in connection with employment.

The standards aim at improving opportunities for women, and actively contribute in removing the political, cultural, legal, social and practical obstacles that prevent the full participation of women on an equal footing with men. Special means are deemed necessary whenever there is a risk of marginalisation of women, to redress the imbalances between men and women's rights, and to protect and support particularly vulnerable groups of women.

b) Protective Standards:

Most of these aim at protecting the reproductive function of women. Two of the conventions deal with maternity protection. The Conventions set down periods of maternity leave, the right to benefits, and protection against dismissal. Some of the standards aim at protecting the health of women during periods of pregnancy or nursing, or at the childbearing capacity of women.⁶⁷ Other standards have been adopted with the aim of protecting women in general. These standards have been criticised as being no longer necessary and infringing on the principle of equality. As a result many of them have been revised.⁶⁸

⁶⁷ The Benzene Convention, 1971 (NO. 136) and its accompanying Recommendation; the Lead Poisoning (Women and Children) Recommendation, 1919 (no. 4); others mentioned were the Maximum Weight Recommendation, 1967 (NO. 128); The Nursing Personnel Recommendation, 1977 (NO. 157); the Protocol of 1990 (no. 171); all of which limit the exposure of pregnant or nursing women to such processes and forms of work.

⁶⁸ The prohibition of night work for women in industry was the subject of one of the very first ILO instruments, Convention no. 4, revised twice, in 1934 by convention no. 41 and in 1948 by convention no. 89. These revisions sought to make the standards more flexible in certain areas but remained similar in the main provisions. In 1990 Convention no 89 was supplemented by a Protocol, which was adopted together with a new Convention no. 171 and a Recommendation on night work. The new Convention and Recommendation apply to men as well as women employed in night-work. The new instruments represent a balanced response to the debate between protection and equality; they are a compromise between maintaining the prohibition of night work for women and its repeal.

3.2 Sources of the Conventions

Countries among themselves as members of a particular international body enter into conventions. They could be regional pertaining to a specific region due to common interests and economic situation, or international. In this context Lesotho is a member of the United Nations and its agency, the ILO; the Organisation of African Unity, as well as Southern African Development Community (SADC).

3.2.1 The ILO Framework

The ILO was established in 1919 as a specialised agency with the objective of promoting peace through social justice and improving the conditions of life by building up a comprehensive code of law and practice⁶⁹. It has become one of the major functions of the ILO to set standards for its members through Conventions and Recommendations. Each Convention is a legal instrument regulating aspects of labour administration, social welfare or human rights. Its ratification involves a dual obligation for the member state: It is both a formal commitment to apply the provisions of the Convention and an indication of willingness to accept a measure of international supervision. A recommendation on the other hand is not open to ratification but lays down general or technical guidelines to be applied at the national level. Recommendations often contain more specific and detailed guidelines to supplement the principles set out in the particular Conventions or provide guidance on subjects not covered by Conventions. Through its Conventions

⁶⁹ The functions of the ILO's decision-making organs, the governing body and the International Labour Conference are those of the secretariat - the International Labour Office.

and Recommendations the ILO aims to define standards and provide a model and stimulus for national legislation and practice in member countries.

The Organisation assists member states in the advancement towards full equality of opportunity and treatment between men and women by integrating equality concerns in all programme objectives and activities. Such activities must be consistent with the ILO principles on equality between men and women. In order to ensure compliance with its standards the ILO provides assistance especially to new member states and developing countries. Programmes are developed to promote ratification and application of the standards by means such as direct contacts, advisory missions, seminars, training and the collection of dissemination of data on social legislation.

The ILO is implementing a number of national, subregional and regional projects in Africa. Some of them are women specific whilst others are components on women in large development projects or projects that cover both men and women. Considerable emphasis is being placed on training owing to its importance for employment. Other areas covered by the projects include rural women, their access to land and other productive resources, women and workers' education, women and co-operatives and also study tours for women to learn from other experiences.

3.2.2 Technical Co-operation

Governments, employers worker's organisations and other NGOs are encouraged to ensure women's increasing involvement in national development planning and programmes in order to further implement the principles contained in the ILO standards.

The ILO has appointed a regional advisor on women workers' questions whose job it is provide individual assistance to African countries and also assist them in the identification of needs and the formulation of project proposals to address the needs. The Interdepartmental project on equality for women in employment covers a number of work items dealing with development of improved methodologies and statistical data, enhancement of the effectiveness of legislation, obstacles to equality in the labour market and policies and practical measures.

Since its inception up to 1996, 180 Conventions and 187 Recommendations have been adopted by the ILO. The ILO monitors the implementation of its Conventions among the members who have ratified to make sure that they carry out their obligations as ratified. Two bodies of the ILO carry out the responsibility of supervision:

1. The Committee of Experts on the Application of the Conventions and Recommendations, a committee comprising eminent jurists whose task is to put forward their observations based on an entirely independent basis.

2. The Committee on the Application of Conventions and Recommendations at the International Labour Conference - a tripartite committee which sits in public and discusses, on the basis of the report of the committee of experts, the cases it considers most important.

The Organisation also offers assistance to its member states through regional advisors on international labour standards, by increasingly frequent recourse to a procedure of direct contact with governments, by organising seminars, and study courses and by diffusing information concerning ILO standards and principles.

The ILO's Conventions and Recommendations are embodied in the International Labour Code. This Code is responsible for influencing the development of social legislation throughout the world. It incorporates principles enunciated in the Universal Declaration of Human Rights and the United Nations human rights covenants.

Since inception the ILO has set out to fight against discrimination in the world of work, in particular, on the basis of sex. Its guiding principle has been equality of all workers. This principle is stated in its constitution as follows:

“ All human beings irrespective of race, creed, or sex, have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.

3.2.3 Principle of Equality

The ILO approaches the fundamental principle of equality of opportunity and treatment between women and men in three main directions:

- a) As a matter of **human rights** and an essential element for achieving democracy, emphasis is given to women’s legal rights and the elimination of all kinds of discrimination on the basis of sex in employment and occupation.
- b) As a matter of **social justice and poverty alleviation**, by improving women’s access to employment and training and their conditions of work and social protection. Particular attention is given to poor women, to unemployed and under employed women, to women in the urban informal sector, and in the rural sector, to women heads of households, to migrant women, to women with disabilities, and to women in the vulnerable position in the labour market⁷⁰
- c) As a matter of **social justice and economic development**. Women’s capacities are utilised, and their participation in decision-making and in shaping labour policies and practices that adequately respond to equality objectives of the entire society including both women and men.

⁷⁰ ILO. “*Women and Work, Selected ILO Policy Documents.*”

3.3 ILO Conventions Relevant to Women's Rights.

The five principal ILO Conventions specific to women workers are:

1. **The Equal Remuneration Convention, 1951 No. 100** (supplemented by Recommendation No.90) provides for equal remuneration for men and women for work of equal value. The Convention refers to remuneration as including

“The ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment”

The convention provides that all members shall promote and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. The means of ensuring this principle could be through national legislation, legally established or recognised machinery for wage determination or collective agreements between employers and employees.

2. **The Discrimination (Employment and Occupation) Convention, 1958** (No. 111) (supplemented by the Recommendation No. 111) Promotes equality of rights between women and men in the workplace (it also covers discrimination on grounds other than sex.
3. **The Workers with Family Responsibilities Convention, 1981 (No. 156)** (supplemented by Recommendation No. 165) Aims to create effective

equality of opportunity and treatment for men and women workers with family responsibilities.

4. **Part-time Work Convention, 1994 (No. 175)** (Supplemented by Recommendation No. 182) aims to ensure the protection of part-time workers in areas such as access to employment, working conditions and social security.

