



NATIONAL UNIVERSITY OF LESOTHO

**AN ANALYSIS OF HOW HUMAN RIGHTS VIOLATIONS AFFECT
DEVELOPMENT IN LESOTHO: CHALLENGES AND PROSPECTS**

By

NTHABEENG MAGRET MOLIKOE

STUDENT NUMBER: 201902085

A mini-dissertation submitted in partial fulfilment of the requirements of the degree of Master of Laws (LL.M.) in the Faculty of Law, National University of Lesotho

Supervised by: **PROFESSOR CAROL CHI NGANG**

MAY 2025

DECLARATION

I, **NTHABELENG MAGRET MOLIKOE**, solemnly declare that this mini-dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook, or other media. The contents of this mini-dissertation entirely reflect my original research, save for where the work or contributions of others have been accordingly acknowledged.

Name: **NTHABELENG MAGRET MOLIKOE**

Signature: *N. Molikoe*

Date: 31 May 2025

Place: Roma, Lesotho

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



Signed: _____

Supervisor

Professor Carol Chi Ngang

DEDICATION

This work is dedicated to my mother, ‘Mamolemo Alina Molikoe and my father, Moleleki Joseph Molikoe for their unwavering support.

ACKNOWLEDGEMENTS

I thank God for the blessing he bestowed upon me towards completing this mini-dissertation. His mercy on my life has been my armour in producing this piece. I thank him deeply for surrounding me with the individuals that have guided and supported me throughout this academic journey.

My sincerest gratitude goes to my supervisor, Prof. Carol Chi Ngang for his dedication, guidance and support. Prof. Ngang's insightful feedback, constructive criticism and patience was not only instrumental in shaping this mini-dissertation but also challenged me to explore new perspectives and form an objective critique. I am eternally grateful for his mentorship and the invaluable impact he has had on my academic development.

Finally, I thank myself for the dedication and perseverance throughout the writing of this mini-dissertation. The countless hours and late nights of hard work have been very instrumental in bringing this work to completion. Without the commitment, discipline and resilience I maintained in the midst of challenges, I would have not been able to achieve this goal.

I cannot forget to thank my family and friends for their unwavering support throughout this journey.

ABSTRACT

This study critically examines the intricate impact of human rights violations on development in Lesotho. It demonstrates that human rights violations are not only perpetuated by direct infringements of fundamental rights but also by the state's failure to ensure the justiciability of all human rights for effective enforcement. Socio-economic and cultural rights are considered non-justiciable in Lesotho and this means that their interdependence with civil and political rights is overlooked. Additionally, discriminatory practices entrenched in customary law are retained and shielded by the Lesotho Constitution of 1993. The system of male primogeniture, which is one of the practices protected by culture, creates gender inequalities in society. Men are privileged to the detriment of women, and this consequently undermines the ability of women to effectively contribute to their societies in promoting development.

It highlights that Lesotho has traditionally been classified as a dualist state. There have however, been trends in the use of monism and this has conversely repudiated Lesotho's strict categorisation as a dualist state. Nonetheless, it is argued that the reliance on both theories of monism and dualism is presently inadequate for ensuring the protection of human rights and compliance with international human rights instruments. Lesotho is a state party to a plethora of treaties, and consequently has to comply with its obligations. To facilitate this, it is important that Lesotho prioritises the protection human rights and discard the strict adherence to the monist-dualist dichotomy, which has proven to hamper the protection of human rights.

Moreover, the study integrates a comparative perspective with South Africa and Kenya to draw valuable lessons and strategies for curbing human rights violations that impact on development. These countries experiences' highlight the complex relationship between the protection of human rights and the effects of such violations on development. This study urges *inter alia*, the government of Lesotho to enshrine all socio-economic and cultural rights as judicially enforceable rights and repeal all discriminatory practices that are protected by customary law.

Keywords: Development, violations, human rights, monism, dualism, monist-dualist dichotomy, male primogeniture, gender inequalities.

ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IMF	International Monetary Fund
HIV	Human Immunodeficiency Virus
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations

TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGEMENTS	iii
ABSTRACT	iv
ACRONYMS	v

CHAPTER ONE

INTRODUCTION AND BACKGROUND	1
1.1 Problem Statement	1
1.2 Research Questions	6
1.3 Objectives of the Study	6
1.4 Hypothesis	6
1.5 Background	6
1.6 Significance of the Study	8
1.7 Literature Review	9
1.8 Research Methodology	12
1.9 Chapter Outline	12

CHAPTER TWO

LEGAL FRAMEWORK ON HUMAN RIGHTS AND DEVELOPMENT IN LESOTHO	14
2.1 Introduction	14
2.2 International Law in the Legal System of Lesotho	15
2.3 Theories of incorporation	17
2.4 National Legal Framework	18
2.5 International Legal Framework	20
2.5.1 International Covenant on Civil and Political Rights	21
2.5.2 International Covenant on Economic, Social and Cultural Rights	22
2.5.3 Convention on the Elimination of All Forms of Discrimination against Women	23
2.5.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	24
2.6.5 Convention on the Rights of Persons with Disabilities	24
2.6 Regional Legal Framework	25

2.6.1	African Charter on Human and Peoples' Rights (African Charter) 1981	25
2.6.2	The Right to Development under the African Charter.....	25
2.6.3	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	26
2.7	Case Law on the Application of Human Rights Instruments in Lesotho.....	28
2.7.1	<i>Joe Molefi v Legal Advisor and Others</i>	28
2.7.2	<i>Makhasane v Commissioner of Police & Others</i>	29
2.7.3	<i>Basotho National Party v Government of Lesotho</i>	29
2.7.4	<i>Mapetla v Leboela</i>	30
2.8	Human Rights and Development	30
2.9	Conclusion.....	31

CHAPTER THREE

HUMAN RIGHTS VIOLATIONS IN LESOTHO AND THEIR IMPACT ON DEVELOPMENT

3.1	Introduction	33
3.2	Human Rights Violations in Lesotho	34
3.2.1	Torture by Police Officers	34
3.2.2	Discrimination.....	37
3.2.2.1	<i>Men</i>	37
3.2.2.2	<i>Women</i>	38
3.2.3	Socio-Economic Rights	40
3.2.3.1	<i>Health</i>	41
3.2.3.2	<i>The environment</i>	42
3.2.3.3	<i>Persons with disabilities</i>	43
3.3	Factors that Contribute to Human Rights Violations	44
3.3.1	Corruption	45
3.3.2	Culture.....	47
3.3.3	Non-Justiciability of Socio-Economic Rights	48
3.4	Impact of Human Rights Violations on Development	48
3.4.1	Economic Development	50
3.4.1.1	<i>Corruption</i>	50
3.4.2	Social Development	52

3.4.2.1	<i>Culture</i>	52
3.4.2.2	<i>Land</i>	54
3.4.3	Political Development.....	55
3.4.3.1	<i>Rule of law and governance</i>	55
3.5	Conclusion.....	55

CHAPTER FOUR

HUMAN RIGHTS AND DEVELOPMENT IN SOUTH AFRICA AND KENYA: A

COMPARATIVE PERSPECTIVE..... 57

4.1	Introduction	57
4.2	South Africa	57
4.2.1	Adherence to the International Legal Framework	58
4.2.2	Compliance with Customary International law	60
4.2.3	Adherence to the Regional Legal Framework	61
4.2.4	Constitution of the Republic of South Africa 1996	63
4.2.5	Socio-Economic Rights	65
4.2.6	Case Law.....	67
4.2.6.1	<i>Soobramoney v Minister of Health, KwaZulu-Natal</i>	67
4.2.6.2	<i>Government of the Republic of South Africa v Grootboom</i>	68
4.2.6.3	<i>Van Biljoin v Minister of Correctional Services</i>	70
4.2.6.4	<i>Khosa v Minister of Social Development</i>	70
4.3	Kenya	71
4.3.1	Theories of Incorporation	72
4.3.2	International Law in Kenyan Legal Framework.....	73
4.3.3	Regional Legal Framework.....	74
4.3.4	Domestic Legal Framework.....	75
4.3.5	The Right to Development in Kenya	75
4.4	Conclusion.....	79

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS 81

5.1	Conclusion.....	81
5.2	Recommendations	83

5.2.1	Theories of Incorporation	83
5.2.2	Right to Development	83
5.2.3	Socio-Economic Rights	84
5.2.4	Customary Law	85
BIBLIOGRAPHY		88

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 Problem Statement

The controversy surrounding the impact of human rights violations on development stems from the fact that the link between human rights and development has not fully been understood, primarily because it has not thoroughly been investigated. Human rights are envisaged as fundamental contributors to sustainable development as they foster inclusive and equitable societies.¹ By creating an environment where people can thrive, human rights contribute to improved social, economic and political outcomes.²

Human rights are universally recognised binding standards for a life with dignity, equality and freedom.³ The entitlement to these inherent rights is not absolute and often limited. This can occur for example, either where governments restrict certain rights to maintain public order in cases of emergencies⁴ or where a state fails to protect individuals from harm.⁵ The former demonstrates an intentional conduct by the state to limit rights while the latter signifies the negligent conduct by the state in protecting its citizens.

