



NATIONAL UNIVERSITY OF LESOTHO

**TOWARDS THE JUSTICIABILITY OF SOCIO- ECONOMIC RIGHTS IN THE LEGAL
SYSTEM OF LESOTHO**

Mini-Dissertation

Submitted by

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SUMMARY

The international standards and obligations on social and economic rights require State parties to harmonize their municipal laws with international human rights law on social and economic rights. The standards and obligations are benchmarks against which States are called upon to test whether they are determined to ensure protection of the rights. States Parties are urged to fulfill, respect and promote social and economic rights in their legal systems. The main aim of this promotion of social and economic rights is to ensure that they are fully realized.

Lesotho as a party to international human rights instruments on social and economic rights is obliged to protect social and economic rights. This research is concerned with the investigation of the justiciability of social and economic rights in the context of Lesotho. It is argued that the justiciability of social and economic rights shall be bedrock of the economic growth in Lesotho.

In advancing my argument, I determine the place of international law in the legal system of Lesotho. I apply theories that include; monism, dualism and harmonization. The Constitution of Lesotho, with its supremacy clause puts the Constitution above every law in Lesotho. In this supreme law of the land, social and economic rights are not recognized as rights but rather as principles of state policy. This renders social and economic rights to be unenforceable in courts of law.

This state of non-justiciability of rights in Lesotho drag the country backward since the dichotomy that existed between the civil and political rights and social and economic rights has been overtaken has been obsolete. It is therefore held that for one to exercise her civil and political rights she must have means of livelihood. The justiciability of social and economic rights is a necessity that will harness the African spirit of communalism in Lesotho.

Keywords: social and economic rights, justiciability, communalism, means of livelihood, domestication.

DECLARATION

I, **Tšepo Phillip Lipholo**, declare that mini-dissertation is the work of my own hands. It has not previously been submitted for any examination or degree in any institution, article, or textbook. Even the words of other people and scholars are acknowledged in this work when I created my own original work.

Signed: TP Lipholo

TŠEPO PHILLIP LIPHULO

Date: 04th July 2022

This mini-dissertation has been approved by the NUL Supervisor for submission.



Signed: _____

Supervisor

DEDICATION

I dedicate this mini-dissertation to my grandmother Nkhono Makhauta Marriett Lipholo, my mother 'M'e Francina Lipholo and my sisters for their unwavering support and to both St. John Paul II and the Late Bishop Paul Khoarai DD who promoted human rights in the world.

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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AfCRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
DCEO	Directorate of Corruption and Economic Offences
GG	Government Gazette
GOL	Government of Lesotho
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	Convention on the Rights of Migrant Workers and their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
ILO	International Labour Organisation
LDHS	Lesotho Demographic of Health Survey
LUNDAP	Lesotho UN Development Assistance Plan
MDGs	Millennium Development Goals

NMDS	National Manpower Development Secretariat
PPE	Proper Protective Equipment
PRWA	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
SDGs	Sustainable Development Goals
SERAC	Social and Economic Rights Action Centre
TB	Tuberculosis
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organisation

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CHAPTER ONE

INTRODUCTION — RATIONALE OF THE STUDY

1.1 Background Overview

Whereas the making of social and economic rights justiciable is no more questionable¹ elsewhere, in Lesotho, they are not recognized as rights and not guaranteed to be enforced by the courts. This position in Lesotho emanates from the controversy circumventing the nature of social and economic rights which resemble widely divergent views, traced back to the Cold War, where the Western side advocated for negative rights² while the Eastern side advocated for positive rights.³ This led to the division of these rights into separate covenants adopted in 1966.⁴ As a result, the drafters came up with implementation clauses that are significantly different in wording even though they talk about states' obligation in each covenant as far as Part III of each of the covenants is concerned. The famous obligation on States contained in the treaty which specifically deals with civil and political rights,⁵ obliges States in this way:

¹ J Mubangizi "The constitutional protection of social and economic rights in selected African countries: A comparative evaluation" (2006) 2 Afr J Legal Stud 3; M Brennan "To adjudicate and enforce social and economic rights: South Africa proves the domestic courts are a viable option" (2009) 9:1 QUTLJJ 64, 69; C Ngang *Social and economic Rights Litigation: A Potential Strategy in the Struggle for Social Justice in South Africa* (unpublished LLM Thesis, University of Pretoria, 2013) 4.

² S Domaradzki, M Khvostova & D Pupovac "Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse" (2019) 20 Human Rights Review 423 <<https://link.springer.com/article/10.1007/s12142-019-00565-x>> accessed 6 January 2022.

³ Ibid.

⁴ H Strydom (ed) *International Law* (Oxford University Press 2016) 331 says:

"Following the adoption of the Universal Declaration, a process was set in motion to convert its provisions into a single binding treaty. However, it soon emerged that such a process was beset with difficulties, mostly owing to different views held by East and West during the Cold War period. Socialist/capitalist fault lines made agreement on the inclusion of justiciable social and economic rights impossible. As a result, and in order to advance human rights, it took almost two decades before sufficient consensus emerged to adopt two separate treaties to capture the spirit of the Universal Declaration: the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)."

⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

“Each state party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covent, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property birth or other status.”⁶

However, the International Covenant on the Economic, Social and Cultural Rights (ICESCR)⁷ provides as follows:

“Each state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁸

This difference in crafting and drafting led to the assumption that the set of rights required different methods of implementation. Whereas, the global human rights system created this conundrum, the African Union (AU) created the Charter⁹ that cleared the problem by including both categories of rights in a single document.¹⁰ All of the rights, negative or positive became justiciable in the African human rights system. Almost two decades ago, the Women’s Protocol was adopted for African women under the umbrella of the AU.¹¹ It has a strong advocacy component on the enforceability of social and economic rights especially for women.

⁶ Article 2(1) of the ICCPR.

⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁸ Article 2(1) of the ICESCR.

⁹ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR).

¹⁰ F Viljoen *International Human Rights Law in Africa* (Oxford University Press 2012) 214.

¹¹ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (1 July 2003, entered into force 25 November 2005) (Maputo Protocol).

Notwithstanding these divergences, at the municipal level, Lesotho as a stake holder to international¹² and regional¹³ human rights treaties is obliged by both international customary law and treaty law to ensure complete realization of social and economic rights. The crux of the argument in this study is that since Lesotho is a stake holder to the international treaties on social and economic rights, which have obligations that have to be fulfilled, Lesotho has to make these rights enforceable in her legal system. In this dissertation, it is argued that the international standards for the plenitude implementation of social and economic rights requires Member States to take necessary methods for the plenitude realization of the rights, adoption of the recommendations, providing for technical assistance and making regional meetings and reporting on the progress of the realization of the rights. It is a clarion call to the Government of Lesotho to legally enforce socio-economic rights law so that people can approach the courts with a beacon of hope that the courts will enforce the constitutional mechanisms for the implementation of socio-economic rights. Given the power to litigate, litigation can play a vital role of reducing poverty.¹⁴ I agree with Ngang that even though “litigation did not actually bring about any improvement in the living conditions of slum dwellers [*Abahlali BaseMojondolo*] but at least it provided legal protection against potential evictions, homelessness and destitutions”¹⁵

This dissertation is based on the idea that despite the entrenchment of social and economic rights in the apex law of Lesotho as mere policy principles,¹⁶ their unenforceability in courts renders them meaningless.¹⁷ For this reason, a gigantic disparity is created between the rich and the poor particularly in a capitalistic society where the masses of the people work for wages that do not enable them to live a decent life. For example, those working in industries and domestic workers among others are working in deplorable situations. There is a rapid acceleration of unemployment and

¹² Lesotho ratified both the ICCPR and ICESCR on 9 September 1992.

¹³ Lesotho ratified the African Charter on 9 April 1991.

¹⁴ Ngang (n 1) 110. In evaluating how litigation alleviates poverty he concludes that, “So it happened in *Abahlali BaseMjondolo* that litigation actually did not bring about any improvement in the living conditions of slum dwellers but at least

¹⁵ Ibid.

¹⁶ Chapter III of the Constitution of Lesotho (1993).

¹⁷ I Shale “The Law and Legal Research in Lesotho” (2014) Global Law of Lesotho.

poverty in Lesotho.¹⁸ Lesotho is known for its abundance of water and yet many of its citizens do not have water which is a fundamental social and economic right. All of these illustrate that social and economic rights are not taken seriously in this country and there is a need for constitutionalizing them as justiciable.

In this dissertation, there will be interrogations of both general and specific obligations of international customary and treaty law on social and economic rights. These obligations will be used as criteria for gauging the legal framework of Lesotho to see whether it allows for the plenitude implementation of social and economic rights or not. The constitutional and legislative undertakings are taken into consideration. This study is also interrogating; judicial, social, financial, educational and administrative measures¹⁹ and other effective remedies for the violation of these rights utilized on the national level as rational depending on the circumstances.²⁰

More so, sources such as United Nations (UN) declarations and resolutions among others, which constitute soft law and other continental human rights instruments, are examined. For instance, the AU instruments on human rights pertaining to social and economic rights which Lesotho ratified are discussed.²¹ There is also comparative study through the exploration of social and economic rights instruments on the regional domains.

Having laid the background of the study, it is pertinent at this juncture to define some of the key terms that are mainly used in this mini-dissertation.

¹⁸ Lesotho has combined 2nd to 8th Periodic Reports on Banjul Charter and Initial Report relating to the Maputo Protocol (April, 2018) 68.

¹⁹ General Comment on ICESCR No 3 (1990) paras 4. 5 and 7.

²⁰ Ibid.

²¹ Lesotho ratified the African Charter on 9 April 1991.

a) Definition of socio-economic rights

Social and economic rights are a blueprint of rights that obligates states to deliver basic needs for their citizens.²² These rights may include among others, food, shelter, means of livelihood, education, health, family, social security and many others.²³ They are contained in the ICESCR and were traditionally called “second-generation rights.”²⁴ They are rights that are instrumental to the state, in ensuring that its citizens attain their full potential and enjoy minimum standards of living befitting of human beings.²⁵ They ensure social order and political freedoms. They are called positive rights since the state (individually and in cooperation with the international community) is obligated to implement them progressively while bearing in mind their full realization, on the basis of the availability of resources.²⁶

b) Definition of justiciability

Justiciability, according to Viljoen, “implies something about the claim (or case).”²⁷ When a human right is “justiciable,” it is legally enforceable. A person or a group of persons can fly to the patronage of the court when their rights are infringed.²⁸ Furthermore, the International Commission of Jurists (ICJ) provides a similar definition of justiciability to that of Viljoen. Justiciability is defined by the Commission as the opportunity to be able to institute an action in the situation whereby the right has been violated so as to get a remedy.²⁹ Where there is justiciability of rights, the courts or

²² T Kondo ‘Constitutionalizing Social and economic Rights in SADC: An Impact Assessment on Judicial Enforcement in South Africa, Zimbabwe, Botswana, Lesotho and Zambia’ (2020) 34 *Speculum Juris* 35.

²³ ICESCR, articles 16 & 17 on health and education, the African Charter.

²⁴ Strydom (n 4) 325.

²⁵ Kondo (n 25) 36 citing Foundation for Social and Economic Rights: Progressive Realization (2016) 16.

²⁶ Article 2 of the ICESCR.

²⁷ Viljoen (n 10) 6.

²⁸ *Ibid* 6.

²⁹ FT Birhane ‘Justiciability of Social and economic Rights in Ethiopia: Exploring Conceptual Foundations and Assessing the FDRE Constitution and Judicial Perspective’ (2018) 9 *Beijing Law Review* 322 <<https://doi.org/10.4236/blr.2018.92021>> accessed 9 February 2022.

tribunals performing quasi-judicial functions are constitutionally empowered to give interpretations and enforce legal instruments.³⁰

1.2 Statement of the research problem

The plight has been highlighted that even though Lesotho obliged by social and economic rights instruments by virtue of ratification, the current legal frame-work has no prospects of progressing to the plenitude implementation of rights. The unenforceability of the social and economic rights by the courts is a stumbling-block for the country to fully implement them with an aim of ensuring that everyone reaches his full potential and live a descent live befitting of a human being.

Due to unenforceability of positive rights, unemployment, poverty and corruption by the kleptocratic regimes are very high.³¹ Kofi Annan is quoted to have said in relation to corruption:³²

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are more destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.

Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development....”³³

³⁰ Ibid.

³¹ *Metsing v Director General, Directorate of Corruption and Economic Offences (DCEO) and Others* [2015] LSHC 1.

³² The erstwhile Secretary General of the United Nations, Kofi Annan.

³³ *Metsing* para 15.

Lesotho is also covered by the dark cloud of corruption which enriches the few while the masses of her citizens are impoverished.³⁴ It has been almost three decades since the inauguration of the third wave democracy and yet the masses of people are living in abject poverty.³⁵ Taking unemployment as an example, the demographics show that from 2008 till 2020, unemployment rate ranged between 27.67 percent and 24.65 percent.³⁶ Given almost twelve years, the reduction rate of unemployment is very slow and this entails that progressive implementation of positive rights is not fully effective.

The failure to enforce positive rights in Lesotho stems from the outdated constitutional design. Even though, the justiciability of positive rights is guaranteed by international human rights instruments, in Lesotho's Constitution they are legally unenforceable. This was influenced by the group that advocated for the unenforceability of social and economic rights.³⁷ This arose from those who argued that the entrenchment of positive rights in the Bill of Rights would emasculate the constitutional legitimacy. Since positive rights depend on the resources delivered by the government, the insufficiency of resources might hamper the government to deliver.³⁸ However, the argument had a problem of assuming that the government will fail to deliver, rather the resources are misused and misappropriated. In Lesotho, there is abundance of water, minerals and arable land, yet the people still suffer in the hands of the government officials who are classified as rich people.³⁹ For that reason, the current framework of the Constitution is based on shaky grounds.

1.3 Hypothesis

The constitutional framework of Lesotho does not follow the international human rights standards in articulating obligations pertaining to social and economic rights. The other measures such as legislative, judicial and administrative rely on the constitution

³⁴ *Metsing* para 16.

³⁵ 1993, the promulgation of the 1993 Constitution of Lesotho.

³⁶ A O'Neill Unemployment rate in Lesotho (25 January 2020) *Economy and Politics International* <<https://www.statista.com/statistics/448024/unemployment-rate-in-lesotho/>> accessed 13 February 2022.

³⁷ Shale (n 17).

³⁸ C Heyns and D Brand 'Introduction to social and economic rights in the South African Constitution' (1998) 9 *Law Democracy & Development* 154.