5. **The Home Work Convention, 1996 (No.177)** (supplemented by Recommendation No. 184) aims at improving the situation of home workers who are largely unrecognised in labour statistics and unprotected by legislation.

It is a recognised fact that women and children as workers, the indigenous peoples, and migrant workers and their families are particularly vulnerable and need to be specially protected. The importance of the International Human rights cannot be over-emphasised; they provide a yardstick to measure the recognition of women's rights at the workplace, as well as in all areas of labour rights in the development of a country's laws. ILO standards are concerned with human rights in the context of Labour. They cover a wide range of social and labour problems, including basic human rights issues (such as freedom of association, abolition of forced labour and the elimination of discrimination in employment.), child labour, minimum wages, industrial policy and employment policy, working conditions, social security, occupational safety and health.⁷¹ etc.

⁷¹ <http://www.ilo.org/public/english/140femme/guides/standard.htm>

The Constitution of Lesotho prohibits discrimination, but provides for limitations of the prohibition in so far as it relates to customary law and personal laws. These would be laws regarding marriage, divorce, and devolution of property on death, and similar matters. Though these areas are central to the issue of women's status, they fall outside the ambit of the prohibition. Women's rights cannot be protected in any matters relating to customary and personal laws. This is somewhat quizzical considering that it flies in the face of the ratified conventions, namely CEDAW, The Economic Covenant, and UN Declaration of Human Rights.

3.4 International Conventions

3.4.1 The Beijing Declaration And Platform Of Action.⁷²

The Declaration reaffirms the commitments of the governments participating in the Fourth World Conference on Women to the equal rights and human dignity of men and women, the human rights of all females, and the empowerment and advancement of all women. Among its objectives is the determination to advance the goals of equality, development and peace for all women everywhere in the interest of humanity.

The declaration takes note that women come from diverse backgrounds in respect of their roles and circumstances. It recognises that the status of women has advanced in some important respects in the past decade, though

the progress has been aberrant. Inequalities between women and men have persisted, and major obstacles remain, with serious consequences for the well being of all people. The participants also recognised that this situation was perpetuated by the increasing poverty that affects the lives of the majority of the world's people, more particularly women and children.

The conference dedicated itself to unreservedly address the constraints and obstacles and thus enhance further the advancement and empowerment of women all over the world. They accepted that this would require urgent action in the spirit of determination, hope, co-operation and solidarity, which would carry women through the millennium.

The conference renewed its commitment to principles enshrined in the UN Charter, the Universal Declaration of Human Rights, and other Human Rights instruments, including CEDAW. They reiterated their commitment to ensure the full implementation of the human rights of women and of the girl child as an alienable, integral and indivisible part of all human rights and fundamental freedoms. They pledged themselves to achieve full and effective implementation of the Nairobi Forward Looking Strategies for the Advancement of Women and to the empowerment and advancement of women.

The basic principle of the convention was the empowerment and full participation of women on the basis of equality in all spheres of society,

⁷² The Beijing Conference was held in China in September 1995

including participation in the decision-making process and access to power, are fundamental to the achievement of equality development and peace. That women's rights are human rights and that equality is critical to their well being of their families, as well as to the consolidation of democracy. The conference reinforced the fact that the eradication of poverty requires the involvement of women in economic and social development.

The Platform of Action on the other hand is a programme of action, which builds upon the Nairobi Forward Looking Strategies for the Advancement of Women. It aims to accelerate its implementation and to remove all obstacles to women's active participation in all spheres of public life, public and private. This is anticipated through a full and equal share in economic, social and political decision-making. The Platform aims to empower women through ensuring that the principle of shared power and responsibility between women and men should be established at home and in the wider national and international communities. The Platform for Action upholds CEDAW as well as all the relevant provisions adopted by the Economic and Social Council and the General Assembly. It establishes a basic group of priority actions to be carried out during the next five years⁷³. As an agenda for action the platform seeks to protect the full enjoyment of all human rights and the fundamental freedoms of all women throughout their life cycle. While it recognises that women share common concerns that can only be addressed when working together, and in partnership with men, it also respects and values the full diversity of women's situations and conditions.

The focus of the Platform of Action is to establish a group of basic priority actions that should be carried out during the next five years. These were identified as:

- The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels. There is world-wide movement towards democratisation which has opened up the political process in many nations, yet the popular participation of women in key decision-making as full and equal partners with men, particularly in politics, has not been achieved.
- Elimination of all forms of violence against women.
- Eradication of poverty- to ensure that all members of society benefit from economic growth based on a holistic approach to all aspects of development: growth, equality between women and men, social justice, conservation and protection of the environment, sustainability, solidarity, participation, peace and respects for human rights.

⁷³ The UN Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995)

3.4.2 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW is an international agreement binding state parties to eradicate all discrimination against women. It sets out a number of practical steps and core principles for the advancement of gender equality. A number of recommendations have been adopted to supplement it since it was first passed in 1979. The convention itself can be divided into three main sections: Articles 1-5 deal with questions of gender equality and the role of states in developing measures to eliminate discrimination. Article 5(a) of CEDAW requires member states

"To take all appropriate measures to modify social and cultural patterns of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women".

Articles 6-16 deal with substantive issues. Articles 17-30 deal with the processes of implementation of the convention by member states.⁷⁴

While CEDAW provides the minimum international requirements for gender equality, it should be read in the context of the constitution of the ratifying Member State and its commitment to equality. It should correspond to the state's commitment to the achievement of substantive equality for men and women.

The convention includes the rights to property, to financial credit and assistance, to training, to choice of a marriage partner to family benefits, to equal right on dissolution of marriage; to reproductive health care and to maternity leave and benefits among others:

In its preamble it sets out that the role of women in procreation shall not be a basis for discrimination. It demands a proper understanding of maternity as a social function, and the fully shared responsibility of child rearing by both sexes. States are encouraged to make provision for maternity protection and child care rights, to be incorporated in areas such as employment, family law, health care, or education. It recognises society's obligation extends to offering social services, especially childcare facilities.

Formal recognition is given to cultural and traditional influence on restricting women's enjoyment of their fundamental rights. Culture and tradition take the form of stereotypes, customs and norms that lead to legal, political and economic constraints on the advancement of women. Member states are entreated to work towards modifying social and cultural patterns to eliminate prejudices and customary and all other practices that are based on the idea of the inferiority or superiority of either of the sexes. One way of doing this is through eliminating stereotyped concepts in the field of education. To challenge the culture which holds the public realm as a man's world and the domestic sphere as the woman's domain.

Initially the Lesotho Government was reluctant to accept the convention as it was. Reservations were made in respect of Articles 15 and 16, which are the key Articles of the Convention. They deal with the legal status of women. Article 15 deals with the women's capacity to contract, to own property and their capacity to sue and be sued in her own name⁷⁵. These sections are even more important when considered in the light of the limitations imposed on women by their minority status, which affects their capacity in contracts, (restricting their access to credit), capacity to own land, and their capacity to sue and be sued. Lesotho eventually ratified CEDAW albeit with reservations on articles 1,15, and 16 in 1995⁷⁶ and the Republic of South Africa had ratified the Convention earlier in 1993. The newly instituted Law Reform Commission in the Kingdom has the mandate to look at laws affecting women as its first project. The practical impact of this is likely to take some years to be felt.⁷⁷

3.4.3 The African Charter

The African Charter on Human and People's Rights ("The African Charter") was adopted under the auspices of the Organisation of African Unity in 1981, and came into force in 1986. It endorses the United Nations Declaration on Human Rights and the Human Rights Covenant⁷⁸. It establishes human rights standards of regional application and machinery for the protection of human rights in Africa. It contains regional standards of conduct in human rights -

⁷⁵ Kalula, E. et al. *"Mission to Lesotho on Equality for women in Employment-Background Report"* ILO Interdep (Cape Town, 1993) p40

⁷⁶ Kalula, E. *"Promoting Gender Equality in Employment in Lesotho."* An update and background Report prepared for ILO/UNDP Workshop Held at the Lesotho Sun, Maseru, 25-27 February 1998, p31.