A number of human rights violations are caused by historical, political, legal, economic, social and religious factors.⁶ In Lesotho, one social dynamic that contributes to human rights violations is culture. Culture is defined as all ways of life including arts, beliefs, and institutions of a

¹ Advisory Council on International Affairs, Sustainable Development Goals and Human Rights: An indivisible Bond, (2019) Advisory Report No. 110, The Hague <https://asser.nl/media/5625/advisory-report-110.pdf&ved> accessed 11 January 2025.

² Mensah Justice, “Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Rights Action: Literature Review” (2019) *Cogent Social Sciences*, 5.

³ Universal Declaration of Human Rights, (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art 1.

⁴ The Constitution of Lesotho 1993, s 23.

⁵ Guercke Lene, “State Responsibility for a Failure to Prevent Violations of the Right to Life by Organised Criminal Groups: Disappearances in Mexico” (2021) 21 *Human Rights Law Review*, 329.

⁶ Mayrhofer Monika and Others, “Factors Which Enable or Hinder the Protection of Human Rights” in Eva Maria Lassen (ed), *Fostering Human Rights among European Policies* (Danish Institute for Human Rights 2012) 1.

population that passed from generation to generation.⁷ These customs are codified in the Laws of Leretholi⁸ and are regulatory of customary practices in Lesotho. A customary law marriage for instance, does not have legal standing in a civil court unless it is registered under the civil law system.⁹ Although civil law entitles women to inheritance, succession and property rights, customary law does not permit women or girls to inherit property, and it takes precedence over civil law in property disputes.¹⁰ According to the Lesotho Federation of Women Lawyers, the government enforces civil law in the urban areas but defers to customary law in the rural areas.¹¹ The authoritative effect of customary law is illustrated in the Constitution of Lesotho, which provides in section 18(4)(c) that “any laws or actions that are based on Sesotho Customary law are excluded from the discrimination test.”¹² As a result, discriminatory cultural practices are retained and this continues the cycle of human rights violations especially, on women. This increases gender discrimination, necessitating immediate action by the state in preventing violations and in promoting equality.

Maputo Protocol which serves as an addition to the African Charter on Human and Peoples’ Rights¹³ is an important regional instrument which promotes the elimination of unfair discrimination and ensures practical equality for women in Africa.¹⁴ At the international level, Lesotho has ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which advocates for “non-exclusion of women irrespective of their marital status, from the enjoyment of fundamental freedoms in all sectors, including civil, social, political, and economic sectors”.¹⁵ When ratifying the CEDAW treaty, Lesotho made a reservation to article 2 of the treaty, which mandates “member states to take all measures, including legislation to

⁷ Spradley James, “What is culture?” https://sphweb.bume.edu/otlt/mph-modules/PH/Cultural_Awareness/Cultural_Awareness2.html accessed 31 August 2024.

⁸ The Laws of Leretholi, 1903.

⁹ Shale Itumeleng, “The impact of the Maputo Protocol in Lesotho” in Thabane T and Shale I (eds) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria University Law Press 2012). https://www.pupl.up.ac.za/images/edocman/edited-collections/impact_of-maputo-protocol/Lesotho-IMP.pdf accessed 02 September 2024.

¹⁰ Ibid 177.

¹¹ Lesotho Human Rights Report, 2021.

¹² The Constitution of Lesotho 1993, s 18 (4) (c).

¹³ 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).

¹⁴ Ibid, art 2.

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women 1981, art 1.

modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women”.¹⁶ In effecting this, the government of Lesotho affirmed that it does not consider Lesotho to be bound by article 2 of the Convention to the extent that “it conflicts with Lesotho’s constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship”.¹⁷

One of the reasons that prompts reservations to treaty provisions by member states is that many societies hold their religious, cultural and societal ordinances in the highest esteem.¹⁸ This is to say that socio-cultural and religious inclinations influence decisions to make reservations to specific treaty provisions. However, it is important to consider that the reservation made should not be contrary to the principal objective of the Convention, which is to abolish all forms of discrimination against women. The reservation has to be examined on the basis of whether or not it is compliant with article 28 of the CEDAW treaty which highlights that “any reservation that is incompatible with the object and purpose of the treaty shall not be permitted”.¹⁹ Additionally, the implications that come with ratifying a treaty should be considered.