³⁹ M Mpesi "MPs' M5000 under the radar again" in *Newsday* (15 November 2021).

because of its supremacy.⁴⁰ For example, the legislation that protects children in Lesotho calls social and economic rights, rights of a child while also imposing responsibility on parents and states to ensure their implementation.⁴¹ The problem is that these positive rights are not recognized as rights in the constitutional. Therefore, they lack enforceability in the judiciary.

1.4 Research Questions

The pertinent interrogation in this dissertation centers on the obligations and standards which are found in the international instruments which Lesotho ratified. It is asked whether Lesotho's legal design has the resemblance of adherence to the obligations and standards guaranteed in the instruments falling within the ambit of customary international law and human rights law system. As a follow up to this interrogation, there are other five sub-questions:

- a) What are obligations on social and economic rights imposed by international human rights law?
- b) What is Lesotho's legal framework on social and economic rights and does it align with the standards of international human rights law?
- c) What challenges obstruct the effective implementation of social and economic rights in Lesotho?
- d) What impact does the failure to adhere to the international obligations on socio-economic rights have at the national level?
- e) What measures could be taken on the path to the plenitude implementation of international obligations on positive rights in Lesotho?

1.5 Research objectives

Generally, this study evaluates the magnitude to which Lesotho implements social and economic rights obligations in her municipal law.

⁴⁰ Section 2 of the Constitution of Lesotho 1993.

⁴¹ Part III of Children's Protection and Welfare Act 2011. Section 11(1) of the Act which mirrors the Banjul Charter has provisions on education, health and basic necessities. The basic necessities include; food, housing and clothing.

Specifically, the objectives include:

- a) to indicate through the thorough analysis of international human rights instruments, human rights standards on social and economic rights' standards in relation thereto;
- b) to highlight the harmonization between international law and Lesotho's municipal law and to give recommendations in which international standards on social and economic rights could be made justiciable in Lesotho's legal system;
- c) to examine pieces of legislation in Lesotho so as to assess the extent to which they incorporate the international human rights standards on social and economic rights;
- d) to illustrate the problems that obstruct the legal enforceability of the aforementioned standards and
- e) to analyze the status of social and economic rights in Lesotho and thus, draw conclusions and make recommendations as to the measures that Lesotho should employ to ensure implementation of international human rights obligations pertaining to the justiciability of social and economic rights.

1.6 Significance of the research problem

The dissertation's relevance is on the assessment of Lesotho's endeavors to implement the international obligations on positive rights. Many of the laws and policies on social and economic rights are scrutinized to determine whether they are effective to eradicate poverty and ensure social justice for all. This study is envisaged to influence the new reforms undertaken in order to enforce entrench social and economic rights in the Bill of Rights.

The entrenchment of positive rights shall be a consolation and a beacon of hope to the masses of poor people, to the masses of the unemployed youth, to the masses of those who are working in industries that are not conducive for their lives, those who eager for economic and social empowerment, emancipation and liberation. It will be a source of reference for any reform geared towards development of Lesotho because development

as a right is intricately intertwined with social and economic rights by ensuring progress for the peoples. The study will make recommendations that are necessary for the enforcement of positive rights. Therefore, this research problem is relevant because it highlights that the enforceability of positive rights could be the best solution against the impact of corrupt, kleptocratic and unaccountable governments.

1.7 Scope and purpose of the study

I adopt the human rights approach, when I deal with the legal design of Lesotho as a party to the instruments based on social and economic rights. By the very nature of being socio-economic these rights have sociological and economical dimensions. From the sociological perspective: It is an undeniable fact that these rights can have sociological and economical dimensions. Different opinions suggest that sociology has not taken housing seriously as one of the major source that can bring social and economic difference.⁴² However, recent studies in sociology have taken cognisance of housing as a point of connection to communities and a place where families are coming from.⁴³

On the other hand, the economical dimension is concerned with the availability and scarcity of resources. In his view, Dobb is of the view that the integration of the charter on social and economic rights so as to ensure that citizens have employment, social security and liberty to assemble has prospects of “a kind of society.”⁴⁴

Whereas reference is made to economics and sociology because of the interrelatedness, the study is mainly adopting legal approach. The position will be that the rights to social and economic issues are not concessions of states but rights imposing duties on states to fulfill. It entails that international standards on social and economic rights be analyzed so as to assess the progress of Lesotho in enforcing them.

⁴² JR Zavisca and TP Gerber “The Socio-economic, Demographic and Political Effects of Housing in Comparative Perspective” (2016) 42 Annual Review Sociology 347 <<https://dx.doi.org/10.1146%2Fannurev-soc-081715-074333>> accessed 6 January 2022.

⁴³ Ibid.

⁴⁴ M Dobb “Economic Social Rights” UNESCO <<https://en.unesco.org/courier/2018-4/economic-and-social-rights>> accessed 6 January 2022.

Both international and regional human rights system are relied upon since Lesotho is a party to international treaties on social and economic rights. By virtue of having ratified the Banjul Charter, Lesotho is obliged to make socio-economic rights legally enforceable. Both the ICESCR with the African Charter are primary sources for this study.

1.8 Methodology

Whereas this dissertation is situated within the wider terrain of human rights on the international domain, it focuses on the narrowest domain of international standards and obligations pertaining to social and economic rights, which must be fulfilled in Lesotho. This study entails international human rights law and domestic law applicable in Lesotho. The theories that determine the locus of international law in Lesotho are utilized in order to extrapolate the debates circumscribing the issue of social and enforcing positive rights at the municipal level.

Conscious of the debates mentioned in the preceding paragraph, in addressing the plight of unenforceability of social and economic rights, a myriad of information is drawn from renowned scholars who have comprehensively researched on different areas be it international, continental or national. Other points of reference include among others; treaties, international customary law, general comments, concluding observations made by treaty bodies responsible for the obligations of States on the promotion of positive rights.

This study adopts the qualitative approach. That means it will be a desktop work involving the use of library materials and internet sources especially UN and AU treaty instruments. When dealing with international standards concerning social and economic rights, the normative approach will be applied. A descriptive analysis of the legal framework of Lesotho is employed in determining the significance of international obligations on social and economic rights in Lesotho. Furthermore, a comparative analysis is made by tapping into the case law and jurisprudence of other countries especially, those that have made social and economic rights justiciable. Lastly, the

prescriptive method is adopted when making recommendations that Lesotho can adopt in order to march towards the plenitude implementation of social and economic rights.

1.9 Literature's review

The four sub-topics comprise this literature review: the first deals with the incorporation of international law in the municipal legal framework. Secondly, a review of the relevance of international standards regarding the enforcement of social and economic rights in the municipal law of Lesotho is provided.

1.9.1 The incorporation of international law in the municipal law

Since social and economic rights are situated within the wider range of international law, it is pertinent to determine the approach taken by municipal law in implementing international law. Dugard suggests two theories, namely, monism and dualism.⁴⁵ According to him, monists include Kelsen, Verdross and Scelle.⁴⁶ According to the monist theory, there is no need to domesticate international law through any piece of legislation since international law and municipal law are blended, that is, they are viewed to be one thing.⁴⁷ Therefore, the proponents of monism are of the view that both international and municipal law should be perceived as one.⁴⁸

However, dualism requires domestication of international law through legislation or adopted by courts into municipal law.⁴⁹ It does not apply directly like in monist's state since the proponents such as Triepel and Anzilotti hold that international and municipal laws should be viewed as different legal systems.⁵⁰ When clarifying the concept of dualism, Lauterpacht advocates for the domestication of international law by express

⁴⁵ J Dugard *International Law: A South African Perspective* (Juta & Co, Ltd 1994) 42.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

authorization of the State due to the difference between international and domestic law on the basis of content, source and subject matter.⁵¹

This entails that dualism is a manifestation of the traditional perception of the rapport between international and municipal law.⁵² In the conflict between international and national law, the national courts have a liberty to harmonize the monism and dualism and this process is the harmonization that qualifies an absolutism of monism.⁵³

1.9.2 International human rights standards on social and economic rights and their role in municipal law

To address this sub-topic the two major systems, include international and regional instruments, which Lesotho is a state party to. Viljoen indicates that the widespread of poverty and underdevelopment on the continental level is the clear testimony that States of Africa do not adhere to the obligations of uplifting social and economic conditions as espoused by the ICESCR.⁵⁴ He goes further to highlight the salient feature of the African Charter in the enforcement of social and economic rights.⁵⁵ He holds the same view with Strydom that the Charter combines all the rights in a single document instead of classifying them according to generations.⁵⁶ In this document, social and economic rights are justiciable like civil and political rights. When advocating for the justiciability of social and economic rights, Viljoen takes cognizance of that all human rights are indivisible, interdependent and universal.⁵⁷ He holds that:

“The justiciability of social and economic rights standards is a response to the prevailing situation of dire poverty and exploitation by kleptocratic elites. The justiciability of social and economic rights was not only an exhortation for things to

⁵¹ “International law and municipal law” in E Lauterpacht (ed) *International Law: Being the Collected Papers of Hersch Lauterpacht* (1970) 1 The General Works 216.

⁵² Dugard (n 45) 42-43.

⁵³ Ibid 43.

⁵⁴ Viljoen (n 10) 119.

⁵⁵ Ibid 214.

⁵⁶ Ibid.

⁵⁷ Ibid.

be different, but also an acknowledgement that accountability through the law was part of the solution.”⁵⁸

However, the African Charter as Viljoen and Strydom agree on did not include all the social and economic rights as justiciable due to the assumption that the governments might be overwhelmed by scarcity of resources to deliver.⁵⁹ As a result, the right to health and education are unequivocally provided for.⁶⁰ The omission of basic rights such as housing, food and water was answered by the jurisprudence of regional human rights bodies for example; the African Commission in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (the *Ogoniland* case)⁶¹ came with the view that the existence of explicitly guaranteed Charter rights, such as the right to life (article 4), dignity (article 5), health (article 16) and family (article 18), are necessarily implying the existence of the right to housing and to food even if these rights were not expressly enumerated.⁶² In this decision, the Commission made it clear that social and economic rights are justiciable.

There are also other instruments and sources of international law such as concluding observations and general comments cited by Viljoen that show the need to make social and economic rights enforceable for their full realization.

1.9.3 Social and economic rights in Lesotho

There is no specific research dealing with non-justiciability of social and economic rights in Lesotho. Scholars like Shale,⁶³ Nyane⁶⁴ and Kondo⁶⁵ have noted the non-justiciability in their diverse writings. All of them observe that the social and economic rights are styled “principles of state policy” in the constitutional framework of Lesotho. They are

⁵⁸ Ibid 214-215.

⁵⁹ Ibid; Strydom (n 4) 347-348.

⁶⁰ Ibid; Articles 16 & 17 of the African Charter on Human and Peoples’ Rights.

⁶¹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (the *Ogoniland* case) (2001) AHRLR 60 (ACHPR 2001).

⁶² Ibid para 124.

⁶³ Shale (n 17).

⁶⁴ H Nyane ‘The State of Administrative Justice in Lesotho’ (2020) Researchgate <<https://www.researchgate./publication/339643963>> accessed 06 January 2022.

⁶⁵ Kondo (n 22).

not couched as rights and not legally enforceable.⁶⁶ Shale highlights that this classification of social and economic rights as mere “principles of state policy” support the argument that they are accordingly meaningless.⁶⁷ Kondo suggests that public authorities should work towards the full realization of these rights through enactment or otherwise.⁶⁸

1.9.4 Constitutionalizing the justiciability of social and economic rights

There is a *lacuna* created by the non-justiciability of social and economic rights in the legal framework of Lesotho, due to the failure of the Constitution as the supreme law of the land⁶⁹ to recognize social and economic rights as enforceable “rights”⁷⁰ in accordance with international and regional instruments as a state party to them. Also, the problem is not with legislation *per se* as Kondo suggests but the Constitution itself that has to be reformed in order to be equated with content akin to international human rights obligations.⁷¹

1.10 Outline of the chapters

Five chapters are contained in this dissertation. The first chapter focuses on the background and definition of social and economic rights tracing them from the international domain to national arena. It sets out the problem and the significance of the study. Literatures dealing with international law in as far as implementation of states’ obligations are concerned; the international human rights obligations on social and economic rights are reviewed. The questions and objectives of the study and hypothesis are provided. Lastly, the structure of the entire dissertation is given.

In chapter two, the legal design of international human rights law on social and economic rights is comprehensively explored, described and analyzed. International

⁶⁶ Section 25.

⁶⁷ Shale (n 17) 17.

⁶⁸ Kondo (n 2222) 46-47.

⁶⁹ Section 2 of the 1993 Constitution of Lesotho.

⁷⁰ Socio-economic rights are recognized as principles that direct policy in Lesotho’s chapter 3 of the Constitution.

⁷¹ See 5.2.2 of chapter five.

customary and treaty laws are extrapolated. It is worth noting that both global and regional human rights instruments, shall be a focus of the discussion especially those that have been ratified by Lesotho.

The third chapter deals with the legal framework of Lesotho. In this way, the constitutional, legislative, judicial and other measures are examined and benchmarked against the international standards in order to elevate municipal law to the higher-level accruing from states obligations towards the full realization of social and economic rights.

Chapter four illustrates the impact of international obligations pertaining to social and economic rights in Lesotho. To determine whether there is a progressive move towards the plenitude implementation of social and economic rights, core minimum requirements are scrutinized.

In the last chapter, the findings of study are summarized and recommendations which Lesotho needs to adopt in order to march towards the plenitude implementation of social and economic rights are proffered.

CHAPTER TWO

INTERNATIONAL HUMAN RIGHTS AND STATES' OBLIGATIONS PERTAINING TO THE LEGAL ENFORCEABILITY OF SOCIAL AND ECONOMIC RIGHTS

2.1 Introduction

Within the terrain of international law, States' rights and obligations require a clear understanding of primary and secondary rules. Hart, 1994, distinguished primary rules from secondary rules in the domestic legal systems.⁷² Then international law borrowed this terminology.⁷³ For this reason, most of international law uses primary rules which focus on States' rights and obligations. For instance, the obligation to obey human rights is the primary rule of international law. Secondary rules rather, "establish sources of international law."⁷⁴ Again, these are applied in order to determine existence and content of the primary rules.⁷⁵

Furthermore, there are sources of international law that include; the law of the treaty, international custom and soft law.⁷⁶ On the basis of the foregoing, I am going to discuss the customary international law, conventions and soft law so to put a bench mark of obligations and standards that will be used to gauge whether Lesotho adheres to the rules of international law or not. Both the global and regional levels will be discussed

⁷² A Roberts and S Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D Evans (eds) *International Law* (Great Clarendon Street Oxford University Press 2018) 90.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Article 38(1) of the Statute of the International Court of Justice (ICJ) enumerates these sources in their entirety:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

meaning the United Nations (UN) human rights system and the African human rights system among other regional systems will be examined in comparison.