⁷⁷ UNICEF, *Making Ends Meet: Women Poverty and Survival in Lesotho*, 1998

relating to the performance of domestic legal systems and confirms acceptance of other human rights instruments in Africa. Most importantly, the covenant recognises economic social and cultural rights⁷⁹.

In so far as women's rights are concerned, the standards include equality before the law and freedom from discrimination, as well as the other fundamental freedoms and liberties. It looks at women's rights as a specific category of human rights. It recognises that human rights have not been adequately employed to improve the position and general well being of women in Africa, and seeks to complement the international instruments protecting women's rights.⁸⁰

Article 18(3) of the Charter provides:

"The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and child as stipulated in International Conventions and Declarations".

The article lays down gender specific obligations upon states in Africa to eliminate discrimination against women, the language employed admits of no exception to this obligation. It distinctly acknowledges the existence of women and children's rights by the state. For this purpose it incorporates the application, within the Charter, of international standards protecting the rights

⁷⁸ Article 18(3) of "the African Charter."

⁷⁹ Articles 14-17.

⁸⁰ Beyani, Chaloka "Toward a More Effective Guarantee of Women's Rights in the African Human Rights System". *"In Human Rights Of Women National and International Perspectives"* ed. Rebecca J Cook.p285

of women and children as stipulated in International Conventions and Declarations. Since the Charter establishes binding obligations for state parties, article 18(3) transforms the Charter into a binding instrument. It renders the CEDAW directly applicable. The Combined effect of the African Charter and CEDAW is that the meaning given to "*morals and cultural values*" in the Charter must be consistent with human rights standards. This means that whatever their nature, the morals or cultural values in question must neither discriminate against women, nor impair their enjoyment of human rights on an equal basis with men, and they ought to be consistent with human rights standards⁸¹.

At chapter 1, the Charter spells out the "*people's rights*" including their right to economic, social and cultural development⁸². A few of the provisions of the charter relate specifically to women, that is apart from its endorsement of the women's charter. This has given rise to a debate that the state's duty to promote and protect the morals and traditional values recognised by the community vis-à-vis the individual's duty to preserve and strengthen African cultural values in relation to other members of society⁸³ represent areas of potential conflict with women's rights. Ilumoka argues that such conflict should depend entirely upon the interpretation given to the provisions of the charter.⁸⁴

⁸¹ Ibid p297. See also the decision of the Tanzanian High Court, in Ephraim v. Pastory and Kaizingele 1990, 87 I.L.R. 106. In this case the court found that the Tanzanian Constitution incorporated a Bill of Rights and the Universal Declaration of Human Rights both of which prohibited discrimination on the basis of sex. The International Conventions regarding human rights and CEDAW, which Tanzania had ratified, were also taken into account. The court found the customary law to be in conflict with the constitution

⁸² Article 22

⁸³ As stated in Article 29(7)

⁸⁴ Ilumoka, A. O. "*African Women's Economic, Social and Cultural Rights*" in Cook (ed.) p307.

In the unreported Botswana case of the *Attorney General v Unity Dow* known as the "Unity Dow" case, involving citizenship, the court made reference to the effect of the African Charter on the Bill of Rights of Botswana. Like many other African states, Botswana had not enacted any legislation adopting or incorporating the provisions of the Charter. The court considered the Charter to be an aid to the construction or interpretation of the Constitution, and concurred with the High Court's determination that domestic legislation should as far as possible be interpreted not to conflict with Botswana's obligations under the Charter or other international obligations. *The intention of the framers of the Constitution cannot be construed to have been to permit discrimination purely on the basis of sex*⁸⁵.

In many English speaking countries in Africa, a repugnancy clause has been used to check the custom against written law although the clause varies from country to country. In Zambia, for instance, it is applicable to local courts which ordinarily adjudicate matters of customary law. Section 12(1) of the Local Courts Act empowers the local courts to administer African customary law relating to any matter before it *in so far as such matter is not repugnant to natural justice or morality or incompatible with any written law*. In Kenya the clause is applicable to the High Court and the Court of Appeal, as well as all the subordinate courts, the scope of the clause is wider.

⁸⁵ My own emphasis. This is a good precedent for the Lesotho situation, which tends to be lacking in protection of women.

Tanzania has made bold advances in the African region in this field. It has passed legislation whose scope exceeds that of the repugnancy clause, and is aimed at establishing conformity between custom and human rights. The Constitutional (Consequential, Transitional and Temporary Provisions) Act of 1984, at section 5(1) empowers the courts to construe the existing law including the customary law with such modifications, adoptions, qualifications, and exceptions as may be necessary to bring it in conformity with the provisions of the Bill of Rights. The legislation shows that customary law can be changed; international human rights standards provide the guidelines toward which changes may be directed.

Change should be encouraged in the customary law in legal systems in the region to eradicate the means of permitting women's suffering under perverse discrimination in the enjoyment of their rights as well as in their individual and collective livelihood.

3.4.4 The Economic Covenant.

Together with the African charter, this covenant articulates the social and economic rights. It affirms the rights enunciated in CEDAW, as well as the Universal Declaration of Human Rights. It has been criticised for its far-reaching implications on the social organisation and the balance of power. States that cater for these rights are mostly welfare states that deem the state to be the caretaker of its subjects. Guarantees offered by the Covenant can only be successfully implemented if the state has the economic capacity to

to be the caretaker of its subjects. Guarantees offered by the Covenant can only be successfully implemented if the state has the economic capacity to afford them. The covenant recognises the right to work; to fair wages and conditions of service; and to an adequate standard of living. It upholds the freedom from hunger; and the right to mental and physical health; to education and freedom from discrimination; to establish and join trade unions, to strike and to have social security and insurance. So far Lesotho has offered health and education at heavily subsidised rates to its citizens. Work related rights have proved more difficult to enforce.

With the insurmountable task of creating employment and income, Lesotho is faced with the challenge of balancing compliance with the Covenant against finding employment for its masses at all costs. One of the ways to attract foreign investment in the country has been the low wages and the loosely regulated labour market. Tipping the balance in favour of rights could translate to job losses to the masses employed in these sectors.

Economic, social and cultural rights are among the most violated all over the world, especially in Africa. States' obligations to enforce them progressively rather than immediately and the ensuing implications for their status and observance continue to generate controversy. As a result, this leaves the various practices in the different countries open to different measurements of compliance. Yet the rights of women still have to be inferred from them, and the significance of the standards still depends on the ability to enforce them.

3.5 The United Nations Decade for Women

The United Nations aimed to focus attention on the position of the woman worker by proclaiming 1975 the International Women's Year, and the first Decade for Women in the period of 1975 to 1985. It was in 1975 that the World Plan of Action for the Implementation of Objectives of the International Women's year was accepted. This led to the official christening of the International Women's Year at the UN conference in Mexico⁸⁶. The UN General Assembly also endorsed the themes of Equality, Development and Peace for the Decade of Women. This coming into being of the United Nations Decade for Women served to formalise and legitimise the international women's movement. Its various activities at the national, regional, and international levels helped to bring women's issues to the forefront of world attention⁸⁷. In 1980 there was a follow-up UN conference in Copenhagen to formulate an Action Programme for five years and to introduce the three additional sub themes of Employment, Health, and Education as approved by the UN in 1979. Betten has said this of the era:

"The adoption of international norms in the post-war decades to the effect that women should be treated equally to men marks – in theory – the end of a centuries long situation in which women were considered to be subordinate to, or even the possession of men."