A country’s human rights record can affect its levels of development. For instance, human rights violations can aggravate conditions of poverty and the living conditions of the poorer segments of the society.²⁰ This can be exacerbated by economic policies that prioritise profits and neglect the social welfare of individuals. Rising inflation for example, erodes the purchasing power, making it difficult for individuals to afford basic needs.²¹ Without support in the form of subsidies, this may cause social unrest and aggravate human rights abuses.

Upholding human rights promotes equal access to resources while, human rights violations can lead to uneven allocation of resources, which can exacerbate poverty and hinder development.²²

¹⁶ Ibid, art 2.

¹⁷ Mamashela M.P, “The significance of the Convention on the Elimination of All Forms of Discrimination Against Women for a Mosotho Woman” (1993) *ASIL Proc* 5: 153.

¹⁸ Rehman, Javid *International Human Rights Law* (Pearson Education Limited 2003) 362.

¹⁹ CEDAW, art 28.

²⁰ Nicholas Aspergis and Cooray Arusha, “Human Rights Violations Affect Poverty and Income Distribution?” (2020) 161 *International Economics*, 56.

²¹ Floyd David, “10 Common Effects of Inflation” (2024) *Investopedia*

<https://investopedia.com/articles/insights/122016/9-common-effects-inflation.asp> accessed 09 January 2025.

²² Rehman (n 18).

Although human rights violations affects all segments of the populations, marginalised communities and vulnerable groups like women who often face social, economic and/or political exclusion based on characteristics such as race, ethnicity, sexual orientation, disability, religion²³ generally experience even more severe consequences. Practices such as political repression,²⁴ disproportionately affects the marginalised and vulnerable categories by disrupting civil engagements, which are crucial for development,²⁵ sometimes necessitating recourse to international treaty instruments for protection.

The inquiry on human rights protection in international human rights law has however, been a subject of controversy in Lesotho. The Constitution of Lesotho is “silent” regarding the place that international law occupies in the hierarchy of laws in its domestic legal system.²⁶ In Lesotho, the Constitution is regarded as the supreme law of the country²⁷ from which all other laws such as customary law, and sector-specific legislation derive their validity from it.²⁸ Chapter two of the Lesotho Constitution enshrines civil and political rights as fundamental rights and freedoms²⁹ whereas social and economic rights are enshrined in chapter three as principles of state policy.³⁰ To demonstrate this, section 25 of the Constitution designates socio-economic rights as “mere principles that shall be helpful in guiding the government of Lesotho and other administrative repositories to progressively achieve the implementation of the principles within the country”.³¹ This is to say, socio-economic rights are merely recognised as guiding principles instead of enforceable rights. The non-enforceability of socio-economic rights does not only undermine the

²³ Diversity and Marginalised Communities, “Planning for a Diverse and Equitable Future” <https://actec.org/planning-for-a-diverse-and-equitable-future/marginalised-communities> accessed 09 January 2025.

²⁴ Demerit Jacqueline H. R, “The Strategic Use of State Repression and Political Violence” (2016) Oxford Research Encyclopedias <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-32> accessed 09 January 2025, he describes political repression as is an act by the government which is applied in times of crises and emergencies to maintain control over the nation for example through restrictions on freedom of association and freedom of assembly.

²⁵ Garcia, David Bondia, “Human Rights and Political Repression around the World” (2021) <https://revistaidees.cat/en/sobre-idees> accessed 13 December 2024.

²⁶ Shale (n 9) 175.

²⁷ Lipholo Tšepo, “Towards the Justiciability of Socio-economic Rights in the Legal System of Lesotho” (LLM thesis, National University of Lesotho 2022).

²⁸ The Constitution of Lesotho 1993, s 2.

²⁹ Ibid, ss 4-20.

³⁰ Ibid, ss 25-36.

³¹ Lipholo (n 27) 42.

ability of persons to hold the government accountable for failing to meet its obligations but also undermines the rule of law.