2.2 Historical sketch of the justiciability of social and economic rights under international law

The legal enforcement of positive rights has a long history. Both the UN and the AU have treaties that focus on positive rights. After the devastations and horrors of the Second World War,⁷⁷ the UN was inaugurated by men and women of goodwill across the globe since the League of Nations seemed weak in preventing the war. The adoption of the Universal Declaration of Human Rights (UDHR) was in 1948 by the UN.⁷⁸ The UDHR has a salient feature since it recognises both negative and positive rights. Due to the fact this Declaration is non-binding on States it is therefore unenforceable.⁷⁹ However, it is worth-noting that the UDHR did not classify rights into categories.

Whereas the UN initially desired to adopt a single treaty⁸⁰ but due to Western capitalism and Eastern communism ideologies, there emerged two separate treaties. The first one is specific covenant on civil and political which are known as negative rights.⁸¹ The other treaty is specifically dealing with socio-economic rights which are known as positive rights.⁸² This was during the Cold War which ended around 1993. T Stein holds that:

“Western countries believed at the time that the establishment of this new treaty would mean that policy choices would be made on an international stage, and would have to be taken in a democratic manner on the national level. There was a fear of a loss of autonomy. On the other hand, socialist countries tried to emphasise the

⁷⁷ Strydom (n 4) 23.

⁷⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR).

⁷⁹ S Shah & S Sivakumaran, ‘The Use of International Human Rights Law in the Universal Periodic Review’ (2021) 21 Human Rights Law Review 264–301 <<https://doi.org/10.1093/hrlr/ngaa056>> accessed 17 May 2022.

⁸⁰ Norwell (ed) *Economic, Social and Cultural Rights: A Textbook* (Kluwer Academic Publishers 2001) 22.

⁸¹ ICCPR (n 5).

⁸² ICESCR (n 7).

importance and equality of this new set of human rights, seemingly promoting them in a stronger way. The reality was, as we all know, a bit different.”⁸³

The ICESCR was therefore relegated to the category of second generation of human rights. In the year 1976, the ICESCR became enforceable. Later on, the trajectories of the UN acts highlight the deviation from categorisation of rights on the basis of equality principle of all rights. For instance, the 1979 Convention which focuses on women rights canvasses the equality of rights *in toto*⁸⁴ and this is the same with the Convention on children’s rights. In 1993, 171 governments gathered at Vienna where they discussed the position of social and economic rights. This was during the World conference of Human Rights. The salient point of this Conference was the reiteration of the indivisibility, universality and interdependence of all rights:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States to, regardless of their political, economic and cultural systems, to promote and to protect all human rights and fundamental freedoms.”⁸⁵

This view has created the situation whereby the construction of civil and political rights to include social and economic rights and thereby to view social and economic rights in the lens of the instruments that do not primarily factor them in.⁸⁶ This approach assumes the justiciability of social and economic rights.⁸⁷

⁸³ T Stein, ‘Constitutional Social and economic Rights and International Law: “You are not Alone”’ (2013) PERJ 16 1 <<http://dx.doi.org/10.4314/pej.v16i1.2>> accessed 10 May 2022.

⁸⁴ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁸⁵ The World Conference on Human Rights: The Vienna Declaration and Program for Action UN doc.A/CONF.157paras1&5 <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)> accessed 25 April 2022.

⁸⁶ Ibid.

⁸⁷ Ibid.

2.3 The justiciability of social and economic rights under customary international law

Customary international law plays a pivotal role in human rights law as international custom and treaty law exist alongside each other. To substantiate this, the African Court on Human and People's Rights coupled the right to life with the right to nationality.⁸⁸ Comparatively, the fundamental human rights are recognised as *ius cogens* by Inter-American judicial system and this reflect that custom is seldom used.⁸⁹ For instance, the prohibition of slavery⁹⁰ and of enforced disappearance has been modified by the Inter-American Court.⁹¹ In *Kononov v Latvia*⁹², the European Court of Human Rights viewed custom in line with the principle of legality.⁹³ Thus, it is logical to infer that negative rights are customary while positive rights lack customary nature.

Against the foregoing, there is customary international law in the arena of social and economic rights. Custom is one of the sources of international law as it is clearly enshrined in article 38 of the Statute of the International Court of Justice (ICJ). Customary international law is borne out of two components: *usus* and *opinio juris*. The former means state practice while the latter means the belief that such practice is required by the law. The range of sources can be used to identify these sources. Some of the forms of States practice, "include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference; conduct in connection with treaties;

⁸⁸ *Robert John Penessis v Tanzania*, No. 013/2015, Judgment, 28 November 2019, paras 85–88.

⁸⁹ WA Schabas, 'Economic, Social and Cultural Rights and Customary International Law' N Blokker, D Dam-de Jong and V Prislán (eds), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development* (Koninklijke Brill NV, 2021) 328.

⁹⁰ *Aloeboetoe and Others v Suriname*, Judgment (Reparations and costs), 10 September 1993, Series C, No. 15, para 56.

⁹¹ *García and Family Members v Guatemala*, Judgment (merits, reparations, and costs), 29 November 2012, Series C, No 258, para 96; *González Medina and Family Members v Dominican Republic* (Preliminary objections, merits, reparations, and costs), 27 February 2012, Series C, No 240, para 130; *Osorio Rivera and Family Members v Peru*, Judgment (Preliminary objections, merits, reparations, and costs), 26 November 2013, Series C, No 274, para 112.

⁹² *Kononov v Latvia* [GC], No 36376/04, §§ 203, 211, 215, 221, 17 May 2010.

⁹³ *Ibid.*

executive conduct...”⁹⁴ Some of the examples that are used to be identify and accept practice as *opinio juris* are the following, although indicative and not exhaustive:

“public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.”⁹⁵

For social and economic rights to qualify as customary, they have to satisfy *usus* and *opinio juris* as two components that make custom. One of the ways that can be traversed when looking at the customary nature of positive rights is through the lens of many provisions of the UDHR which forms part of customary international law.⁹⁶ The UDHR guarantees the right to social security of each and every human person so as to ensure his dignity and development of personality by means of both international and national resources that promote positive rights.⁹⁷ More so, the Declaration protects the unemployed, people with disabilities, widows, aged people, ill people and other disadvantaged people who are in circumstances beyond their control by ensuring that their right pertaining to social security is guaranteed.⁹⁸ These specific rights of the UDHR were codified in the international conventions that create legal obligations on all States that ratify them.

The social security as well as social insurance as rights of persons is guaranteed in the ICESCR.⁹⁹ Besides this, States Parties are obliged to ensure that the working mothers are “paid leave or leave with adequate social security benefits during a reasonable period before and after childbirth.”¹⁰⁰ The evidence adduced from reports periodically

⁹⁴ The International Law Commission “Text of the draft conclusions on identification of customary international law”, A/73/10, pp. 119–122, Conclusion 6(2).

⁹⁵ Ibid conclusion 10(2).

⁹⁶ D Shiman, “Economic and Social Justice: A Human Rights Perspective” (Spring 1998) Human Rights Resource Center <<http://hrlibrary.umn.edu/edumat/hreduseries/tb1-3.htm>> accessed 28 April 2022. See Schabas who enumerates some of socio-economic rights appearing in the UDHR as forming part of customary international law, cited in footnote 104. H Hannum, “The UDHR in National and International Law”

⁹⁷ Article 22 of the UDHR.

⁹⁸ Article 25 of the UDHR.

⁹⁹ International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3, art. 9.

¹⁰⁰ Ibid. Article 10(2).

submitted the Economic and Social Council highlights that the States Parties have no reservation to the principle of social security.¹⁰¹ The practice of social security is not only found in States that ratified the ICESCR but even those which have not ratified the Covenant.¹⁰² This principle is also accepted and confirmed by both continental and specialized treaties.¹⁰³ On the basis of this, Schabas observes that:

“The pattern of treaty ratification leaves no shortage of evidence of the *opinio juris* of all States. The reports to the Human Rights Council confirm the existence of State practice. A similar exercise can be undertaken that demonstrates the presence of both elements of customary international law with respect to essentially every State for the right to work, the right to just and favourable conditions of work, the right to rest and leisure, the right to food, to housing, to health, and to medical care.”¹⁰⁴

There is a consensus in the contemporary era that some of the social and economic entitlements spelled out in the UDHR and the ICESCR as well as specialised and regional treaties allow no derogations. Just like the prohibition of torture and slavery, the rights such as free primary education, “public health and of the right to a certain minimal level of medical care and other measures intended to ensure our collective well-being.”¹⁰⁵ The corollary to the right to life is that one should also be entitled to the right to livelihood and rights to basic necessities that include food, shelter and clothing.

¹⁰¹ Reservations or declarations have been formulated by France, C.N.335.1980.treaties. See also France, Fourth periodic report, E/C.12/fra/4, paras. 306–333; Monaco, Initial report, E/ 1990/5/Add.64, paras. 110–157.

¹⁰² United Arab Emirates, National report, A/HRC/10/75, para 11 and National report, A/HRC/wg.6/3/are/1 8, 12, 17, 24.

¹⁰³ Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195; Articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 UNTS 13; Article 26(4) of the Convention on the Rights of the Child, (1990) 1571 UNTS 3; Article 27 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, (2003) 2220 UNTS 3; Article 9 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OAS 69; Article 12 to 14 of the European Social Charter, ETS 35; Article 12 to of the European Social Charter (revised), CETS 163; Article 36 of the Arab Charter on Human Rights.

¹⁰⁴ Schabas (n 89) 331.

¹⁰⁵ Schabas (n 89) 335.

2.4 UN standards pertaining to the social and economic rights

After the atrocities of the Second World War, the UN indicated its commitment to create a new world order where people shall enjoy minimum standards pertaining to social and economic rights. The preamble to the UN Charter stipulates that the UN is determined “to promote social progress and better standards of life in larger freedom” and for this end “to employ international machinery for the promotion of the economic and social advancement of all peoples.” One of the purposes of the UN is to “achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character”¹⁰⁶ and to “promote:¹⁰⁷ higher standards of living, full employment, and conditions of economic and social progress and development;¹⁰⁸ solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.”¹⁰⁹

The UDHR, in the similar tone, envisages promoting social and economic rights in the same way with civil and political and collective rights. For example, with regard to public health which has been globally understood to be significant during the Covid-19 pandemic, the Declaration provides the right to health care and other basic necessities of life such as food, clothing and medical care.¹¹⁰

2.4.1 UN Treaties

Other UN treaties enshrine standards pertaining to social and economic rights. The chief one is the ICESCR. There are also treaty instruments pertaining to particular categories of persons such as the CEDAW and the CRC, which equally enshrine that contain standards on social and economic rights. Other binding treaties worth noting include: the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965;¹¹¹ the Convention on the Rights of Migrant Workers and their Families

¹⁰⁶ Article 1(3) of the UN Charter.

¹⁰⁷ Article 55 of the UN Charter.

¹⁰⁸ Article 55(1) of the UN Charter.

¹⁰⁹ Article 55(2) of the UN Charter.

¹¹⁰ UDHR, Article 25(1).

¹¹¹ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

(ICRMW), 1990¹¹² and the Convention on the Rights of Persons with Disabilities (ICRPD), 2006.¹¹³ All of these treaties have been ratified by Lesotho.¹¹⁴ Here, the focus will be only on the first three treaties, namely, the ICESCR as the primary source, the CEDAW and CRC for they articulate much in a specialised manner concerning the needs of vulnerable and disadvantaged groups like women and children across the globe.

2.4.1.1 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

The primary international instrument on socio-economic rights is the ICESCR.¹¹⁵ The rights contained therein include; the right to self-determination,¹¹⁶ 'equality rights for all regardless of gender,¹¹⁷ the right to get employment,¹¹⁸ the right to conducive working environment,¹¹⁹ the rights that allow workers to collectively bargain,¹²⁰ 'the rights that ensure that persons are socially secured and insured,¹²¹ and the obligations that ensure that the family is protected and assisted.¹²² The right to an adequate standard of living which includes the trilogy of basic necessities; food, clothing and shelter,¹²³ the right to

¹¹² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) (ICRMW).

¹¹³ Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) (CRPD).

¹¹⁴ The ICESCR was ratified on the 09th September 1992; the CEDAW was ratified on the 22 August 1995; the CRC was ratified on the 10th March 1992; the ICRMW was ratified on the 16th September 2005 and the ratification of the CRPD was on 02nd December 2008.

¹¹⁵ Ontario Human Rights Commission, "Human Rights and economic and social rights" <<https://www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-cultural-and-economic-rights-under-international-law>> accessed 27 April 2022. See also, Ontario Ministry of the Attorney General, Constitutional Law and Policy Division, *The Protection of Social and Economic Rights: A Comparative Study*, Staff Paper (19 September 1991) at 34.

¹¹⁶ Article 1 of the ICESCR.

¹¹⁷ Article 3 of the ICESCR.

¹¹⁸ Article 6 of the ICESCR.

¹¹⁹ Article 7 of the ICESCR.

¹²⁰ Article 8 of the ICESCR.

¹²¹ Article 9 of the ICESCR.

¹²² Article 10 of the ICESCR.

¹²³ Article 11 of the ICESCR.

freedom from hunger,¹²⁴ “the right to the highest attainable standard of physical and mental health, including the right to health care”¹²⁵ and education’s right.¹²⁶

The above social and economic rights are substantive in nature and are meant to promote social justice.¹²⁷ They are meant to enable everyone to enjoy his rights and freedoms while he is living a dignified life endowed with necessities of life such as work, food, clothing, housing, health care and education.

The ICESCR contains standards and obligations that bind States that have ratified it.¹²⁸ It sets out obligations and the manner in which States Parties should approach the implementation of positive rights.¹²⁹ States Parties are obliged to progressively utilise their available resources in order to ensure that positive rights are fully realised.¹³⁰ To be fully realised, States Parties have to take not legislative measures but other measures which are on the sphere of the judiciary, society, economy, education and administration.¹³¹

2.4.1.2 Social and economic rights for marginalised groups

The underlying principle to ensure full enjoyment of fundamental rights by vulnerable groups is non-discrimination, which is read in line with equality principle. All the treaties subscribe “to the principles of non-discrimination and equality before the law.”¹³² The Inter-American Court of Human Rights asserts that non-discrimination constitutes a peremptory norm:

“Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the

¹²⁴ Article 11 of the ICESCR.