1985 marked the end of the Decade for Women. The UN held a meeting in Nairobi where Forward Looking Strategies for the Advancement of Women

⁸⁶ Drake V C. "The Gender Bias Issue in Environment and Development: Fact or Fiction?" In Buchner G. *supra* p4

⁸⁷ UN. "The United Nations and the Advancement of Women, 1945-1995."

during the period from 1986-2000 were adopted. The emphasis was placed on the unremunerated contributions of women to household activities.

The decade will be most remembered for its historic events such as the Copenhagen and the Nairobi Conferences, and its legal and policy achievements, such as the 1979 CEDAW. The decade's major conferences offered a forum in which women's organisations had a voice in shaping the work of the United Nations. These were expressed as follows:

*"The most fundamental transformation was the shift from the belief that development served to advance women to a new consensus that development was not possible without the full participation of women. The United Nation's statistics for the first time dramatised the fact that women's equality and rights, far from being isolated issues were important factors in the well being of all people. The undervaluation of women was identified as both a cause and an effect of underdevelopment, closely linked to such global problems as poverty overpopulation, illiteracy, food shortages, malnutrition and poor health conditions."*⁸⁸

It was during this period that pragmatic measures were adopted to provide for technical assistance, the United Nations regional commissions began to develop their own programmes as part of a broad effort to strengthen the drive for the advancement of women and to support grassroots organisations. The UN was transformed from being an organisation in which Governments formulated policies and agendas to one in which there was input from the grassroots level and from the NGOs. At the national level, many NGOs

⁸⁸ *ibid*, p37

worked towards the implementation of the UN policies, to enhance women's human rights and uplifting them from poverty.

As this global "civil society" emerged, the voices and concerns of women in developing countries, particularly in rural areas, increasingly shaped the United Nations assistance programmes.⁸⁹

The Decade for Women did have a few achievements, one of which was that the link between women and development had finally been recognised in many aid agencies. Crippling factors contributing to its failure has plagued the Decade of the Women. These may be enumerated as follows: A mounting international; economic crisis that rocked the developing country sphere characterised by immense foreign debts; inadequate structural adjustment programme policies in response to the negative economic factors; protection against exporting efforts; failure to establish democratically based economic relationships; progressive depletion of non-renewable resources and the lessening access to them; high illiteracy rates and low education standards, high job discrimination and the lack of recognition for their contribution to the economy.

⁸⁹ Ibid p38

CHAPTER IV

EXTENT TO WHICH LESOTHO IS UNDER OBLIGATION TO IMPLEMENT INTERNATIONAL STANDARDS

4.1 The Position Regarding CEDAW.

When the military government in Lesotho eventually considered the ratification of the Convention for the Elimination of all forms of Discrimination Against Women, reservations were expressed in relation to articles 15 and 16. These articles form the core of the convention; they relate to women's capacity to contract, to own property and their capacity to sue and be sued in their own name.⁹⁰ They also deal with marital rights⁹¹. Another important provision in the Convention is the stipulation of the right "*to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the equality of work.*" The convention could therefore not be ratified due to these reservations on the basis that that they were inconsistent with the constitutional provisions of the Kingdom which did not recognise the principle of equality of women to men.⁹²

What remains to be seen right now is whether the present democratically elected government will ratify the convention. And failing that, whether the lot of Basotho women will change now that Lesotho is a signatory to the

⁹⁰ Article 15 of CEDAW

instrument. Since coming into power in 1993, the ruling Basotholand Congress Party (BCP), and its successor, the Lesotho Congress for Democracy (LCD)⁹³ have been bedevilled by with resistance and general ungovernability of the disciplined forces, punctuated by attempted *coup d'etat*. This has left the government with little time to deal with the substantial issues involving international relations and improving government policy, while they were kept busy looking over their shoulders in case of an attack from their own armed forces and from the police.

Other important Conventions are those sponsored by the ILO specifically aimed at the issues of equality between men and women. Of particular importance is the Equal Remuneration Convention no. 100 of 1951 which came into force on 23 May 1953, and the Discrimination (Employment and Occupation) Convention, 1958 (no.111) which became effective on 15 June 1960. Neither of these Conventions has been incorporated into Lesotho's domestic law. It is arguable therefore whether any of these conventions are applicable to the law of the Kingdom on the basis of sections 4 (a) and (b) of the Labour Code Order of 1992. In the case that they are applicable by virtue of this section then it would mean that every Mosotho woman is entitled to redress under the statute for infringement of any of these conventions

⁹¹ Article 16 of CEDAW.

⁹² S18 (4) especially (b) and (c)

⁹³ This was virtually the same party since the leader of the BCP in a historic move "crossed the floor" a few weeks before the 1997 election, forming a new party and taking all the parliamentarians with him, and then declaring the BCP to be the opposition. All members of the BCP who did not defect to the LCD were declared opposition members.

4.2 The legal system

Women have many factors including the law that disable them from effective participation in the economy and the society. Some of these are discussed below:

4.2.1 Marriage and status.

While it is true that the legal system in Lesotho is dualist in nature, this is little comfort to the Basotho woman since both systems are guilty of subjecting her to various forms of oppression. What differs is the mode employed to achieve the same discriminatory result. The only exception seems to be for 'emancipated' woman under either system through either attainment of majority if remaining unmarried, or being married under the Ante-Nuptial Contract (ANC) with the exclusion of marital power. under the common law system.

The other aspect about the minority status of the Basotho woman is the fact that she cannot appear in court on her own without the assistance of her legal guardian (this is termed *Locus standi in judicio* in common law). This may be her husband, her son, or at worst a relative who has no interest in her affairs and welfare.

The status of African women is dictated by a deeply entrenched tradition of patriarchy. This has been defined to mean deference due to males, or more precisely the control exercised by senior men over the property and lives of women and juniors. The empowerment of men entails a corresponding

disempowerment of women, who are deprived of the capacities necessary to deal with the world at large. This is well delineated by Bennett in the following quotation:

*"Legal customs that endorse patriarchy, as customary law does, deny women three powers essential to realizing their autonomy. In common law these are contractual and proprietary capacity and locus standi in judicio"*⁹⁴

Patriarchy is deeply entrenched in custom and has been accepted by women and men as a way of life. Many are complacent to the fact that it actually strips women of all powers and subordinates them to the power of their husbands or the male guardian so that they continue to look up to men as the powerful partners in control of virtually all areas of their lives.

4.2.2 Housing

Government recognises the urgency of formulating and adopting a national housing policy; much of the government's policy can be seen in the achievements of the Lesotho Housing Corporation. In an attempt to promote gender equality, Lesotho government's housing policy is formulated in gender neutral terms. This unfortunately does not guarantee gender equality in a society of inequalities such as that of Lesotho. Like in other countries in the region, housing schemes are beyond the reach of many women⁹⁵. As stated above, women are among the unemployed and the self employed, and thus a great deal of them find themselves effectively excluded from access to housing, and falling outside the housing schemes provided for under the

⁹⁴ Bennett TW. *"Human Rights and African Customary Law Under the South African Constitution"*. Juta & Co LTD 1995

different banking institutions⁹⁶ and parastatals⁹⁷. Many women are disadvantaged because of their lack of a stable source of income.