Furthermore, the non-justiciability of socio-economic rights leads to an increase in unemployment, poverty and corruption. The absence of enforceable socio-economic rights perpetuates social inequalities and excludes marginalised groups from societal benefits such as access healthcare and adequate housing among others.³² This leads to systematic discrimination which does not only violate the rights to equality and freedom from discrimination, but also hinders development.³³

The economic impact of human rights violations in Lesotho is that it affects the country's ability to attract foreign investment from international financial institutions such as the International Monetary Fund and the World Bank.³⁴ These financial institutions often impose conditions on foreign aid, requiring improvements in governance and human rights protections.³⁵ Lesotho's ongoing issues, including political instability, corruption and systematic discrimination creates a perception of political risk.³⁶ This is the type of risk wherein changes in the political environment either through civil unrest or political instability adversely affect the economic landscape and investments. Consequently, the lack of funding exacerbates socio-economic challenges such as poverty, which further stifles progress and ultimately also restrains development in the country.³⁷ The state's failure to protect human rights undermines the legitimacy of these rights and creates a cycle of violations that hinders development.³⁸ Similarly, unjustified limitation of human rights contributes to violations and more extensively, the non-enforceability of socio-economic rights.

³² Frederick Kakwata, "Perspective Chapter: Determinative Factors for Bridging Social Inequality Gaps: A South African Perspective. Sustainable Development" (2024) <https://intechopen.com/chapters/1178692> accessed 10 January 2025.

³³ Ibid 10.

³⁴ United Nations Conference on Trade and Development, *Investment Policy Review Lesotho* (United Nations Publication 2003) 1.

³⁵ International Monetary Fund, IMF Conditionality (2023) <https://imf.org/en/About/Factsheets/Sheets/2023/IMF-Conditionality> accessed 10 January 2025.

³⁶ United Nations Human Rights, (2023) <https://ohchr.org/en/news/2023/07/dialogue-lesotho-experts-human-rights-committee-commend-measures-combact-domestic-and?> accessed 13 December 2024.

³⁷ Ibid.

³⁸ Bellina Severine and others, "The Legitimacy of the State in Fragile Situations, (2009) Organisation for Economic Cooperation and Development DAC: Development and aid committee" (2009) 17 *HALSHS*, 02422968.

1.2 Research Questions

In conducting the research, the following questions are answered:

- a) How effective is the legal framework in Lesotho in protecting and enforcing human rights?
- b) What are the main factors contributing to persistent human rights violations in Lesotho despite existing legal protections?
- c) How do human rights protections and development indicators compare to those of South Africa and Kenya?
- d) What lessons can be drawn to improve Lesotho's human rights and development outcomes?

1.3 Objectives of the Study

The research aims to:

- a) To analyse the specific human rights violations in Lesotho.
- b) To determine the underlying factors that contribute to human rights violations, including social, cultural, economic, and political conditions.
- c) To analyse the effectiveness of existing legal and institutional frameworks in addressing and preventing human rights violations.
- d) To determine the impact of human rights violations on development in Lesotho.

1.4 Hypothesis

- a) Communities with lower socio-economic status are more susceptible to human rights violations, signifying that social inequalities contribute to increased vulnerability.
- b) Deterioration in socio-economic conditions leads to an increase in human rights violations.
- c) The impact of human rights violations on development leads to long term setbacks in social, economic and political progress. This continues even after the violations have ceased.

1.5 Background

Lesotho is a small landlocked country in Southern Africa, which gained independence from British colonial rule on the 4th October 1966.³⁹ Post-independence, Lesotho faced a complex political history marked by periods of instability, including coups and civil unrest that have contributed to a tradition where human rights violations are committed with impunity.⁴⁰ The period from the 1970s when the first coup occurred, has been described as the “darkest years in the history of Lesotho”, wherein civil liberties were severely restricted.⁴¹

Moreover, Lesotho is a “constitutional monarchy with a bicameral parliamentary system” based on the British model, which consists of the National Assembly and the Senate.⁴² The country faces significant challenges related to the protection of human rights.⁴³ The legal system initially consisted of the colonial mixture of Roman-Dutch law and English common Law, which has presently been supplemented by statutory law, with a legal framework that incorporates a dualist approach to international law.⁴⁴ Regarding commitments under international law, Lesotho is a party to numerous international human rights treaties that create both general and specific obligations.⁴⁵ For enforceability of all ratified human rights treaties, there has to be domestication of the treaties through an act of parliament.⁴⁶

Meanwhile, the legal system in Lesotho also consists of customary law, which refers to traditional customs and cultural practices codified in the Laws of Lerotholi⁴⁷ as well as received law, comprising of common law and statutory law.⁴⁸ The Constitution serves as the source of all laws

³⁹ Arnold Clay, “Government, Public Service, and International Studies” (University of Central Arkansas, 2024) <https://uca.edu/politicalscience/home/research-projects/dadm-project/sub-saharan-africa-region/Lesotho-1996-present> accessed 16 December 2024.