¹²⁵ Article 12 of the ICESCR.

¹²⁶ Article 13 of the ICESCR.

¹²⁷ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations – Canada)*, 10 December 1998, E/C.12/1/Add.31 at para 3.

¹²⁸ Ontario Human Rights Commission (n. 115).

¹²⁹ Article 2 of the ICESCR.

¹³⁰ Ontario Human Rights Commission (n.115).

¹³¹ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/17, para 17-18.

¹³² Ibid.

whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens."¹³³

In article 2 of both the CEDAW and the CRC, discrimination is proscribed in as far as women and children are concerned. They should not be discriminated against in order to enjoy a range of social and economic rights that are examined seriatim.

2.4.1.2.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

The CEDAW is the specialised treaty that deals with the rights of women on the international domain. The Convention requires State parties to adopt adequate measures to ensure that women are empowered in all spheres be it; administrative, political, social and economic.¹³⁴ The specific articles are found in Part III. Women should enjoy equally with men in: education,¹³⁵ employment,¹³⁶ health care¹³⁷ and family benefits and credit.¹³⁸ To give effect to the provisions, State parties are obliged to adopt judicial, legislative and administrative measures that are appropriate.¹³⁹ The State parties are also required to submit periodical reports to the UN Secretary, for consideration of the Committee on the Elimination of Discrimination against Women.¹⁴⁰

¹³³ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, Inter-Am. Ct. H.R. (Ser. A), No 18 (2003), para 101.

¹³⁴ Article 3 of the CEDAW.

¹³⁵ Article 10 of the CRC.

¹³⁶ Article 11 of the CRC.

¹³⁷ Article 12 of the CRC.

¹³⁸ Article 13 of the CRC.

¹³⁹ Article 18 of the CRC.

¹⁴⁰ Ibid.

2.4.1.2.2 Convention on the Rights of the Child (CRC) 1989

Mirroring somehow the wording of the ICESCR, albeit specific to children, the CRC states that:

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”¹⁴¹

The specific articles bind States Parties to adopt appropriate measures for the protection of refugees,¹⁴² promotion of the rights children with disabilities,¹⁴³ ensuring the rights of the child pertaining to the highest standard of health care,¹⁴⁴ ensuring “periodic review of the treatment to the child” under the care of competent authorities,¹⁴⁵ the right to social security and social insurance,¹⁴⁶ the right to adequate standard of living that allows the child to spiritually, morally, socially and mentally develop and¹⁴⁷ the right to education and making primary education free and primary for all.¹⁴⁸ Thus, States Parties are obliged to submit periodic reports for their progress in realising these rights.¹⁴⁹

2.4.2 UN Soft Law

Outside the enumerated sources of international law in article 38 of the Statute of the ICJ, there are other forms of standard setting. These are guidelines or standards made by the UN to influence states in their conduct. Although, they are non-binding in nature “they may over time mature into binding norms in the form of treaty provisions or

¹⁴¹ Article 4 of the CRC.

¹⁴² Article 22 of the CRC.

¹⁴³ Article 23 of the CRC.

¹⁴⁴ Article 24 of the CRC.

¹⁴⁵ Article 25 of the CRC.

¹⁴⁶ Article 26 of the CRC .

¹⁴⁷ Article 27 of the CRC.

¹⁴⁸ Article 28 of the CRC.

¹⁴⁹ Article 43 of the CRC.

through the development of customary international law.”¹⁵⁰ These recommendations or guiding principles are customarily called soft law.¹⁵¹ It should be noted that:

“The noncompliance with “soft law” rules cannot engage in the liability of the State authors of the violation, and no recourse may be pursued. According to a part of the doctrine, such soft law instruments do not have a legal nature and only include moral and political engagements that are not governed by international law. In addition to the confusion of the “legal” and the “binding” nature, another part of the doctrine relativizes the fact that “soft law” has no legal force. As such, recommendations from international organisations are in reality governed by international law and have legal significance because if States are not obliged by these rules, they are bound by the principle of good faith.”¹⁵²

The influential nature of soft law is conspicuously observed in the UDHR, which despite its non-binding nature has significantly influenced international law. This declaration provides for social and economic rights,¹⁵³ which have been incorporated in the binding treaty of 1966 referred to as the ICESCR. Furthermore, the UN World Conference on Human Rights, which came with the Vienna Declaration and Program of Action of 1993, emphasised the significant point of universality of fundamental human rights.¹⁵⁴

In 2015, the United Nations formulated a 15 year plan of action on three levels. The first one is global action to secure resources followed by local action which is designed to make policies, budgets and establish institutions in the locality. The last one on people action is an invitation to all to put more pressure so as to push for required changes. The 2030 Agenda for Sustainable Development is aimed at transforming the entire world so as to be habitable for everyone. Here, States envisage to work together in order to ensure that there is decent employment and means of livelihood.¹⁵⁵ It is

¹⁵⁰ Strydom (n 4) 98.

¹⁵¹ Ibid.

¹⁵² P Dailler, M Forteau and A Pellet, *Droit International Public* (LGDI, Paris 2009) 4. See also N Weib and JM Thuvenin (eds), *The influence of Human Rights on International Law* (Springer International Publishing, Switzerland 2015) 191.

¹⁵³ Universal Declaration on Human Rights (UDHR), 1948, especially articles 22-26.

¹⁵⁴ UN World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993.

¹⁵⁵ Ibid 9.

determined to reduce poverty so that everyone shall be entitled to adequate and healthy food.¹⁵⁶ It is committed to ensure the full realization of the Sustainable Development Goals (SDGs)¹⁵⁷ while also going beyond since, it focuses on the alleviation of poverty, health care, and other social and economic issues such as education and nutrition.¹⁵⁸

2.4.3 The tripartite obligations

The UN Committee on Economic, Social and Cultural Rights (CESCR) obliges States to “respect, protect and fulfil” social and economic rights.¹⁵⁹ This tripartite typology owes its origin from Henry Shue who, in 1980, formulated it in terms of obligations “to avoid depriving,” “to protect from deprivation” and “to aid the deprived.”¹⁶⁰ In 1987, Asbjørn Eide formulated the similar trilogy of “obligation to respect, the obligation to protect, and the obligation to fulfill human rights.”¹⁶¹

2.4.3.1 The obligation to respect

States are obliged not to interfere with non-state support systems that spearhead social security systems. This is substantiated by Olivier and Vonk:

“It is also certainly not the case that it is primarily the state that is called upon to take charge of the social security system. On the contrary, the document formulates a hands-off policy as the first obligation for the state. The government must respect

¹⁵⁶ Ibid.

¹⁵⁷ Transforming our world: the 2030 Agenda for Sustainable Development (adopted 25 September 2015) A/RES/70/1.

¹⁵⁸ Ibid 16-17.

¹⁵⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, <<https://www.refworld.org/docid/4538838d0.html>> accessed 16 May 2022.

¹⁶⁰ H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, NJ 1996) 52 [Google Scholar](#) (Shue, *Basic Rights*); “This was applied directly to business, with the argument being that businesses have direct responsibilities only to ‘avoid depriving’” in T. Donaldson, *The Ethics of International Business* (Oxford University Press 1989) [Google Scholar](#).

¹⁶¹ UN Economic and Social Council, “The New International Economic Order and the Promotion of Human Rights—Report on the Right to Adequate Food as a Human Right Submitted by Mr. A. Eide, Special Rapporteur” (7 July 1987) UN Doc E.CN.4/Sub.2/1987/23, para 66 (Eide, Report on Food).

non-state support systems; these may not be the subject of negative interventions.
This is the duty to respect.”¹⁶²

This entails that all measures taken by independent bodies to ensure the plenitude implementation of positive rights should be at liberty to do so without any hindrance by the Government.

2.4.3.2 The obligation to protect

“Protect” is related to “respect” in the sense that States are required to protect against “harm by third parties of a similar scope to the State obligation to “respect.”¹⁶³ The obligation to protect requires States to take action of preventing third parties that interfere with the enjoyment of social and economic rights.¹⁶⁴

2.4.3.3 The obligation to fulfill

The last obligation that the CESCR imposes on States is the one of fulfilling social and economic rights. It obligates States to take positive measures for the furtherance of the rights in question. States have “to take legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.”¹⁶⁵ Thus, for example, the failure of States “to provide essential primary health care to those in need amount to a violation.”¹⁶⁶

2.5 The justiciability of social and economic rights in the African human rights system

Apart from the standards set by UN human rights treaty instruments, there are also regional human rights instruments that played a pivotal role in the promotion and

¹⁶² G Vonk & M Olivier, The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa) (August 9, 2019) European Journal of Social Security <<https://doi.org/10.1177/1388262719867337>> accessed 16 May 2022.

¹⁶³ UN Economic and Social Council (n 161) para 67.

¹⁶⁴ Ibid.

¹⁶⁵ International Commission of Jurists “Maastricht Guidelines of Violations of Economic, Social & Cultural Rights” 1997, 6.

¹⁶⁶ Ibid.

protection of social and economic rights. In Africa, the Organisation of African Unity, which was established in 1963 at Addis Ababa in order to promote “unity and solidarity among African states,”¹⁶⁷ adopted the African Charter in 1981. Later on, other notable treaties include, the African Charter on the Rights and Welfare of the Child (AfCRWC), 1990 and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (PRWA), 2003.

2.5.1 African Treaties

2.5.1.1 African Charter

The salient feature of the African human rights system is the entrenchment of the justiciability of the social and economic in the African Charter. These rights are contained in article 15 to article 17, namely the right to work in a good condition,¹⁶⁸ the right to healthcare¹⁶⁹ and the right to education.¹⁷⁰ The Charter requires State parties of the OAU now the AU,¹⁷¹ to adopt and undertake legislative or other measures to give effect to the rights, duties and freedoms enshrined therein.¹⁷²

Strydom asserts that the “African Charter is celebrated as the first international human rights instrument to include not only civil and political rights, but also social and economic rights, and to make the two previously separated categories of human rights equally justiciable.”¹⁷³ However, the Charter limits these rights to essentially two rights: education and health.

Even though, the right to basic necessities is not mentioned in the Banjul Charter, the African Commission in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (the *Ogoniland* case)¹⁷⁴ held that “social and economic rights are not justiciable but the limited number of the rights in the Charter impliedly include the right

¹⁶⁷ Dugard (n 45) 540.

¹⁶⁸ Article 15 of the African Charter.

¹⁶⁹ Article 16 of the African Charter.

¹⁷⁰ Article 17 of the African Charter.

¹⁷¹ KD Magliveras and GJ Naldi ‘The African Union—A new dawn for Africa?’ (2002) 51 ICLQ 415; and M Growling ‘The African Union—An evaluation’ (2002) 27 SAYIL 193.

¹⁷² Article 1 of the African Charter.

¹⁷³ H Strydom and Others (n 4) 347.

¹⁷⁴ *Ogoniland* case (n 61).

to housing and food.”¹⁷⁵ Later on, the African Commission was confronted with the “poisoning by the Janjaweed of the wells of the Darfur region of Sudan.”¹⁷⁶ The violation pertained to the right to water. However, the Commission twisted its prior judgement in the *Ogoniland* case, which extended the limited rights to include the right to basic necessities on the basis of implied theory by judging it on the basis of the existing right to health.¹⁷⁷

2.5.1.2 African Children’s Charter

The African Charter in the Rights and Welfare of the Child (African Children’s Charter) was immediately adopted in the wake of the CRC in 1990 in order to deal with regional specificities that are specifically relevant to the children of Africa. In it, State parties are required to take appropriate legislative and other measures so as to give effect to the provisions of the Charter. It provides for the rights to education and health. It also provides that member States to the Charter are obliged to fully implement education’s right by ensuring that they implement free primary education and progressively implement free secondary education.¹⁷⁸ It provides for health care and other basic necessities such food, nutrition and clothing for children.¹⁷⁹ In the similar way with the African Charter, the African Children’s Charter lays more emphasises on education and health care.

2.5.1.3 Women’s Protocol

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women (known as the Maputo Protocol) in Africa locates the CEDAW in the African context. It provides obligations for member States to ensure full implementation of the social and economic rights of women. It advocates for equality and non-discrimination of women in education,¹⁸⁰ economic and social welfare rights,¹⁸¹ health and reproductive

¹⁷⁵ Ibid.

¹⁷⁶ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan (the Darfur case)* (2009) AHRLR 153 (ACHPR 2009).

¹⁷⁷ Ibid para 126.

¹⁷⁸ Article 11 of the African’s Children’s Charter.

¹⁷⁹ Article 14 of the African’s Children’s Charter.

¹⁸⁰ Article XII of the Maputo Protocol.

rights,¹⁸² the right to food security¹⁸³ and the right to adequate housing.¹⁸⁴ The uniqueness of this regional Protocol is that it spells out the right to basic necessities for women. The State parties are also required to periodically report with regard to their progress in fulfilling these obligations and even to budget for the realisation of these rights.

2.5.2 African regional soft law

Soft law plays a pivotal role in shaping the African human rights system. Despite its non-binding nature, soft law has influenced the formulation of many African treaties. When reading the preambles of African human rights treaties, the AU takes cognisance of the guiding principles, declarations and programmes of actions. For example; the International Conference on Population and Development,¹⁸⁵ the Fourth United Nations World Conference on Women, Beijing Declaration and Platform for Action (Beijing Platform for Action),¹⁸⁶ Gender Equality, Development and Peace for the 21st Century,¹⁸⁷ and The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.¹⁸⁸

The African Agenda 2063 was adopted by the AU in January 2013 as a “blueprint or master plan for sustainable development and economic growth in the continent.”¹⁸⁹ As a long term plan of fifty years, Africa aspires to be a prosperous and peaceful continent where there will be accessibility of education from primary to higher learning, good health and nutrition, poverty alleviation, equal opportunities for all without any discrimination or inequality and decent living of all Africans.¹⁹⁰

¹⁸¹ Article XIII of the Maputo Protocol.

¹⁸² Article XIV of the Maputo Protocol.

¹⁸³ Article XV of the Maputo Protocol.

¹⁸⁴ Article XVI of the Maputo Protocol.

¹⁸⁵ Cairo, 5-13 September 1994.

¹⁸⁶ 15 September 1995.

¹⁸⁷ Special Session of the General Assembly, 5-9 June 2000, GA Res. S-23/3, 10 June 2000 (Outcome Document Beijing +5).

¹⁸⁸ March 2007.

¹⁸⁹ Reporting on Africa's Agenda 2063 (NEPAD, 13 February 2020).