Married women have been particularly hard hit by the lack of gender sensitivity in policymaking. Though on the face of it many housing schemes tend not to discriminate among women, married women are still caught up in the net of Deeds Registration Act which strips married women of any right to register property in their own name. The selection criteria for the schemes clearly stipulates that all permanent employees, irrespective of sex, age, income level or marital status qualify for assistance, provided they have completed at least two years of service. However there's a binding clause for both schemes, indicating that women married in community of property will not be considered without the consent of their lawful husbands⁹⁸. Although unmarried women do not require the approval of their guardians under the housing schemes, the nature of the contract changes immediately upon marriage. Mokhothu quotes a clause in one of the agreements:

*"A single woman who subsequently marries in community of property and becomes subject to the marital power of the husband, then in such event the husband shall immediately bind himself as a surety and a co-principal debtor for his wife's obligations in terms of the loan agreement"*⁹⁹.

⁹⁵ Mapetla, M. et al *"Changing Gender Relations in Southern Africa: Issues of Urban Life"*. Institute of Southern African Studies, National University of Lesotho. Roma, Lesotho.

⁹⁶ Such as the Lesotho Building Finance Corporation, and the Lower-Income Housing Corporation were some of them.

⁹⁷ Mokhothu focuses on the Central Bank and the University in her article *"Housing Loans Schemes and Gender Relations among the Educated in Lesotho"*. In Mapetla et al supra. p226

⁹⁸ Ibid. p 229

⁹⁹ Clause 13.4(b) of the NUL Loan Agreement.

Married women therefore have to register any land acquired by them in the name of their husbands even if they themselves would have to make the loan repayments. This goes with the risk of losing the house to an irresponsible husband during the marriage. Women remain subordinate to their spouses even when they are responsible employees who have the responsibility to house their families. Mokhothu argues that the gender structures in Lesotho are based upon the prevailing patriarchal culture that has resulted in the subordination of women¹⁰⁰. She argues that because of the shifts in the roles played by men and women, gender specific responsibilities and division of labour which considered men as bread winners and women as homemakers has undergone some changes.

This trend is not peculiar to Lesotho. A similar pattern has been observed in Zambia where a plural legal system is maintained in order to preserve the status of customary law. Law enforcement agencies perceive issues with a bias to tradition. The current constitution¹⁰¹ permits the application of discriminatory personal laws and customary practices. This seriously detracts from the general guarantee of sexual and marital equality in the right to life, security of the person and protection of the law as contained in Article 11 of the same Constitution. The same applies to the guarantee of protection for the privacy of what the Constitution terms "his" home¹⁰²

¹⁰⁰ supra p 227

¹⁰¹ Article 23, the Constitution Act, no.1 of 1991,

¹⁰² Munalula, "*Shelter and Gendered Power Relations: A study of spousal Homicide in Zambia.*" Article in Mapetla (ed) p244

A similar pattern has been observed in South Africa. Fadane¹⁰³ has said this about her study on Durban "In the past decades, the composition and structure of families have changed dramatically. The effects of urbanisation, modernisation and industrialisation have been very significant in transforming the customs and rules that sustained in traditional households.... In spite of these changes and shifts, very little has changed in the way that society treats women. Housing is one of the aspects where allocation reflects the division of labour between the sexes and therefore results in the oppression of women."

Another factor instrumental to the subordination of women is the civil marriage regime under common law. It is according to this system that whilst all other persons attain the age of majority at 21, and gain full legal power to own property and sign contracts, a woman married in community of property has no such rights. The husband automatically becomes the administrator of the now joint estate. Many women in Lesotho are married under this regime. This trajectory runs through all Southern African States due to their common law system. In Swaziland for instance Miles¹⁰⁴ says that women who are in the low income and those who are heads of their households are usually denied access to basic shelter. She says that this occurs at three levels: The first is on the ground of their low and irregular earnings. They cannot have access to formal housing or sponsored housing projects. Their access to credit through formal banking channels is barred since they have no collateral and they need the assistance of their husband or male family member. This makes it almost impossible for a female headed household to have access to housing finance.

¹⁰³ Fadane N " *Women street Vendors and housing in Durban* " in Mapetla eds.p17

4.2.3 Employment and Labour

As has been said above, Lesotho has an insurmountable challenge of creating employment and income to battle the current under-employment and open unemployment that afflict large sections of the population. The increasing numbers of new entrants into the labour market as well as returning migrant workers has heightened the problem. The economy has thus far been unable to absorb these work seekers and not enough employment opportunities have been provided. In order to meet the challenge, the government has stated policies, strategies and programmes for the creation of employment opportunities and income generating activities. The Sixth Plan aims at poverty reduction, which in turn prompts the incorporation of employment generation in the overall employment strategy¹⁰⁵. Of interest particularly to women is the reduction of poverty among rural and urban households through the provision of adequate social amenities and relief programmes. The promotion of equal access to the productive assets such as land, credit for women in rural areas and in informal sector activities and lastly, the promotion of social justice and adherence to internationally mandated labour standards impacting directly on women's position.

The strategies envisaged by government involve the promotion of labour intensive methods of production in all sectors of the economy, particularly

¹⁰⁴ Miles M "Housing and Domestic work in Women's Coping Strategies: Evidence from Swaziland." In Mapetla (Eds). Supra. p184

¹⁰⁵ Sixth National Development Plan 1996/97-1998/99, Ministry of Economic Planning, Maseru. 1997 The "Sixth Plan" p 93

building and construction, agriculture and industry sectors. The Sixth Plan also identifies government's constraints to the growth of the informal sector such as access to capital inputs, supporting infrastructure, markets and training – and recommends measures to address these constraints¹⁰⁶.

Government's strategy to expand employment in the formal sector will be achieved through labour-intensive export production as well as upgrading and development of informal and formal sector enterprises. The strategy is intended to focus on enterprises that are labour absorptive (i.e. which rely on cheap and abundant labour), give Lesotho a place in the export and regional markets; cater to viable import substitution; or use the natural resources in the country.

The strategy also focuses on the reduction of hidden under-employment (in low productivity sectors). Government proposes to achieve this through various means targeted at the small-scale industry sector. As has been seen above, women dominate this sector as street vendors and in other low productivity activities. They should thus form the bulk of the target group. Measures taken such as access to credit should benefit more women. This is where responsible foreign assistance should come into the picture. Donations from the IMF and the World Bank can be of use if channelled into these kind of projects. Between 1991 and 1995, the World Bank financed small-scale enterprises with Twelve and a half million Maloti (M12.5m). Measures were being taken by Lesotho Bank to improve the flow of credit funds, including

¹⁰⁶ Ibid at p94

lowering the required contribution of entrepreneurs from 20% to 10% of total investment in a project.

Another strategy adopted in the Sixth Plan is the Sustainable Human Development (SHD). This strategy gives priority to the effective participation of people in the development of the economy. It advocates empowerment of all people to participate in the design and implementation of major decisions that have¹⁰⁷ impacts on their lives. The SHD strategy thus recognises the need for gender equality and the desirability to address all aspects in society that cause women to be disadvantaged in their socio-economic interaction with men.

4.3 International Labour Law and The Labour Code

As with other countries, Lesotho's obligations arise from any international conventions that it has entered into, and from customary international law¹⁰⁸. The ILO treaties to which Lesotho is a party have been mentioned in greater detail elsewhere in the work. It is these conventions and treaties that are used in the interpretation of and referred to in the Labour Code. These conventions are the standards against which compliance has to be measured. The Labour Code¹⁰⁹ has to be "read down" in order to ensure compliance with Lesotho's obligations under the International Labour Organisation. To this end the Labour Code provides:

¹⁰⁷ Sixth Plan, *supra* at p 82

¹⁰⁸ For the South African position see Du Toit "*The Labour Relations Act of 1995*", Butterworths, 1997.