⁴⁰ Pherudi Mokete, “Political instability in Lesotho: Causes and Possible Remedies” (2022) 34 *Botswana Journal of African Studies*, 81.

⁴¹ Shale Itumeleng, “The Law and Legal Research in Lesotho” (2019) 19 *Legal Information Management*, 233-239.

⁴² Nyane Hoolo, “Bicameralism in Lesotho: A Review of the Powers and Composition of the Second Chamber” (2019) 23 *Law, Democracy & Development*, 18.

⁴³ Freedom in the World 2024 <https://freedomhouse.org> accessed 11 December 2024.

⁴⁴ WCM Maqutu & AJGM Sanders, “The International conflict of laws in Lesotho” (1987) 20 (3) *The Comparative and International Journal of South Africa*, 379.

⁴⁵ Shale Itumeleng, “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*, 193-218.

⁴⁶ Dube Buhle Angelo, “The Law and Legal Research in Lesotho” (Globalex, 2010) <https://nyulawglobal.org/globalex/lesotho> accessed 16 December 2024.

⁴⁷ The Laws of Lerotholi 1903.

⁴⁸ Shale Itumeleng, “The impact of the Maputo Protocol in Lesotho” (2012). https://www.pupl.up.ac.za/images/edocman/edited-collections/impact_of-maputo-protocol/Lesotho-IMP.pdf accessed 02 September 2024.

in Lesotho.⁴⁹ Chapter II of the Constitution of Lesotho enshrines the bill of rights which is referred to as fundamental rights and freedoms.⁵⁰ It provides that “every person in Lesotho is entitled, notwithstanding their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to fundamental rights and freedoms”.⁵¹

The Lesotho legal framework has not fully integrated both customary international law and treaty law, despite ratifying various treaties.⁵² Whereas Lesotho has ratified various social and economic human rights treaty instruments, the national constitution does not recognise these rights as having any legally binding effect but simply as guiding principles of state policy.⁵³ Consequently, these principles are not legally enforceable in the same manner as civil and political rights.⁵⁴ The failure to guarantee enforceable human rights undermines social justice and equitable access to resources. While legal frameworks exist on paper, there remains critical gaps in the implementation, enforcement and institutional capacity. This research addresses these gaps by analysing how Lesotho’s legal and political history shapes current human rights protection mechanisms and development outcomes.

1.6 Significance of the Study

The relevance of this study is to assess the impact of human rights violations on development in Lesotho. This study analyses the nexus between human rights and sustainable development. Laws and policies are examined to determine whether they are effective in rectifying human rights violations to foster economic growth and the achievement of sustainable development. The study is intended to influence new reforms that address human rights concerns and create an equitable environment that ensures development benefits all citizens.

Moreover, the study serves as a guide to the Lesotho society towards a more equitable future. It is intended to illustrate that studying the impact of human rights violations on development fosters positive change in society and lays a groundwork for sustainable development, ensuring that every

⁴⁹ The Constitution of Lesotho of 1993, s 2.

⁵⁰ Ibid.

⁵¹ Ibid, s 4(1).

⁵² Lipholo (n 27) 55.

⁵³ Ibid.

⁵⁴ Ibid.

individual can benefit from economic, social and political advancements. Ultimately, the study demonstrates that the integration of human rights into development strategies promotes inclusive governance and empowers vulnerable groups and marginalised communities.

1.7 Literature Review

The literature on the impact of human rights violations on development has gathered significant attention among scholars, resulting in varied perspectives and findings. The link between human rights and development has been seen as synonymous with economic growth by several scholars.⁵⁵ For instance, Torado equates development with economic and political processes which are necessary for effecting the rapid structural and institutional transformation of the entire society in a manner that influences more economic progress to the broadest segments of the populations.⁵⁶ Heidenheimer defines development as a social and cultural transformation of a town or an area which is influenced by politics, culture and corruption.⁵⁷ Development is conceived in this instance as referring to changes that a community experiences, resulting from cultural and political dynamics as well as constraining factors like corruption.