¹⁹⁰ The African Union Commission, Agenda 2063 Framework Document (September 2015).

2.6 Conclusion

In this chapter, the main focus has been to extrapolate the international standards and obligations in as far as social and economic rights are concerned. The first step was to trace the justiciability of social and economic right from the historical point of view. Thanks to the UN that took human rights to great esteem. History highlights the conundrum caused by the Cold War that resulted in the separation of rights into civil and political and social and economic rights. However, the ICESCR indicated its aim that ultimately, social and economic rights have to be fully realised. The full realisation of social and economic rights should always be a guiding principle, no matter how limited resources maybe. For this to happen, member states are required to adopt appropriate measures. At the regional level, the African human rights system makes provision for the justiciability of social and economic rights. It obliges State parties to fully implement social and economic rights enshrined in the African Charter and ancillary treaty instruments. This serves as a benchmark and the gauge that will be used in determining whether Lesotho as a member State is committed to the standards set at the international and regional levels or not.

CHAPTER THREE

THE NORMATIVE FRAMEWORK OF SOCIAL AND ECONOMIC RIGHTS IN LESOTHO

3.1 Introduction

Lesotho is the native land of Basotho people who are an amalgamation of different tribes from the East who were called the Bantu.¹⁹¹ These people were inspired by African culture, which is socio-centric that is based on the concept of *botho Ubuntu* being human. To be human is to recognise others. “*Motho ke motho ka batho*’ *‘umuntu u muntu nga bantu*” (a person is a person by other people). The typical African saying is, “I am because we are; I exist because the community exists.”¹⁹² This spirit of communion calls for respect, love, justice sacredness of life, hospitality and many other values that contribute in the building of communalism.¹⁹³

Having acquired what it means to be human, the martial band of Basotho was forged into one nation by Morena Moshoeshe I, the son of Mokhachane in 1820 at Thaba-Bosiu in Lesotho. The wise words of doctor Mohlomi which are redolent of African spirit of *Ubuntu* were fulfilled:

¹⁹¹ T Brown, *Among the Bantu Nomads*, (Service & Co. Ltd. London, 1926) 19.

¹⁹² S Gbadegesin “Yoruba Philosophy: Individuality, Community, and the Moral Order” E Chukwudi (ed), *African Philosophy* (Blackwell Publishers, Massachusetts 1998) 131.

¹⁹³ Tekane Sophoniah Maqakachane, “Towards Constitutionalization of Lesotho’s Private Law through Horizontal Application of the Bill of Rights and Judicial Subsidiarity” (Unpublished Master’s Dissertation, University of Free State, 2016) 125. He succinctly defines the social and economic system of the Basotho,

“the social and economic system of Basotho of the First Kingdom Lesotho had embodied values and cardinal principles of respect and honor for the elders, governors and the entire society; unity, fraternity, cooperation and warm hospitality; forgiveness, restorative justice, harmonious relationship; truth, love and loyalty; regard and acknowledgement of one’s extended family and benefactors; self-control, courtesy and generosity; diligence and industry; respect for human rights which included individuality; personal responsibility, the dignity and integrity of every person, sacredness of life and religiosity. These were epitomized in the tradition of communalism through which the sharing of a common social life, commitment to the social or common good of the society, acknowledgement of mutual obligations, caring for others, interdependence, communality, collective responsibility and cooperation were manifested on daily life.”

“On one occasion, when he happened to be in the neighbourhood of Buta-Bute (sic), Moshesh having gone to see him, Motlume (sic) said to him, My friend, if thou couldst only forget thy country, I would take thee along with me whenever I go. But some day, in all probability, thou wilt be called upon to govern men. When thou shalt sit in judgement, let thy decisions be just. **The law knows no one as poor man.**”
[Emphasis added].¹⁹⁴

As a nation, Lesotho was governed by the customary laws of the land which were codified in 1903.¹⁹⁵ There was also influence of English Law since Lesotho was a British colony from 1868 till she regained independence in 1966.¹⁹⁶ In 1884, Lesotho received the Common Law from the Cape of Good Hope enshrined in General Proclamation 2B:

“In all suits, actions and proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the colony of Cape of Good Hope: Provided, however, that in any suits, actions or proceedings in any courts, to which all the parties are Africans, and in all suits, actions or proceedings whatsoever before any Basuto Court, African law may be administered....”¹⁹⁷

Upon regaining independence on 4th October 1966, one of the symbolism of sovereignty and recognition as a state became the Independence Constitution.¹⁹⁸ As a state, Lesotho acceded to and ratified many international treaties, which include the ICESCR. Since, international human rights law needs to be concretised in the locality where individuals as subjects of social and economic rights exist, domestication brings human rights home. This creates a situation whereby individuals can easily vindicate for their violated rights in the courts of the land. This defines the relationship of international human rights law and municipal law in the process of protecting, respecting and promoting human rights at the local level.

¹⁹⁴ LBBJ Machobane ‘On the Idea of Good Government in the 19th Century Lesotho’ (1991) *The Constitutional Government and Human Rights in Africa* 3.

¹⁹⁵ *The Laws of Lerotholi*, 1903.

¹⁹⁶ VV Palmer & SM Poulter, *The Legal System of Lesotho* (Michie Company 1972) 10, 212.

¹⁹⁷ Section 2 of the General Proclamation 2B 1884.

¹⁹⁸ It was promulgated in the 20th September 1966 by Order in Council.

Lesotho as a State Party to the international treaties on social and economic rights is required to adopt a normative frame-work that aligns with international law. In this chapter, the normative framework pertaining to social and economic rights in Lesotho is examined. First, the discussion on the principles of international law when determining the place of international law in the municipal law is discussed. Then, the Constitution and pieces of legislations are discussed.

3.2 Domestication of public international law in the municipal law

Human rights are primarily protected in the state where individuals are found. However, after World War II, the individual became a subject of international law for human rights as a result of being internationalised.¹⁹⁹ Beginning with the adoption of the UDHR, it has been widely accepted that international human rights has a pivotal role “to play in supplementing municipal law.”²⁰⁰ For this reason there is a need to harmonise international human rights and municipal law as a state obligation which is canvassed by the majority of international human rights instruments.²⁰¹ Furthermore, international courts and tribunals of the human rights treaty bodies highlight the States’ obligation to harmonise the two legal systems.²⁰²

A State party is obliged to internalise international law in order that the individuals can benefit. This strengthens the relationship between domestic and international legal

¹⁹⁹ Strydom (n 4) 324.

²⁰⁰ Strydom (n 4) 325.

²⁰¹ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights; Article 1 of the African Charter on Human and Peoples’ Rights mandate State Parties to adopt legislative measures to give effect to their provisions.

²⁰² For instance, in the case of *Abdel Hadi & Others v Republic of Sudan* Communication 368/ 2009, November 2013, 54th ordinary session, the African Commission on Human and Peoples’ Rights held that: “the failure of the State’s Party to implement an adequate legislative design to protect the integrity of individual persons violated Article 1 of the Banjul African Charter.” Similarly, in *Mikhail Pustovoit v Ukraine* Communication 1405/ 2005 (HRC), 12 May 2014 UN Doc CCPR/110/D/1405/2005(2014) para 11, the Human Rights Committee (HRC) held that “A State Party to ICCPR is obliged by Article 2(3) (a) of ICCPR to adopt appropriate measures that implement the Covenant instead of violating the Covenant.”

systems that determine “the extent to which individuals can rely on internal law for the vindication of their rights within the national legal system.”²⁰³ According to Strydom:

“The rationale for the existence of international human rights law is primarily two-fold. On the one hand, it serves as a beacon based on international consensus about what minimum rights all persons should enjoy, and towards which states should steer their domestic law, policies and practices. International human rights law aims to exert a kind of gravitational pull on all states, drawing them towards accepting core human rights. On the other hand, it acts as a safety net, providing the possibility of recourse when efforts to obtain a remedy in the legal system have failed.”²⁰⁴

This means that international human rights law is there to mobilise states to fully realise human rights in municipal law. However, international law takes cognisance of the principle of subsidiarity which requires adversely affected persons to take recourse to national remedies before approaching an international or regional body to vindicate their human rights.²⁰⁵ In order to determine how international law is enforced at the national level, there are two theories that are used. These are monism and dualism. Let us discuss them seriatim.

3.2.1 Monism

Monist approach is analogised in terms of Cartesian’s doctrine of the mind and the soul. According to the French philosopher Rene Descartes, the mind and the soul constitute one thing since they serve the same purpose.²⁰⁶ This approach has in the context of international law, been translated in terms of public international law and national law as constituting a single system of law since they fulfil the same purpose.

²⁰³ I Shale, “Domestic Implementation of International Human Rights Standards against Torture in Lesotho” (unpublished Doctoral Thesis, the School of Law of the University of the Witwatersrand, Johannesburg, South Africa 2017)126.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Cited by Makara J in the case of *Metsing v Director of Public Prosecutions* (CC 27 & 28/2018) [2020] LSHC 46 (12 November 2020).

The renowned scholar Hans Kelsen as a proponent of monism held the view that “monism occupied a superior hierarchy over dualism.”²⁰⁷ He postulates that:

“*Monism* is designed to holistically address the issues of mankind across sovereignties, national and sociological demarcations. To reinforce the point, he stresses that the superiority of *Monism* over *Dualism* amalgamates both international law and the domestic laws into one single universal system of law.”²⁰⁸

The Republic of South Africa follows this approach. Since, international law has a direct application in the municipal law.

3.2.2 Dualism

Dualism regards international and municipal law as two areas of law and autonomous systems.²⁰⁹ Dualist theory holds that public international law has to be formally domesticated into national law before it would be enforceable before a national court.²¹⁰ This doctrine is premised upon the principle of sovereignty of the State coupled with democratic principle that allows active participation of citizens.²¹¹ The concept of sovereignty is accompanied by non-interference of States as a hall-mark principle of international law.

3.2.3 Harmonisation theory

Dugard indicates that there is also a harmonisation approach.²¹² This theory developed as a result of harmonising absolute monist approach “by acknowledging that in cases of conflict between international law and municipal law the judge must apply his country’s own judgement.”²¹³ In this way, the municipal law is given priority over international law to bring an end to the conflict that exists between them. Makara J held that:

²⁰⁷ Ibid para 105.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid para 107.

²¹² Dugard (n 45).

²¹³ Ibid.

“A genesis of this school of thinking is traceable from the endeavour to reconcile the entrenched positions maintained by Monism against the ones belligerently held by Dualism. In the process, it seeks to initiate a practical solution which emphasise more on addressing the challenges of mankind internationally than from a perception of sovereign States.”²¹⁴

As attested by the above citation, the harmonization doctrine strikes a balance between monism and dualism in order to solve the challenges of humanity on the international level rather than within the scope of sovereignty of States.

3.3 The place of public international law in Lesotho

There is a view that Lesotho has taken the dualist approach in as far as the relationship between international law and municipal law is concerned.²¹⁵ This traditional view is based on the supremacy clause, which puts the Constitution of Lesotho as the supreme law of the land and other laws being relegated under it. This provision renders any law inconsistent with the supreme law of the land null and void. Furthermore, there is legislation such as the Children’s Protection and Welfare Act that shows its purpose of protecting and fulfilling the rights of the child as expounded in the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child:

“The objects of this Act are to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.”²¹⁶

This legislation domesticates the afore-mentioned international conventions. To substantiate this, there are also cases that explicitly pronounce that Lesotho follows a

²¹⁴ *Mothejoa Metsing* (n 207) para 99.

²¹⁵ I Shale “Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy” (2019) 19 African Human Rights Law Journal 195.

²¹⁶ Section 2. Lesotho is a State party of CRC and of African’s Children Charter not just a signatory as purported by the Act.

dualistic approach. The very recent case of *Mothejoa Metsing v The Director of Public Prosecutions*²¹⁷ applied the supremacy clause of the Lesotho Constitution and as a result ruled that:

“Lesotho is characteristically a dualist State. Tellingly, from the narrative made, about such a country, international law can only assume a status of law upon being domesticated through an Act of Parliament. The philosophy behind has already been stated. Understandably, a pre-condition is that the law concerned must be an international one and recognized as such.”²¹⁸

However, Shale holds that the courts have long moved from this dichotomous distinction in the pursued of the *locus* of international law in Lesotho.²¹⁹ Dugard observes that:

“Whatever the jurisprudential basis for the application of international law in municipal law may be, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. In so doing courts seldom question the theoretical explanation for their recourse to international law.”²²⁰

This entails that the question of monism and dualism are rarely asked in the courts of law nowadays. The popular approach in this situation is harmonization theory.

3.4 Legal framework on the social and economic rights in Lesotho

In line with the second chapter, a State party is obliged to take appropriate legislative, judicial, administrative and other measures to give effect to the treaty in question. There is a task for the harmonisation of international law and municipal law. In this section we extrapolate those legal statutes that enshrine social and economic rights with the aim of determining whether they incorporate international human rights law.

²¹⁷ *Metsing v DPP* (n 207).

²¹⁸ *Ibid* 110.

²¹⁹ Shale (n 215).

²²⁰ Dugard (n 45) 43.

3.4.1 The Constitution of Lesotho

At the apex of the legal system of Lesotho, is the Constitution as the supreme law of the democratic and sovereign country. According to section 2 of the Constitution of Lesotho, the Constitution is supreme and other laws derive their validity from it. In this way, all other laws such as legislation, customary and common law derive their validity from this *lex fundamentalis* which is the *grundnorm* of the land.

The second chapter of the Constitution only enshrines civil and political rights, while social and economic rights are categorised under the third chapter as principles that guide policy. To substantiate this, Section 25 expressly design positive rights as mere principles that shall be helpful in guiding the Government of Lesotho and other administrative repositories in their endeavour to progressively achieve the plenitude implementation of the principles.

It would appear that the Constitution is not fair to the international treaties to which Lesotho is a party. For instance, the ICESCR calls the social and economic entitlements rights. By calling them the “principles of state policy,” the Constitution is incompatible with the Convention. Furthermore, the African Charter which Lesotho has ratified has dealt away with the dichotomy of categorisation of rights and in this way even social and economic rights are enforceable and justiciable in the African human rights system. Lesotho’s Constitution by rendering social and economic rights legally unenforceable fails to fulfil the obligation to protect, fulfil and respect social and economic rights.