- (a) *"No provisions of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to derogate from the provisions of any international labour convention which has entered into force for the Kingdom of Lesotho.*
- (b) *In case of ambiguity, provisions of the Code, and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with the provisions and conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation.*

By this legislative act parliament has not only given effect to ILO Conventions ratified by Lesotho as part of municipal law but to all conventions adopted by the ILO conference. Of this provision Lethobane says this is a very important provision as "it's effect is government's submission to virtually all ILO conventions whether or not it has rectified (sic) them". He further says that this should come as a source of relief to players in industrial relations as *"this will ensure that substantial justice is done to every case notwithstanding any possible inadequacies which may occur in the law"*.

It is argued that Lesotho's obligations do not end with International Labour Organisation's Conventions. It is trite that states are bound by customary international law principles under the common law. Lesotho is no exception to this rule. South Africa has given force to this principle by recognising the place of Customary International Law in the statute of the country¹⁰⁹. A number of the ILO'S conventions including those on discrimination in

¹⁰⁹ The Labour Code Order, no. 24 of 1992

employment and occupation have acquired the status of customary international law. These are therefore directly binding on South Africa irrespective of ratification¹¹¹. It is accepted however that generally speaking, unratified conventions and recommendations (that do not form part of customary international Law) do not impose any obligations on the State merely by virtue of its membership of the ILO.

The Vienna Convention on the Law of Treaties, 1969 codifies customary international law. At Article 18 it provides that a state's signature is sufficient to impose upon it a general obligation to uphold the principles underlying the treaty. Even if a state has not acceded to CEDAW, it will find itself under pressure to recognise a norm of non-discrimination on the ground of sex or gender since the principle is now firmly established in the general corpus of international human rights law. An example of this is the protection of women's rights in marriage in the Universal Declaration of Human Rights.¹¹² It states that men and women of full age, without any limitation due to race, nationality and religion, have a right to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Some International Conventions as well as ILO Conventions recognise labour rights as "basic human rights"¹¹³. The Universal Declaration of Human Rights of 1948 recognises the freedom of association as a right. The International

¹¹⁰ The Constitution of South Africa S231 (4)

¹¹¹ Erasmus, G & Jordaan, B "South Africa and the ILO: Towards a New Relationship" cited by Du Toit in "The Labour Relations Act of 1995" Butterworths, 1997.

¹¹² Bennet TW supra. P82 n. 16

¹¹³ Rugege, S. "Worker's Rights and the Lesotho Labour Code", Paper presented at seminar on the new Lesotho Labour Code Order 24 of 1992. 23-24 August 1993.

Convention of Economic and Cultural Rights recognises Labour Rights under Part III, namely the right to form and join trade unions for the protection of his economic and social interests, and the right to strike in conformity with the laws of the particular country. The ILO also recognises the freedom of association and the freedom to organise and bargain collectively. It seems that the time is nigh for the recognition of women's rights as basic human rights.

4.4 Equal pay and Pension Benefits.

Legislated discrimination is prohibited in the Constitution of the Kingdom as long as the alleged discriminatory law does not deal with the personal law of the person discriminated against, or with the customary law in the case of persons who are subject to that law. Discrimination is also legitimate in respect to the appropriation of public revenues or other public funds¹¹⁴. This provision has had direct impact on the pensionability of women since the civil service pension is not funded by contributions from the employee and employer, as is the case in the private sector. The funds that pay for the pension are therefore public revenues.

The earlier provisions of the ILO treaties dealt more with protective measures than on equal treatment of men and women at work and in social security. While it is quite easy in simplistic terms to apply the principle that all men and women are equal, regardless of colour, religion, nationality, race, etc, its acceptance by the worldview has always been problematic. The main

¹¹⁴ S18 (d)

problem has been to change the worldview that women, because they are biologically different from men, justifies any ideas that they are inferior.¹¹⁵ The world community had to recognise that women had the right to equal pay for work of equal value. It was soon realised however that equality in work is not achieved by money alone. It was important to give women the same opportunities as men to pursue careers and generally to treat them equally in regard to all labour conditions, *including social security matters*.

The Employment terms of women in the public service have been governed by the Lesotho Public Service Order No. 21 of 1970 which has been singularly guilty of perpetrating discriminatory practices within the public service. It was under this piece of legislation that female employees were upon their marriage, deemed to have retired from the public service unless the minister approved their retention. In practical terms this meant that upon marriage the female officer became a temporary employee, and was ipso facto stripped of her right to permanent employment as well as her pension rights.

In 1992 the Pensions (Amendment) Order, 1992 was passed, changing the position of female civil servants who were appointed after 10 august. The terms of service for married female officers were changed and they could now be employed in the public service on pensionable terms. This amendment has left female officers of the public service who were not "appointed" on a permanent basis without redress. It goes without saying that this class of female employees comprises a small group of women who are already at the

¹¹⁵ Betten L, "*International Labour Law : Selected Issues*" (1993) p266

age of retirement and need a break from work. Government did not need their services for much longer and therefore did not offer them any opportunity to serve on a permanent basis. These are the women who only continue to work because they have no other means of income since there is no social security in Lesotho to provide a livelihood. They are faced with destitution and poverty once they stop working. Some of them thus have to continue to work until they die. The issue was brought to the attention of different departments of government without any joy. It is difficult to accept that this omission was anything other than a calculated act to avoid the cost.

The practice of treating women as temporary employees is a legacy of the colonial era when the men in the colonial government would bring their wives to work in support services as temporary month to month employees. In order to avoid disrupting their work when their husbands were transferred, the women were pay a fraction of their husband's salaries and were not pensionable. They were considered to be dependants of their husbands and their salaries were only supplementary income to that of their husbands¹¹⁶. This legacy has greatly influenced the status and terms of employment for women in the civil service to the present day, albeit the fact that the circumstances have changed through the times and the targeted group is not the same.

The Labour Code recognises and protects the fundamental rights of individuals. Most particularly it recognises the right not to be discriminated

¹¹⁶ Kimane et al. supra

against and the Freedom of Association. The forms of discrimination that are censored are those that occur in the areas of gender, equality of opportunity, sexual harassment, and equality of pay. Section 5 of the Code says:

"Men and women shall receive equal remuneration for work of equal value."

No definition is given for the meaning of the term "*remuneration*" and the ordinary meaning of the word is therefore applicable. A meaning of the word "wages" is given, however. This is interpreted ¹¹⁷as

Remuneration or earnings, however designated or calculated, capable of being expressed in terms of money, fixed by law or by a mutual agreement made in accordance with the Code, and payable by virtue of a written or unwritten contract of employment to an employed person for work done or to be done or to be rendered

The provisions have evidently been incorporated with the influence of article 2(1) of the ILO Convention¹¹⁸, which provides:

[E]ach Member State shall, by means appropriate to the methods in question for determining rates of remuneration, promote and in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

The European Community has a similar provision in its treaty. Article 119 refers more specifically to gender equality but defines the principle only in relation to pay. It refers to "pay" as the ordinary basic or minimum wage or

¹¹⁷ Labour Code Order, 1992. Part II-"Interpretation and Fundamental Principles."

salary or any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, *in respect of his employment from his employer*. This requirement has presented a problem in relation to the important issue of whether pension benefits can fall within Article 119, or actually qualify as social security benefits.

Two requirements have been extracted from this definition for payment to qualify as falling under article 119.