Alston and Robison argue that the link between human rights and development in this contemporary era is defined more by its disparities and disconnects than by its areas of convergence.⁵⁸ It means that there is recognition of convergence of human rights and development but their separate evolution leads to lack of coherence in policy frameworks resulting in human rights being overlooked in development agendas.⁵⁹ As a result, it undermines both sectors' efficiency in addressing inequalities and promoting sustainable development,⁶⁰ which is understood as the changes in the socio-economic and political frameworks that are envisaged to motivate growth. These changes should benefit the society at large so that each person is accorded a better quality of life.

⁵⁵ Konese Tshidiso Simon, "Factors Influencing Human Rights Violations and their Effects on Development in Africa" (Masters Public Management and Governance University of Johannesburg, 2012).

⁵⁶ Todaro M, *Economic Development in the World* (London Longman 1977).

⁵⁷ Heidenheimer A.J, Johnston M. and Levine V.T (trs), *Terms, concepts, and definitions: An introduction. In Political Corruption: A handbook* (New Brunswick Transaction Publishers 1989).

⁵⁸ Alston Phillip and Robison Mary (trs), *Human Rights and Development: Toward Mutual Reinforcement*, (Oxford University Press 2005).

⁵⁹ Ibid.

⁶⁰ Ibid.

The Organisation for Economic Co-operation and Development and the Development Assistance Committee issued an Action-Oriented Policy Paper, which affirmed unequivocally that human rights are an indispensable part of development cooperation and a crucial component for long term development sustainability.⁶¹

Integrating human rights into development policies and practice is essential for three main reasons, which are; first and foremost, that human rights are essential for protecting human dignity, so implying that development policies must aim to create conditions that support long-term economic growth.⁶² Secondly, that incorporating human rights can enhance development efforts by addressing social risks, encouraging accountability and promoting community participation and accordingly, foster more equitable sustainable development outcomes.⁶³ Lastly, that human rights obligate state parties to various human rights treaties to respect individuals' dignity and this should occur in all context, including development.⁶⁴

A World Bank study on human rights and economics found that human rights and human rights-based approaches may improve development outcomes and the quality of economic growth in both the short term and long term.⁶⁵ Human rights can be an effective tool for poverty reduction, because it contributes to the empowerment and social protection of marginalised groups, reinforces equity, and draws attention to other legal approaches.⁶⁶

Alfredo Sfeir-Younis has expressed the view that human rights are highly correlated with economic development.⁶⁷ He further highlights that ensuring human rights protection is a vital step

⁶¹ Organisation for Economic Co-operation and Development and the Development Assistance Committee, "Action-Oriented Policy Paper on Human Rights and Development" (OECD Publishing 2007).

⁶² Strinka Sarah M, "The Human Rights-Based Approach to Development: A Theory of Change" (Master of Arts, College of Arts and Sciences of Ohio University, 2020).

⁶³ Darrow Mac and Amparo Thomas, "Power, Capture and Conflict: A call for Human Rights Accountability in Development Cooperation" (2005) 27 *Human Rights Quarterly*, 471.

⁶⁴ Action-Oriented Policy Paper (n 66).

⁶⁵ Nordic Trust Fund, Human Rights and Economics: Tensions and Positive Relations (2012) The World Bank <https://documents1.worldbank.org/curated/en/568971607704442026/pdf/Human-Rights-and-Economics-Tensions-and-Positive-Relationships.pdf> accessed 09 January 2025.

⁶⁶ Ibid.

⁶⁷ Sfeir-Younis Alfredo, "Violation of Human Rights is a Threat to Human Security" (2004) *Conflict, Security & Development*, 383.

to development in the sense that when people are denied their rights, it often results in social instability, war and other conflicts.⁶⁸ In advancing the theory that human rights are a major determinant of poverty, he cautions that “to take away the power to use and to allocate human rights endowments is to convict poor people of poverty”.⁶⁹

It is noted that violation of human rights, particularly, socio-economic rights, often leads to lower rates of economic growth.⁷⁰ However academic observations express doubt that the recognition of socio-economic rights will eliminate poverty or alleviate social inequalities.⁷¹ Ngang argues that socio-economic rights litigation is not an absolute remedy to the challenges of poverty, deprivation and exclusion but it has potential to guarantee protection and empowerment to the poor.⁷² The necessity to guarantee socio-economic rights by the state was remarked by Justice Yacoob when he stated in the *Grootboom* case that:

A society must seek to ensure that the bare necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality [...]. Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right [...]. Furthermore, the Constitution requires that everyone must be treated with care and concern.⁷³

He emphasises the importance of prioritising socio-economic rights for the benefit of the overall society, most especially, for those in desperate situations whose ability to fully enjoy their rights is threatened. This ultimately assists in creating an equitable community for everyone without discrimination of any nature.