The basis of the principles that guide policy in Lesotho is the principle of social justice. The following citation enunciates the principle of social justice by proscribing discrimination while prescribing equality:

“Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In particular, the State shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in the society to enable them to participate fully in all spheres of public life.”²²¹

This provision is in line with the principles of international law, which proscribes discrimination. It seeks to create the society where all are equal before the law. The disadvantaged groups may include people with disabilities, women and children.²²²

Furthermore the Constitution deals with specific social and economic rights as policies: protection of health,²²³ provision for education²²⁴ with special emphasis to primary education as “compulsory and available to all,”²²⁵ opportunity to work,²²⁶ just and favourable conditions of work,²²⁷ protection of workers’ and interests,²²⁸ protection of children and youth,²²⁹ rehabilitation, training and social resettlement of persons with disabilities²³⁰ and economic opportunities.²³¹ There is no provision for the right to basic necessities such as water, food,²³² shelter and clothing.

These policies are not rights and they are not justiciable in the courts of law. Even the right to health and education which are very prominent as justiciable in the African Charter are treated the same in the Constitution of Lesotho.

Before dealing with the legislative measures, it is pertinent to highlight that the 1993 Constitution retains the tradition of the laws in existence prior to its promulgation.²³³ These laws are to be modified, adapted and qualified in order to conform to the new

²²¹ Section 25 of the Constitution of Lesotho.

²²² For example, the treaties on group rights such as CRPD, CRC and CEDAW talk about these vulnerable persons.

²²³ Section 27 of the Lesotho’s Constitution.

²²⁴ Section 28 of the Lesotho’s Constitution.

²²⁵ Section 28(b) of the Lesotho’s Constitution.

²²⁶ Section 29 of the Lesotho’s Constitution.

²²⁷ Section 30 of the Lesotho’s Constitution.

²²⁸ Section 31 of the Lesotho’s Constitution.

²²⁹ Section 32 of the Lesotho’s Constitution.

²³⁰ Section 33 of the Lesotho’s Constitution.

²³¹ Section 34 of the Constitution of Lesotho.

²³² Base de données FAOLEX in « Organisation des Nations Unies pour l’alimentation et l’agriculture » <<https://www.fao.org/faolex/results/details/fr/c/LEX-FAOC129835/>> accessed 06 May 2022.

²³³ Section 156(1) of the Constitution of Lesotho.

Constitution. In the coming discussion, there will be a legislation which already existed when the new 1993 Constitution was promulgated.

3.4.2 Legislation on social and economic rights

Since Lesotho as a party is required to adopt legislative measures in order to give effect to social and economic rights, now we look at the legislation dealing with social and economic rights.

3.4.2.1 *The Public Health Order of 1970*

To promote good health, the Council of Ministers passed the Public Health Order in 1970. It applies specifically to the Ministry of Health and the duties of the health officers who are vested with the power to protect the citizens from the pandemic diseases from foreign countries and other communicable diseases.²³⁴ It includes International Health Regulations in situations where diseases are pandemics such as small pox, yellow fever, cholera and so on.²³⁵ Of course, today it is fitting to include HIV/AIDS,²³⁶ Ebola²³⁷ and Covid-19.²³⁸

In situations of a pandemic outbreak, the Ministry shall be in charge of combating the disease in terms of international health laws.²³⁹ However, the Order does not mention the right to health nor does it domesticate any social and economic rights treaty pertaining to healthcare.

3.4.2.2 *Labour Code Order of 1992*

The Code on Labour was enacted by the Military Council in 1992 in order to protect workers in Lesotho. What is salient about this piece of legislation is the recognition of

²³⁴ Section 3 of the Public Health Order 1970.

²³⁵ Section 17 of the Public Health Order 1970.

²³⁶ A Timeline of HIV and AIDS in "The HIVGOV Timeline" <<https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline>> accessed 09 May 2022.

²³⁷ Ebola Outbreak in West Africa (2014-2016) Centres for Disease Control and Prevention <<https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html>> accessed 09 May 2022.

²³⁸ Coronavirus disease 2019 (COVID-19) <<https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>> accessed 09 May 2022.

²³⁹ Section 17 of the Public Health Order 1970.

the International Labour Organisation (ILO) which deals with international law on labour issues.²⁴⁰ It states that in interpreting the Act, care must be taken to ensure that the Act does not deviate from the mandate of the ILO. Section 4 provides:

- a) “no provision 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 provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation.”

This provision gives international law preference where there is ambiguity. The non-discrimination principle is one of the underlying principles in this Act.²⁴¹ One of the duties imposed on employers is the duty to ensure that there is safety, health and welfare of workers in employment.²⁴² The Order imposes on employers to provide clean water for the employees and to ensure that there is adequate water for their employees.²⁴³

Furthermore, section 115 obligates the employers to provide for housing with water and food for the employees who will be remote to the homes. These provisions are

²⁴⁰ According to the internet sources, since the regaining of Independence in 1966, Lesotho has been a “Party to the International Labor Organization (ILO). For that reason, it has ratified twenty three international labor conventions, which include all the 8 fundamental human rights instruments of the ILO. The Prohibition and Elimination of the Worst Forms of Child Labor Convention (No 182) and the Minimum Age of Employment Convention (No 138) have also been ratified by Lesotho. Furthermore, Lesotho has signed these treaties which enhance social dialogue; Freedom of Association and Protection of the Right to Organize Convention (1947 No 87), Right to Organize and Collective Bargaining Convention (1949 No 98), Workers’ Representatives Convention (1971 No 135), Tripartite Consultation Convention (1976 No 144) and Labor Administration Convention (1978 No 150).” <<https://www.privacyshield.gov/article?id=Lesotho-Labor>> 06 April 2022.

²⁴¹ Section 5 of the Labour Code Order 1992.

²⁴² Section 93 of the Labour Code Order 1992.

²⁴³ Section 110 of the Labour Code Order 1992.

important for showing the rights to basic necessities. It also provides for sick pay²⁴⁴ and maternity leave²⁴⁵ as means of livelihood.

3.4.2.3 The Labour Code Amendment Act of 2006

In 2006, the Parliament of Lesotho in its wisdom enacted a piece of legislation to protect persons who are HIV positive and sufferers of AIDS in workplaces. This social enactment advocates for the testing²⁴⁶ and employees' counselling, as well as for the provision of medical treatment. It focuses on the education of employees with HIV/AIDS,²⁴⁷ testing,²⁴⁸ privacy,²⁴⁹ discrimination²⁵⁰ in employment,²⁵¹ eligibility for employee benefits,²⁵² protection against victimization,²⁵³ care and support, and workplace HIV/AIDS policy.²⁵⁴ This Act proscribes stigmatisation and creates an atmosphere where people with HIV/AIDS can work in harmony with others in employment.

3.4.2.4 Legal Capacity of Married Person's Act of 2006

The repeal of marital power empowered women to be equal with men.²⁵⁵ This enabled women to be socially and economically emancipated in the sense that the Legal Capacity of Married Person's Act allowed them to: enter into contracts,²⁵⁶ sue or be sued,²⁵⁷ register immovable property in her own name,²⁵⁸ act as executrix of a deceased's estate,²⁵⁹ act as a trustee of an estate,²⁶⁰ act as a director of a company²⁶¹ and bind herself as a surety.²⁶²

²⁴⁴ Section 123 of the Labour Code Order 1992.

²⁴⁵ Section 136 of the Labour Code Order 1992.

²⁴⁶ Section 235C of Labour Code (Amendment) Act 2006.

²⁴⁷ Section 235B of the Labour Code (Amendment) Act 2006.

²⁴⁸ Section 235C of the Labour Code (Amendment) Act 2006.

²⁴⁹ Section 235D of the Labour Code (Amendment) Act 2006.

²⁵⁰ *Harksen v Lane* 1997 11 BCLR 1489 (CC).

²⁵¹ Section 235E of the Labour Code (Amendment) Act 2006.

²⁵² Section 235F of the Labour Code (Amendment) Act 2006.

²⁵³ Section 235I of the Labour Code (Amendment) Act 2006.

²⁵⁴ Section 235J of the Labour Code (Amendment) Act 2006.

²⁵⁵ Section 3 of the Legal Capacity of Married Person's Act 2006.

²⁵⁶ Section 3(3)(a) of Legal Capacity of Married Person's Act 2006.

²⁵⁷ Section 3(3)(b) of Legal Capacity of Married Person's Act 2006.

²⁵⁸ Section 3(3)(c) of Legal Capacity of Married Person's Act 2006.

²⁵⁹ Section 3(3)(d) of Legal Capacity of Married Person's Act 2006.

3.4.2.5 *Water Act of 2008*

The right to water is one of the basic necessities falling under the framework of social and economic rights. In 2008, the Government of Lesotho enacted the Water Act for the management, protection, and conservation development and sustainable utilisation of water resources.²⁶³ Water resources belong to the Basotho nation and the King holds them in trust. The usage of water is a right according to Section 5 of this Act:

- 1) “The right to use water shall be in accordance with the provisions of this Act.
- 2) In the case of conflicting water use and if water is insufficient to cater for other uses, domestic use shall prevail and be given first preference over other uses.
- 3) For purposes of this section, water use shall include
 - a) taking of water from a watercourse;
 - b) storing water;
 - c) impounding or diverting the flow of water in a water course;
 - d) engaging in a stream flow reduction activity identified as such; discharging waste or water containing waste into a water resource through a pipeline, canal, sewer, sea, outfall or other conduit;
 - e) using water for irrigation, industrial and or mining purposes and disposing in any manner water which has been heated in any industrial activity, mining or power generation process;
 - f) altering the bed, banks, course or characteristics of a watercourse;
 - g) removing, discharging or disposing of water found underground if necessary for the efficient continuation of an activity or safety of people;
 - h) using water for recreational purposes; and
 - i) bottling of water for commercial purposes.”

This piece of legislation is important to show that everyone is entitled to the use of water as a basic right. In her comments regarding the Report on Water Sanitation and

²⁶⁰ Section 3(3)(e) of Legal Capacity of Married Person’s Act 2006.

²⁶¹ Section 3(3)(f) of Legal Capacity of Married Person’s Act 2006.

²⁶² Section 3 (3)(g) of Legal Capacity of Married Person’s Act 2006.

²⁶³ Water Act 2008.

Hygiene, Lesotho highlighted her endeavour to protect social and economic rights which are bedrock to the enjoyment of civil and political rights:

“Even though economic social and cultural rights are classified as Principles of State Policy in the Constitution of Lesotho, the Government works tirelessly towards their fulfilment as they are considered essential for the enjoyment of other rights (civil and political rights). The rights to safe drinking water and sanitation are therefore, as mentioned by the Special Rapporteur, basic, cross cutting and a human rights-based approach is thus important. The right to water which is safe and of good quality is undoubtedly on Government agenda as water is a natural resource which is vital for the survival of all human beings and other species.”²⁶⁴

This commitment indicates the Lesotho’s endeavour to ensure that there is clean and adequate for all. The right to water is recognised and the Government is determined to promote because it is essential for the livelihood of citizens.

3.4.2.6 Education Act of 2010

The purpose of this Act is to implement section 28 of the Constitution of Lesotho, which is concerned with the provision of education. The Act provides:

3. “This Act seeks to –
 - a) make provision for free and compulsory education at primary level;
 - b) align the education laws with decentralisation of services;
 - c) make provision for education for all in accordance with the provisions of section 28 of the Constitution; and
 - d) clarify roles and responsibilities of persons tasked with the administration of education.”

The above provisions entrench customary international law which requires that in primary schools education must be free and compulsory for all children. Upon reaching six years of age, every child shall be sent to free primary education. It is given to all

²⁶⁴ Report of the Special Rapporteur on the human rights to safe drinking water and sanitation on his visit to Lesotho - Comments by the State (A/HRC/42/47/Add.7) < <https://reliefweb.int/report/lesotho/report-special-rapporteur-human-rights-safe-drinking-water-and-sanitation-his-visit>> accessed 17 May 2022.

without any discrimination. Children with disabilities are to be given special treatment. In this way, the Act also fulfils the international obligations pertaining to education.

3.4.2.7 Children's Protection and Welfare Act (CPWA) of 2011

In 2011, the Parliament of Lesotho in its wisdom promulgated the Act that was aimed at protecting children and promoting their rights. The Act attempts to align international human rights standards with the municipal law.²⁶⁵ The Act also enumerates many rights of the child such as the right to education and health²⁶⁶ (mentioning food and clothing which are basic necessities of social and economic rights),²⁶⁷ the right to social activities,²⁶⁸ the rights of children with disabilities²⁶⁹ and the right to protection from exploitative labour.²⁷⁰ Section 22 of the Act obligates the State to make policies that will ensure positive action to promote the rights of the child.

The salient feature of the Children Act 2011 is that it calls the social and economic entitlements rights. It even spells out that it is inspired by international human rights norms and seeks to implement its obligations. However, by referring to these entitlements (rights) as objects of policy renders them non-justiciable and unenforceable and hence, international human rights law is not fully complied with by the legislative measures on education.²⁷¹

There are other legislations that promote social security for old persons and other vulnerable groups. The key areas of social security includes among others, "the sectors of health, social benefits for older persons, protection in case of unemployment, employment injuries and occupational diseases, family and maternity benefits, and support for the disabled, survivors and orphans."²⁷² The Old Age Act of 2004 governs old persons' social welfare. The Pension Fund Act of 2019 deals with pensions in

²⁶⁵ Viljoen (n 10)10; see Section 2 of the CPWA.

²⁶⁶ Section 11 of the CPWA.

²⁶⁷ Section 11(1) of the CPWA.

²⁶⁸ Section 12 of the CPWA.

²⁶⁹ Section 13 of the CPWA.

²⁷⁰ Section 15 of the CPWA.

²⁷¹ See 5.2.3 of chapter five.

²⁷² The Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 19 of the CESCR.

Lesotho to ensure that are well regulated. The Disaster Management Act of 1997 is intended to ensure that means of livelihood are provided for during times of disaster and state of emergencies.²⁷³ Even though, there is no specific Act of Parliament dealing with the social and economic rights of persons with disabilities in Lesotho,²⁷⁴ the only legislation that provides for them is the Act in question.²⁷⁵

3.5 Conclusion

Lesotho's normative framework does not fully domesticate customary international law and the law of treaties, which she has ratified. Although Lesotho has ratified many social and economic rights treaty instruments, the Constitution of Lesotho does not recognise social and economic rights as rights but rather as directives of state policy. These directives are not enforceable in the same manner as civil and political rights. Among the legislative measures taken by Lesotho, the Children's Protection and Welfare Act of 2011 conspicuously stands out as the only legislation that recognises the social and economic rights of the child although, they are also taken as a matter policy by the state and not enforceable through judicial processes since the Constitution renders them non-justiciable. Again, the free and compulsory education in primary schools has been provided for and this fulfils customary international law. Lesotho is predominantly a dualist country.