1. The scheme *must be funded in part at least by the employer*, since otherwise they may fail to represent consideration received from the employer within the meaning of Article 119;
2. The scheme *must be contractual* rather than set up by statute.

The question of whether a pension falls under social security or is pay was decided by the ECJ in the matter of *Defrenne v Belgium*¹¹⁹ dubbed "*the first Defrenne*" case. In this case the court decided that:

"[The] part due from the employers in the financing of such schemes does not constitute direct or indirect payment to the worker. Moreover the worker will normally receive the benefits legally prescribed not by reason of the employer's contribution but solely because the worker fulfils the legal conditions for the grant of benefits."

¹¹⁸ No. 100.1951

¹¹⁹ Case 80/70 [1971] ECR 2019.

In the second *Defrenne Case*, however, the court ruled that Article 119 had a direct effect on the social security cases:

[I]n particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public".¹²⁰

In a watershed decision on part-time work in the EU, the ECJ in the case of *Bilka-Kaufhaus v Weber von Hartz* was faced with the question whether sex discrimination in equal work for equal pay could be justifiable. In the matter, only full-time employees were given a non-contributory pension on retirement. In order to qualify, part-time workers had to have worked fulltime for at fifteen years. The ECJ decided that this policy was directly discriminatory against women workers, who because their family duties could not undertake fulltime employment. The court also found that article 119 had also been infringed by the plaintiff/applicant by the exclusion of part-time workers from its occupational pension scheme where the exclusion affects a much greater number of women than men¹²¹. The onus lay on him to show that the exclusion was based on objectively justified factors unrelated to any discrimination based on sex. The test applied was that of "objective

¹²⁰ *Gabrielle Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena*, Case 43/75, (1976) ECR pp455 et seq.

¹²¹ See L. Betten at p274; *Bilka Kaufhaus GmbH v Karin Weber-von Hartz*, case 170/84, 1986 ECR, at pp1607 et seq., at p 1627.

justification". The UK courts have not followed this test however, and have instead applied the "reasonable need" approach¹²².

The ECJ's case law indicates that all benefits paid by an employer to his or her employees, fall within the scope of article 119, even if they form part of benefits which are granted after the worker has retired. The court in the case of *Garland v British Rail* stated this¹²³. The case concerned the granting of special travel facilities to male workers, their wives and their dependant children after retirement, while female employees received such facilities only for themselves. In that case the court considered that:

"The concept of pay contained in the second paragraph of Article 119 comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer."

It is clear that these cases in the ECJ are of persuasive authority alone and cannot be of any binding force on African jurisdictions like Lesotho.¹²⁴ A leaf out of the European Community's decisions can only be of great value to a judiciary in the absence of clear legislation.

The true test for the Labour Code will be in the use of legal mechanisms. The mission poses the question "[whether] the legal mechanisms in Lesotho are

¹²² See *Greater Glasgow Health Board v Carey*(1987)IRLR 484; *Rainey v Freatre Health Board* (1987)2 CMLR 11; *Hampso v Department of Education and Science* (1989) ICR 179; and *Clymo v Wandsworth* (1989)CMLR 577

¹²³ *Eileen Garland V British Rail Engineering Ltd.* Case 12/81, 1982 ECR. 359 AT 365.

¹²⁴ ILO Background Report p 50.

sufficient" and "if the law in Lesotho can be used to challenge such phenomenon as ...failure to provide emoluments or employment-related benefits where the reason is the sex of the employee." The reason for this is given as "an undeniable 'yes'. Of this the mission says

"The limits of protection found in Lesotho's Labour Code will not, however, be known until cases are brought, settled, won or lost. This is why legal literacy and attitudinal change towards the enforcement of gender rights is so important in Lesotho."

4.5 International Law Obligations

The obligations of Lesotho under International Law arise from the treaties that it has entered into with other countries, as well as under customary international law. The Kingdom's Constitution and the Common law govern their implementation in turn. In the case of Lesotho, the Constitution is silent on the matter therefore resort is had to the common law. As has been mentioned above the common law of the country is as that which pertains in the Republic of South Africa. The common law is quite clear and unambiguous on the rule that customary international law forms part of our law¹²⁵.

Christie argues that ILO Conventions including those on discrimination in employment and occupation have acquired the status of customary International Law and are therefore directly binding on states irrespective of

¹²⁵ Dugard, J. "International Human Rights In Rights and Constitutionalism". (1994) p190

whether a Convention has been ratified¹²⁶ or not. This is in line with the common law presumption that the legislature in enacting a statute could not have intended to derogate from or legislate in conflict with international law principles¹²⁷. Erasmus and Jordaan¹²⁸ say that two requirements are necessary to create a customary rule or norm:

1. Settled practice (Usus)
2. Acceptance of an obligation to be bound (opinio iuris)

It has been argued that a number of the ILO Conventions, including that on discrimination in employment and occupation have acquired the status of Customary International Law.

As explained by Byrnes¹²⁹ one of the promises of recent developments in the international system(s) for the protection of human rights is not just the elaboration of norms intended to bind or guide national authorities in the manner in which they treat persons under their jurisdiction. It is also the prospect that if the national system fails to ensure the observance of human rights, some redress may be available through the international system. It is recognised however that the system is fraught with limitations and it is often difficult to evaluate the importance of the role played by the deployment of international procedures. In some cases recourse to international procedures

¹²⁶ Christie, S “Submissions on the Promotion of an Equal Opportunities Draft Bill” *Current Labour Law*. (1993) 127

¹²⁷ Devenish, GE “*Interpretation of Statutes*” (1992) 28 Cape Town Juta Cited by Du Toit supra

¹²⁸ *ibid* p91

¹²⁹ Byrnes A, “*Enforcement Through International Law and Procedures.*” In Cook (Ed) *Human Rights of Women*.

may have a direct effect at national level it would be more realistic to view it as one of the means of exerting pressure on governments in order to achieve the promotion of the enjoyment of equal rights by women. They might form part of a broader political strategy and provide some additional leverage to a campaign at the national level that can be used to bring about change.

4.6 Social and Economic Rights

The economic, social and cultural rights of women in Africa are enunciated in three international legal treaties. In the International Covenant on Economic, Social and Cultural Rights (ICESCR); the African Charter on Human and Peoples Rights (the Banjul Charter), and in the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW). Despite decades of articulation of human rights in various international and national legal instruments, however, systematic violation appears to be more the rule than the exception.

In cases where the feminist movement has scored a victory, there has been a gulf between human rights and women's rights activities on the one hand and those who see the (subordinate) status of women as an integral part of their ethnic identity on the other. The question has been raised what is the point of all the constitutional protection if ethnic identity is an acceptable justification for reducing the status of women according to diverse cultural identity?¹³⁰

In the Indian Sati Case of Roop Kanwar, a young woman of 18 years was burned alive on her husband's funeral pyre. Through the pressure of feminist groups, parliament passed a law banning the ritual. It was declared to be "utterly reprehensible and barbaric." While the state tolerated this kind of behaviour, it was flouting international norms so as to articulate religious fundamentalist ideals. The persistence of discriminatory personal laws undermines the universality of the international prohibition of discrimination

against women. This type of activity can be eradicated not through the legal system that has become perverted by political will, but political mobilisation from within and international support from without.

Personal law is usually maintained as part of the politics of communalism, and within that context women have no rights. All men are created equal but women are bound by the position relegated to them by the different systems of personal law. Many African countries are state parties to the African Charter, which states that members should ensure that whatever cultural values and practices are permitted by domestic law, must comply with the Human Rights principle of freedom from discrimination on the basis of sex. At the national level however most governments are not taking the necessary legislative steps to change their laws, practices and customs with regard to women's property rights. Consequently states parties are failing in their obligations under the Charter to reform sex discriminatory laws.

4.7 Municipal Law

States do not acquire obligations under international law merely by virtue of it's membership of the ILO. Conventions still have to be ratified in order for them to have the binding nature, and then translated into domestic law by an act of Parliament. Ratification of a Convention imposes upon the state ratifying the obligation "to take such steps as may be necessary to make effective the provisions of such Convention". The ILO has interpreted this to

¹³⁰ Coomaraswamy *"To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights"* Cook ed.

mean that effect has to be given to the Convention ratified in municipal law and practice. This is the reason a Convention does not become part of municipal law merely upon ratification. Some Act of transformation, for example, incorporating the provisions of the Conventions into an Act of Parliament, is required. This principle does not extend to Customary International Law, which becomes part of municipal law without any legislative act or incorporation once it has acquired the status of a customary international law.¹³¹

4.8 Judicial Decisions.

The Constitutional Court of South Africa had course to address the issue in the recent case of the *National Coalition for Gay and Lesbian Equality and another v The Minister of Justice and others*¹³² the court held that

*"Our courts must be bold enough to interpret the constitution with imagination and foresight so as to make the Bill of Rights worth more than the paper it is written on. The constitution does not envisage a passive or purely negative concept of equality. In fact, I submit that our courts are expected to take positive steps to redress the effects of discrimination in pre-Constitutional times."*¹³³

The court said that what was pertinent for the present purposes was the court's active approach in tackling the issue of unfair discrimination. From the reading of the provision in question it was clear that its primary purpose was

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¹³¹ Du Toit *supra*.

¹³² (CC) 9-10-1998 (Case CCT 11/98 Unreported)

the need to prohibit patterns of discrimination.¹³⁴ The court also said that the state, and through it the courts, are obliged to promote the achievement of substantive equality by legislative and other means designed to protect and advance persons or categories of persons disadvantaged by unfair discrimination.

In the United Kingdom there has been attempts to use the judicial review procedure – in which the applicant argues that a public body is acting *ultra vires*, unreasonably, or contrary to natural justice, to enforce anti discrimination standards, including those of domestic and European Law. In *R v Birmingham City Council, ex parte EOC*¹³⁵, an application for judicial review was successful and a declaration was granted to the effect that the council was acting *ultra vires* in breach of anti discrimination law requirements. The process is becoming increasingly important as a mechanism for enforcement¹³⁶.

¹³³ Reported in De Rebus, Aug 1998

¹³⁴ Though this case concerns the discrimination of gay and lesbian persons, it could be said that the *ratio decidendi* applies *mutatis mutandis* to gender discrimination.

¹³⁵ [1989] 1 All ER 769

¹³⁶ McCrudden C. "Equality in Law between Men and Women in the European Community."—United Kingdom.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

5.1 General

In the previous chapters an attempt has been made to expose the various factors affecting the role of gender in sustainable development of a developing country such as Lesotho.

Land tenure is one of the major constraints for rural development in many African Countries, including Lesotho. Most rural land is communally held under the custody of chiefs, resulting in a number of problems such as limited availability of arable land, declining agricultural production, and other environmental problems arising from high population density. Various attempts have been made by previous government administrations not only to address the above problems but also to modify the land tenure system in order to accommodate the demands of a growing economy. One of these attempts can be seen in the Land Act of 1993, which introduced new administrative features to improve land allocation systems. The 1979 Land Act superseded the 1973 one, it introduced a concept of title holding with respect to rural and urban land, as well as a new element of compensation in cases where land was required for public purposes.

The problems related to land tenure still remain in spite of these statutory interventions. The land tenure system in Lesotho is complicated in structure

and operation. Its roots are deeply embedded in the history, the patriarchal culture and social organisation of the Basotho nation and therefore it is highly treasured by them. The tenure system has resulted in the structure of rural as well as urban Lesotho today. It has had a major developmental influence on society and cultural values, politics and the economy. However there is a need to change the system.

The extreme poverty of many living on the land and the increasing population pressure highlight the double challenge (socio-economic and demographic) of rural development: to raise productivity and income in agriculture, and at the same time to absorb more people into employment in the sector. Access to land, and the conditions that govern access are questions of major importance in Lesotho.

Lesotho has been one of the member states to the international instruments that govern gender the equality under the ILO and United Nations. Most of these have been passed and ratified during the early undemocratic rule of the Basotho National Party, and the military juntas. When the women's convention CEDAW was passed by the United Nations, it was unfortunately at a turbulent time for Lesotho and the government was charged on an urgent basis with the responsibility to bring democracy to the country. Matters such as gender equality or even ratification and implementation of international standards took the backseat. This position persisted even during the newly elected government, which failed to acquire the popularity of disciplined forces. CEDAW was as a result only signed but never ratified. There is a

body of thought that says the intention of the state in signing the instrument must not be overlooked, and that in passing laws it could not possibly intend to go against its commitment under the instruments to which it is signatory.

Women in Lesotho should therefore capitalise on the signatory status of the Kingdom to CEDAW, while attempting to lobby the parliamentarians to pass legislation more favourable to women, and ensuring the implementation of international standards. If Lesotho's economy is to benefit from its physical and natural assets changes will have to be introduced through legislative measures. The success of these changes will depend on a political will to ensure implementation. These are bound to have ramifications throughout the nation and should be approached with a great deal of sensitivity and caution, though at the same time with boldness and commitment on the part of government.

It is essential that the Constitution of the Lesotho be reformed to eliminate the ambiguities in section 18, which tend to perpetuate gender inequalities. Statute and common law should also be reformed in order to eliminate the minority status of women. In point is the Deeds Registry Act that denies women of outright ownership of property once married.

Since customary law is not easy to change, due to the same being a source of national pride and identity, it must be reformed through awareness creating programmes. Educating women as well as men about the effects of the laws on their status and showing men that granting such rights is not necessarily to

challenge away their power.¹³⁷ Marriage should be a partnership rather than servitude.

In social security matters it is necessary to accelerate the establishment of a Social Security Scheme in order to address women's needs not covered by the law such as remuneration during maternity leave¹³⁸. Social security benefits should be extended to those involved in unpaid care work, as well as those involved in the informal sector so as to acknowledge the unpaid and underpaid work involved in these activities.

On the question of status, women must be accorded legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular women must be given equal rights to conclude contracts and to administer property.¹³⁹ As is already happening in some countries such as Uganda, banks must be lobbied especially for micro lending. It must be seen that women have access to low cost housing and land reform must adequately address women's issues. Specific interventions are needed to deal with gender discrimination in respect of, inter alia, access to finance, security of tenure, and economic empowerment. Government should have a gender based subsidy plan, not just income based. In this regard leadership must be committed to implement changes to legislation. It is not sufficient that legislation has been passed and applauded by international bodies, it also has to be implemented and given effect to.

¹³⁷ "Workshop on Gender Equality in Employment in Lesotho." 25-27 February 1998. Recommendations.

¹³⁸ Ibid.

Women must be empowered economically. Training in non-traditional skill areas such as construction work and tendering for public works contracts should be the training focus for women.

In accordance with CEDAW¹⁴⁰, the state must implement measures to eliminate employment inequality. In the public service this would include equal remuneration, benefits and equal treatment in respect of work of equal value, as well as equality in the evaluation of the quality of the work. Public service employees should, without discrimination as to gender, also be entitled to the right to social security, particularly for retirement, unemployment, sickness, invalidity, old age, and other incapacity to work, and the right to paid leave.

¹³⁹ Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand
"Implementing CEDAW in South Africa. A Resource Document."

¹⁴⁰ Article 11

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