²⁷³ Section 23 of the Constitution of Lesotho. For example, in 2015 the Prime Minister of Lesotho declared drought that ravaged so much in Southern Africa due to El Nino weather phenomenon as emergency. Since many people faced hunger as a result of poor agricultural production. He called upon the international community to assist with food.

²⁷⁴ I Shale, "Country report: Lesotho" (2015) 3 African Disability Rights Yearbook 183-202 <<https://dx.doi.org/10.17159/2413-7138/2015/v3na8>> accessed 17 May 2022.

²⁷⁵ CPWA (n 269).

CHAPTER FOUR

THE IMPACT OF SOCIAL AND ECONOMIC RIGHTS IN THE CONTEXT OF LESOTHO

4.1 Introduction

Throughout the ages, Lesotho has been dreaming of a social and economic system in order to ensure that all the people live a decent and healthy life befitting of a human beings. The 1963 Constitutional Commission contemplates this system which is determined to harness social order:

“In advocating a Bill of Human Rights and Freedoms, we do not contemplate a dismembered society of self-sufficient individuals, where all the emphasis is on the rights of each, without regard to social duties and the establishment of a just social order. On the contrary, we would like to see established in Lesotho a polity in which the rights and obligations of the individual citizens one to the other, and the rights and obligations of the community to which they belong, are reconciled in a stable social order, and preserved from the abuse of power in any of its forms. And such a social order can, in our view, best be encouraged in the manner in which we suggest.”²⁷⁶

However, the Independence Constitution of 1966, which came as a result of the above aspirations, failed to include the social and economic rights in the Bill of Rights.²⁷⁷ The failure to make social and economic rights judicially enforceable was also repeated in the 1993 Constitution, which mirrors the Independence Constitution.²⁷⁸

Whereas Lesotho is an African country which ought to be characterized by the principles of communalism as the bedrock of social and economic rights, Lesotho chose to take the Western approach of taking civil and political rights in great esteem while

²⁷⁶ Report of the Basutoland Constitutional Commission 83 (1963).

²⁷⁷ The social and economic rights are styled principles of state policy in chapter 3 of the 1966 Constitution of Lesotho.

²⁷⁸ Chapter 3 of the 1993 Constitution mirrors the 1966 Constitution.

making social and economic rights mere principles that are not enforceable in the courts of law. In this chapter, the focus is on the challenges of implementing social and economic rights in Lesotho. First, I look at judicial measures. After that I - assess some of the administrative measures taken in promoting social and economic rights.

4.2 Challenges of the judicial decisions on social and economic rights

4.2.1 On the means of livelihood

In *Khathang-Tema-Baitšokoli & Another v Maseru City Council & Others*,²⁷⁹ the Court was confronted with whether the right to life includes the right to means of livelihood. It is a common cause that the members of Khathang-Tema-Baitšokoli Association were evicted from Kingsway where they were selling food-stuff and other commodities to the public. The reason was that they had no license to trade in the area. As a registered association of traders acting in concert with an individual member who had a stall at Makhetheng, along Kingsway from 1979 till recently, they sued the Maseru City Council.

The first appellant's members sought to carry on their trade along Kingsway, the capital's main highway, selling items of basic necessities to the public. Instituting a constitutional challenge in terms of section 22 (6) of the Constitution of Lesotho, read with Government Gazette (GG) 104 of 14 December 2000), the appellants challenged their removal by the Maseru City Council and other respondents who assisted him.

The appellants' challenge is that the right to life should factor in the right to means of livelihood.²⁸⁰ They opposed eviction since this affected them with regard to their socio-economic rights such as earning food and clothing.²⁸¹ The Court *a quo* dismissed the case on the grounds that the right to life should not be interpreted "expansively and purposively – to include [the] right to livelihood...."²⁸² If the Court *a quo* had a room to learn from other jurisdictions such as India, it would have a different judgment.

²⁷⁹ *Khathang-Tema-Baitšokoli & Another v Maseru City Council & Others* Court of Appeal of Lesotho CA (CIV) 4/2005.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid* para 5.

In 1986, *Olga Tellis v Bombay Municipal Corporation*,²⁸³ took the different to that on *Re Sant Ram*.²⁸⁴ In *Re Sant Ram*, the Apex Court of India interpreted the right to life in a similar fashion with the one applied in *Khathang-Tema-Baitšokoli*.²⁸⁵ The Indian Court said that the right to livelihood does not fall within the ambit of the right to life as expressed in article 21 of the Indian Constitution.²⁸⁶ Later on, the pavement dwellers (Olga Tellis) who were unlawfully evicted by the Municipality (Bombay Municipal Corporation) lodged their case in the Indian Supreme Court.²⁸⁷ Their contention was that their eviction infringed upon their right to life since by being evicted from the place where they get means of livelihood is tantamount to deprivation of the right to life.

The Court made it clear that the right to life includes the right to means of livelihood. The right to life as found in Article 21 does not mean merely extinction of life or capital punishment but it transcends that mere explanation. The right to life is concerned with the right to livelihood since “no person can live without the means of living, that is, the means of livelihood.”²⁸⁸

Furthermore, although recognizing the international standards and obligations which Lesotho is a State Party to them, the Court of Appeal held that:

“In accordance with a number of other constitutions and international covenants on human rights, Lesotho has dealt with what are generally described as social and economic rights (or ‘green rights’) in a way which is distinct from the treatment of fundamental rights (or “blue rights”). In Lesotho’s case this is to provide separately for a chapter in the Constitution (chapter III) entitled “Principles of State Policy.” One of these (s.29 (1)) is that “Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts.”²⁸⁹

²⁸³ *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180.

²⁸⁴ In *Re Sant Ram*, AIR 1960 SC 932. This case was before Maneka Gandhi. Citing the Court ad verbatim, “The argument that the word “life” in Article 21 of the Constitution includes “livelihood” has only to be rejected. The question of livelihood has not in terms been dealt with by Article 21.”

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ *Olga Tellis v Bombay Municipal Corporation* (n 283).

²⁸⁸ *Olga Tellis v Bombay Municipal Corporation* (n 283).

²⁸⁹ Ibid para 18.

While conscious that socio-economic rights are recognized as rights in socio-economic treaties and other foreign constitutions, in Lesotho they are taken as mere principles that guide policy. On this basis, the appellants lost the case on the ground the right to life is under civil and political right whereas the rights to means of livelihood are under principles that guide policy and these principles are not legally enforceable.²⁹⁰

The Lesotho Appeal Court should also learn from Indian jurisprudence as found in *Olga Tellis* case and advanced in *Chameli Sigh v State of Uttar Pradesh*.²⁹¹ The case is concerned with the appellants who owned the plot and other lands which were neither arable nor waste land. They acquired that land for the purpose of housing for Dalits Tribes and the poor. The State passed Land Gazette pertaining to this land in order to acquire it for public purpose. The appellants challenged the matter on the ground that the order was not compatible with Article 21 of the Indian Constitution and that there was no urgency to take it. The appellants further argued that “Acquisition of the land deprives the owner of his source of livelihood enshrines under Article 21 of the Constitution which cannot be deprived by denuding the owner of the means of livelihood, viz., the land by resorting to compulsory acquisition.”²⁹² The State argued that they will build decent houses for them with better sanitations.

The Apex Court interpreted the right to live and the right to shelter as fundamental rights rather in Lesotho where socio-economic rights are merely principles that guide policy. The right to life and the right to means of livelihood are harmoniously integrated in Indian jurisprudence. In *Chameli's* case, the Court made it clear that “right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter.”²⁹³ The Indian Court took cognizance of the international obligations imposed on India as a Party State of the international human rights treaties on socio-economic rights and therefore compelled the State to act positively on the implementation of socio-economic rights.

²⁹⁰ Ibid.

²⁹¹ *Chameli Sigh v State of Uttar Pradesh & Anr.*, (1996) 2 SCC 549.

²⁹² Ibid.

²⁹³ Ibid.

It is clear that India provides has enough jurisprudence that Lesotho can emulate in order to fully implement socio-economic right in her legal system. At this juncture, I discuss social welfare of women in Lesotho.

4.2.2 On the social welfare of women

Lesotho has empowered women in many sectors of life. The only problem is the reservation of the office of chieftainship to males.²⁹⁴ This male primogeniture arises from the customs, practices and traditions which have a characteristic of patriarchal system. Kingship as ascribed status²⁹⁵ belongs to males only. In this way, women are subjected to perpetual minority.²⁹⁶ To protect this customary tradition, the Constitution of Lesotho allows for discrimination where the matter pertains to “the application of customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law.”²⁹⁷ The proviso following this citation is very important in the realisation of social and economic rights by removing discriminatory laws: ‘Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all citizens of Lesotho and thereby removing any discriminatory law.’²⁹⁸

However, section 18(4) of the above cited proviso was heavily challenged in the in the case of *Princess Senate Gabasheane Masupha v the Magistrate*,²⁹⁹ where the learned Judge said:

²⁹⁴ Section 2 of the Laws of Lerotholi, 1903 and section 10 of the Chieftainship Act 1968.

²⁹⁵ This kind of status is assigned by the society or a group of people. See M Hoghes & C Kroehler, *Sociology: The Core* (The McGraw-Hill Companies 2008) 58.

²⁹⁶ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) in para 92, the Court held that:

“The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.”

²⁹⁷ Section 18 (4) (c) of the Constitution of Lesotho 1993.

²⁹⁸ Section 18(4).

²⁹⁹ *Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others* (C OF A (CIV) 29/2013) [2014] LSCA 22 (17 April 2014).

“Section 25 states that the principles contained in the chapter shall form part of the public policy of Lesotho. Section 26 (1) provides that Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless, inter alia, of their sex. However, s 25 says that the principles set out in the Chapter are not enforceable by any Court. Reliance on Chapter III was accordingly misplaced.”³⁰⁰

In this case, Princess Senate is unmarried daughter of the late Principal Chief of Ha ‘Mamathe. She is also one of the ambassadors of Lesotho serving in Italy. Upon the demise of her father, her mother acted as Principal Chief. Her mother also died. The office fell vacant. As a result of vacancy, the meeting was held by family members that appointed Lepoqo David Masupha who was a minor son of the subsequent marriage of the Late Principal Chief of Ha Mamathe to succeed his father. The daughter of the late principal chief of Ha ‘Mamathe, instituted an action whereby he prayed the Court to overrule the discriminatory law that prohibited woman from being chief so that she may succeed as the principal chief of Ha Mamathe.

The Court dismissed the case on the ground that the Constitution allows for discrimination in as far as chieftainship is concerned, only males can succeed. Whereas, in other aspects of social and economic rights women are empowered in line with the CEDAW treaty and the Maputo Protocol.³⁰¹ The judgment seemed to drag the country backward to the antiquated laws that are no longer reasonable. Hence, the observation made in *Bhe*’s case holds water:

“The rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in text books, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly

³⁰⁰ Ibid para 21.

³⁰¹ Legal Capacity of Married Persons Act 2006 (n 255).

out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.”³⁰²

One of the elements that make our judiciary stagnant to read the signs of the times is to rely on the ossified traditions and customs that have been codified instead of taking cognizance of the dynamism of the living customary law.

4.2.3 On health

In the wake of Covid-19, medical doctors were at the frontline to combat the deadly virus which threatened to decimate the populations of the world. This philanthropic profession endangered and exposed the doctors to the risk of being negatively affected by the pandemic. According to the World Health Organisation (WHO), reports of infections, illness and attacks among health workers fighting COVID-19 mounted.³⁰³ The WHO urged governments to address the persistent threats to healthcare workers’ health and safety:

“COVID-19 has exposed health workers and their families to unprecedented levels of risk. Although not representative, data from many countries across WHO regions indicate that COVID-19 infections among health workers are far greater than those in the general population.

While health workers represent less than 3% of the population in the large majority of countries and less than 2% in almost all low- and middle-income countries, around 14% of COVID-19 cases reported to WHO are among health workers. In some countries, the proportion can be as high as 35%. However, data availability and quality are limited, and it is not possible to establish whether health workers were infected in the work place or in community settings. Thousands of health workers infected with COVID-19 have lost their lives worldwide.”³⁰⁴

³⁰² *Bhe and Others* (n 296) para 82.

³⁰³ Keep health workers safe to keep patients safe: WHO (17 September 2020) News Release Geneva <<https://www.who.int/news/item/17-09-2020-keep-health-workers-safe-to-keep-patients-safe-who>> accessed 11 May 2022.

³⁰⁴ *Ibid.*

Against this background, medical doctors in Lesotho were also exposed to infection. They decided to approach the High Court. They complained that:

“We do not have requisite tools including, among others, safety kits and we from time to time work with our bear (sic) hands handling patients with open wounds and sometimes with highly communicable or infectious diseases. This imposes a threat to doctors’ own physical integrity, life and renders it hard for them to practice their profession.”³⁰⁵

The situation was triggered by the failure of the State to provide doctors with proper protective equipment (PPE) that could be utilized in the course of the Covid-19 pandemic. The State made an allegation that it had lack of funds and was not obliged to provide doctors with PPE even in the face of the threat posed by the pandemic.³⁰⁶ As a result, the doctors asked the Court to intervene. In the case of *Lesotho Medical Association and Another v Minister of Health and Others*,³⁰⁷ the High Court was confronted with this matter. The doctors asked the court to come to their aid. They argued that the State’s failure to provide them with adequate PPE violated their rights to just and favorable conditions of work and, ultimately, their right to life. They also asked the court to declare the conditions under which they were compelled to work in violation of their right to ‘physical, mental and emotional life.’³⁰⁸

It is worth noting that the Court was in this case, confronted with issue relating to the non-justiciable principles of state policy of forced labor and unjust and unfavorable working environment interpreted in line with the right to life. The High Court cited the

“The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions,

³⁰⁵ K Farisè, COVID-19 and Africa Symposium: The State’s Duty to Provide PPE to Health Workers in Lesotho (2020) *Opinio Juris* <<http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-states-response-to-covid-19-in-africa/>> accessed 10 May 2022, citing *Lesotho Medical Association and Another v Minister of Health and Others* (CONST. CC NO: 19/2019) [2020] LSHC 14 (24 June 2020).

³⁰⁶ *Lesotho Medical Association* (n 305).

³⁰⁷ *Lesotho Medical Association* (n 305).

³⁰⁸ *Ibid.*

procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.”³⁰⁹

This judgment is *prima facie* evidence that the right to life is intertwined with the right to all means of livelihood that are meant to sustain life. In its wisdom the Court held that:

“As the starting point, although our Constitution is worded differently from Article 2 of the European Convention on Human Rights, in my view nothing much turns on this as regard the positive and negative obligations the two instruments impose on the respective States towards protection of lives. Furthermore, even though these foreign decisions do not deal with the plight of medical doctors who are not provided with safety equipment in their workplace, jurisprudence garnered from them serve as a useful guide as to the approach to be adopted by this court in dealing with the present matter. This case implicates, as is abundantly clear, the State's substantive obligation to provide safety equipment to the medical doctors employed in public facilities.”³¹⁰

By urging the Government of Lesotho to provide protective equipment to the doctors and interpreting the just and favorable conditions of work in the light of the right to life, the Court proved the indivisibility and interrelatedness of these rights. Although in *Khathang-Tema-Baitšokoli*, the Court made it clear that the right to life is independent from the right to means of livelihood,

“The aspirational language is significant. That is not to say that the provisions of s.29, like those of adjacent provisions regarding matters such as health, education, protection of children, workers’ rights and interest and the environment, may not in appropriate circumstances and in appropriate ways find implementation, and that recourse may be had to the courts in that regard. But that is not a matter that falls to be determined in this case. It is however to say that the opportunity to gain a living by work – in other words, to secure a livelihood – is expressly dealt with outside the

³⁰⁹ Ibid citing *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 at paras 2 and 3.

³¹⁰ *Lesotho Medical Association* (n 305) para 40.

ambit of s.5 (and thus outside the means for enforcement for chapter II rights in terms of s.22, which is expressly confined to chapter II rights).³¹¹

However, it highlighted the possibility of the justiciability and implementation of social and economic rights. The Covid-19 pandemic has challenged States with the duty to take the right to health seriously. This decision calls upon the state of Lesotho to make social and economic rights justiciable.

4.3 Administrative measures

The Government of Lesotho (GOL) has made a number of policies and programs on social and economic rights. There are many policies, actions, strategies that were made by the government to ensure among others quality education, quality health care, poverty reduction, water sanitation and other development strategies that are of a social and economic nature. These measures are inspired by the Millennium Development Goals (MDGs), the 2030 Agenda for Sustainable Development³¹² and the African Agenda 2063. These international agendas and goals are reflected in Lesotho Vision 2020.³¹³

4.3.1 Vision 2020

The Vision 2020 is one of the best strategic plans made in Lesotho. It envisages among others a country that is prosperous. The social and economic values are captured in this document and intended to ensure that everyone lives a decent life, socially secured and that the, best health facilities and quality education is guaranteed to all. For example:

“With regard to **health**, Lesotho has made remarkable progress in providing access to social infrastructure, including access to safe drinking water. Challenges include

³¹¹ *Baitsokoli and Another* (n 279) para 19.

³¹² Transforming our World: the 2030 Agenda for Sustainable Development < <https://sdgs.un.org/2030agenda> > accessed 19 May 2022.

³¹³ National Vision 2020 (Ministry of Finance and Development Planning, Government of Lesotho 2004).

equitable distribution of health facilities and strengthening the health institutions for efficient and effective service delivery.”³¹⁴

When the Vision 2020 was written, there were still challenges pertaining to proper health facilities. Then the Vision 2020 continues to highlight the challenges facing education in Lesotho. They include, improvement of ‘access to education at all levels,’³¹⁵ development of a curriculum that responds to local needs of the country and promotion of vocational, technical and entrepreneurial skills.³¹⁶

4.3.2 Education Program

Since 2000, the ‘primary education is free and compulsory.’³¹⁷ This is the case in government and church-owned schools since ‘in practice, government sponsors only those primary school children who attend government-owned and church-owned schools. It does not sponsor those who attend private schools.’³¹⁸ Even though, elementary education is devoid of quality. According to the Lesotho UN Development Assistance Plan (LUNDAP):

“The Government spends about 14% of public resources in the education sector. Despite state efforts and investment in education, Lesotho has not been able to provide basic quality education for all. Issues of limited education opportunities for school age population, high dropout rates, poor retention, poor quality of education and low transition to secondary education are critical issues across the country, in particular in rural areas.

The reason of limited access to and quality of education include inter alia, poverty (over 57% of people in Lesotho are poor); insufficient attention to early learning (Early Childhood Development and Education); misallocation of financial resources

³¹⁴ Ibid xii.

³¹⁵ Ibid xii.

³¹⁶ Ibid xii.

³¹⁷ This is in accordance with s 28(b) of the Constitution of Lesotho, 1993 read with the Education Act 10 of 1995.

³¹⁸ KE Mosito, A Panoramic View of the Social Security and Social Protection Provisioning in Lesotho (2014) PELJ (17)4 <<http://dx.doi.org/10.4314/pelj.v17i4.11> > accessed 10 May 2022.

and inefficiency across the education system and corruption and mismanagement of education resources and institutions.”³¹⁹

In secondary schools, the Ministry of Social Development pays for the fees of disadvantaged children especially double-orphaned children as well as those from very poor families. At the tertiary level, the National Manpower Development Secretariat (NMDS) sponsors students on the basis of merit. However, these are mere policies which are not enforceable in courts as Mosito observes:

“The government is not statutorily compelled to take action in this area. Consequently, the courts are not able to monitor government action in the absence of clear legal objectives, standards and provisions. Furthermore, a legal obligation to allocate part of the national budget to public assistance is clearly absent, and public assistance is consequently under-funded. It is clear from the discussion that individuals and communities in need of protection are exposed to arbitrary and discretionary selection and decision-making. The discussion has revealed that there is little incentive to target vulnerable groups as a matter of public assistance priority.”³²⁰

The above citation testifies that there is a challenge with regard to the full realization of socio-economic rights in Lesotho. Their implementation depends on the discretion of the Government. The lack of enforcement leads to the marginalization of the vulnerable groups who should be socially secured.

4.3.3 Health Program

In the year 2008, the Government introduced the free health program. This program is operationalized in church and government clinics and hospitals. Patients of HIV/AIDS, Tuberculosis (TB) and Covid-19 receive free nationwide health services. More so, to curb the corona virus, the GOL made the Covid-19 vaccine mandatory and available to all. Health systems in Lesotho are poor and as a result there is a high death rate of

³¹⁹ Lesotho Country Analysis Working Document Final Draft (September 2017) 7.

³²⁰ Mosito (n 318) 1613.

children³²¹ and women in maternity.³²² There is a 'limited access to appropriate health services across Lesotho.'³²³ The main cause of these problems is the lack of accountability and limited community empowerment.³²⁴ This program lacks adjudicative enforcement and has no statutory frame-works.³²⁵

There are many policies and programs that lean towards the furtherance of social and economic rights but the problem is lack of implementation. Up to date, Lesotho has failed to submit initial and progressive reports to the Committee on Economic, Social and Cultural Rights.

4.4 Conclusion

The implementation of social and economic rights in Lesotho is still a major challenge as illustrated in this chapter. The case of *Khathang-Tema-Baitsokoli* highlighted the problem of the unenforceability of social and economic rights in the courts of law. The relegation of social and economic rights to a subordinate status as mere principles of State policy allows the Government to fulfill the rights at their own pace without anyone questioning their failure to do so. However, the case of Medical Association shows the liberal approach which lays bedrock for the justiciability of the social and economic rights since it highlights the inseparable union of the right to life and the right to health. Other actions, programs and visions are implemented as mere policies entailing proper legislation for their enforcement through judicial processes. Lastly the failure to submit progress reports is one of the contributive factors in the failure to fulfill the obligations of the treaties pertaining to social and economic rights.

³²¹ Lesotho Country Analysis Working Document Final Draft (n 319).

³²² Lesotho Demographic and Health Survey (LDHS), 2014.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ Mosito (n 318) 1612.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The prominent issue in this discussion has been justiciability of social and economic rights in Lesotho. As a State party to a plethora of international instruments on social and economic rights, Lesotho's legal frame work has no recognition of social and economic rights as justiciable.

Chapter one dealt with a general overview of the entire dissertation. It gave the background, the problem, objectives, questions of the study, relevance and definition of some keywords. This created a background whereby the problem exposed the country of Lesotho to one of the countries in the world that does not recognise social and economic rights as 'rights' and not constituting the Bill of Rights in her constitutional framework. The procedure of answering the questions was to first extrapolate the international standards and obligations, with special emphasis on international customary practice, treaty law and soft law as African well as regional law.

The international obligations as enshrined in international human rights treaties, instruments and protocols were discussed in chapter two. The chief instrument is the ICESCR adopted by the United Nations in 1966. This document which Lesotho ratified imposes obligations that include among other protection, respect and fulfilment of the social and economic rights and to ensure their full implementation. This convention together with other ancillary instruments requires States to take judicial, legislative and administrative measures so as to effectively and efficiently promote social and economic rights.

Chapter two further highlighted the fact that the Banjul Charter expressly requires States to make social and economic rights justiciable. It is worth noting that the Charter only enshrines the right to healthcare and the right to education as justiciable entitlements. According to the African Commission, when it dealt with the complaint of

the *Ogoni* people, the basic rights like food, water and shelter are enunciated. In this way, it is illustrated that both the international and the African regional human rights systems recognise social and economic rights as justiciable entitlements and makes provision for the enforcement mechanisms for vindicating the rights. These international mechanisms are however, only secondary. National laws ought to equally make provision for judicial mechanisms, which individuals can easily access to vindicate their social and economic rights. This is the principle of subsidiarity.

Having completed the bench-mark in chapter two, the next chapter dealt with the normative framework of Lesotho's municipal law Lesotho. The theories on the determination of the place of international law in Lesotho were discussed. It was found that Lesotho lean towards dualism which allows the State to domesticate the international treaties before they could be enforced in the national legal system. As Shale pointed out, there are traces of monism in as far as judicial judgements are concerned.

The first piece of law that was examined is the Lesotho Constitution which has a supremacy clause. The salient feature of the Constitution is that it does not include social and economic rights in the Bill of Rights. Only civil and political rights are justiciable.³²⁶ Legislation like the Children's Protection and Welfare Act are inspired by international instruments.³²⁷ In the aforementioned Act, social and economic rights are explicitly couched as rights. By being called 'rights,' the presupposition is that, they are remedies when the rights are violated.³²⁸ However, since legislation is subservient to the Constitution, the rights are conceived mere policies that lack enforceability in the domestic courts.

The impact of socio economic rights in Lesotho is too minimal. There is guarantee of free primary education and free health services but they lack quality. This is observed in chapter four. Lesotho has clear policies and programmes of action but lacks legislative measures to ensure enforcement. There is also lack of accountability to ensure that

³²⁶ Mosito (n 318) 1577.

³²⁷ See 3.4.2.7 of chapter three.

³²⁸ The Latin maxim, "*ubi ius ibi remedium*" applies with full force.

policies are effectively implemented. Even though, the *Medical Association* case is a search light for the enforcement of social and economic rights, there is no consistency in the courts just as in the *Khathang-Tema-Baitsokoli* case where the court said the right to life does not include the right to the means of livelihood. Lessons from the Indian jurisprudence were drawn in order to illustrate that the right life includes the right to means of livelihood.³²⁹ This was clearly illustrated by *Olga Tellis's* case. The main problem of the ineffectiveness of the judicial measures flows from the Constitution that fails to take the social and economic rights seriously like it does with civil and political rights.

There are many findings in this study on the justiciability of social and economic rights in Lesotho. One of them is the weak normative framework that does not accord with international standards and obligations. Lesotho as a State party fails to submit progress reports to international treaty bodies concerned in order to see how they can join hands in fulfilling and promoting social and economic rights. Whereas the international bill of rights comprises the UDHR, the ICCPR and the ICESCR,³³⁰ in Lesotho the bill of rights as enshrined in the Constitution excludes social and economic rights, which are not recognised as rights but rather as principles of state policy. In this way, they are technically not enforceable in any domestic court of the land. Whereas there are policies and programmes inspired by international aspirations, they lack statutory measures. In that way, their implementation is not guaranteed.

5.2 Recommendations

5.2.1 Adoption of the Indian integration approach by the courts

The courts of Lesotho have to adopt the Indian integration approach where civil and political rights are invoked in order to enforce socio-economic rights. In this way, socio-economic rights will be interpreted in a way that establishes indivisibility and interdependence between them and civil and political rights.³³¹

³²⁹ See 4.2.1 of chapter four.

³³⁰ AJ Veal "Human rights, leisure and leisure studies" (2015) World Leisure Journal 249-272 <<https://doi.org/10.1080/16078055.2015.1081271>> accessed 29 June 2022.

³³¹ See 4.2.1 of chapter four.

5.2.2 Constitutional Reforms

The country of Lesotho is already in the journey of constitutional reforms. It is worth noting that one of the key areas that have to be revisited includes the justiciability of the social and economic rights. The Constitution should put social and economic rights in the rightful place in the bill of rights. In this constitutionalisation part, I amplify what Kondo already suggested that socio-economic rights have to be constitutionalised in the municipal law.³³² It has to take into consideration that rights are interrelated, indivisible and universal. The Constitution has to reflect the universality of rights. In this way, the rights will serve as an antidote to unemployment, illiteracy, high mortality rate and abject poverty.

5.2.3 Enactment of social and economic legislation

Programmes that are in place in Lesotho need statutory measures so that they can be legal and enforceable in the courts of the land. The Health Order³³³ for example, does not recognise healthcare as a right. The Education Act³³⁴ also does not conceive of education as a right.³³⁵ Consequently, new legislation is needed, which should domesticate social and economic rights contained in the international and African regional instruments that Lesotho has ratified.

5.2.4 Establishment of a local Economic and Social Rights Commission

This Commission will serve as a liaison between the Government of Lesotho and the UN Committee on Economic, Social and Cultural Rights. The Committee can among others, advise the Government of Lesotho on budgetary and implementation measures with respect to international standards and obligations.

³³² See 1.9.4. of chapter one.

³³³ See 3.4.2.1 of chapter three.

³³⁴ See 3.4.2.6 of chapter three.

³³⁵ See 3.4.2.7 of chapter three.

5.2.5 Submission of initial and progressive reports

Lesotho should remember her call to action in as far as reporting on the progress of the social and economic rights is concerned. This will enable the State to fully implement the obligations because there will be checks and balances. Reporting mechanism avoidance is a clear searchlight that Lesotho fails to implement the obligations and the standards required by the treaty bodies pertaining to social and economic rights. The submission of reports will be a wakeup call to Lesotho to fulfil her mandate.

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