⁶⁸ Ibid.

⁶⁹ Alfredo (n 67).

⁷⁰ Blume Lorenz and Voigt Stefan, “The Economic Effects of Human Rights” (2007) 60 *Kyklos*, 509.

⁷¹ Jones P and Stokke K (eds), *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (Martinus Nijhoff Publishers 2005).

⁷² Ngang Carol Chi, “Socio-economic Rights Litigation: A Potential Strategy in the Struggle for Social Justice in South Africa” (LLM thesis, University of Pretoria 2013).

⁷³ *Government of the Republic of South Africa v Grootboom* 2000 11 BLCR 1169 (CC) 44.

With regards to the domestication of international law, scholars like Dugard posit two theories namely monism and dualism.⁷⁴ He highlights that with the monist theory, “there is no need to domesticate international law into any piece of legislation since international and municipal law are blended”.⁷⁵ Proponents of monism are of the view that both international and municipal law should be perceived as one.⁷⁶ However, the principle of dualism requires that international law be domesticated through legislation or adopted by the courts into municipal law for it to become applicable in the domestic jurisdiction.⁷⁷

To advance socio-economic rights litigation, Ngang argues that development for social change entails a balanced jurisprudence that provides a forum for the prevalence of social justice to ensure that benefits accrue equitably to the poor.⁷⁸ Ngang’s thesis accurately demonstrates how litigating socio-economic rights is a potent strategy in addressing inequalities in society.

1.8 Research Methodology

In responding to the research question and achieving the study objectives outlined above, a doctrinal research method is used. This includes the use of qualitative methods, including desktop literature review of primary and secondary sources such as textbooks, journal articles, statutes, case law and internet sources from reliable websites and case studies to gather comprehensive information on the implication of human rights violations to the attainment of sustainable development in Lesotho. These sources are subjected to a critical analysis with the aim of determining the impact of human rights violations on vulnerable populations and how the violations impede development. Through a comparative analysis, the study makes a determination on lessons that Lesotho could learn from South Africa and Kenya.

1.9 Chapter Outline

Chapter one – Introduction

⁷⁴ Dugard J, *International Law: A South African Perspective* (Juta & Co Ltd 1994) 42.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ngang (n 72).

This chapter introduced the problem of the study, including the research questions, the aims and objectives of the study, background and significance of the study, a brief literature review and the research methodology used.

Chapter two – Legal framework on human rights and development in Lesotho.

This chapter analysed various human rights instruments and demonstrated how human rights are envisaged to contribute to development. Reference to both regional and international human rights instruments that Lesotho has ratified was made.

Chapter three – Human rights violations in Lesotho and their impact on development

This chapter provided a comprehensive analysis of human rights violations in Lesotho and examined the issues that contribute to such violations.

Chapter four – Human rights and development in South Africa and Kenya: A comparative perspective.

This chapter has provided a comparative analysis of the laws on human rights protection in South Africa and Kenya. South Africa on the one hand, has vast jurisprudence on how human rights contribute to development while Kenya on the other hand, has a comprehensive jurisprudence on the right to development enshrined in the African Charter on Human and People's Rights. The comparative perspective has provided valuable lessons that Lesotho could learn from, in enhancing its legal system and ultimately assist in addressing existing gaps in the Lesotho legal framework.

Chapter Five – Conclusion and Recommendations

This chapter has provided a summary of the study with focus on key issues. Recommendations have also been provided on how the law in Lesotho could best be developed to ensure that human rights contribute to development

CHAPTER TWO

LEGAL FRAMEWORK ON HUMAN RIGHTS AND DEVELOPMENT IN LESOTHO

2.1 Introduction

The main human rights framework in Lesotho is the Constitution.⁷⁹ It is crucial as it establishes a foundational legal framework for the governance and protection of human rights to foster a democratic society.⁸⁰ The Constitution of Lesotho provides a bifurcated system that delineates civil and political rights in chapter II as enforceable fundamental human rights and freedoms, and categorises socio-economic rights in Chapter III as non-justiciable principles of state policy.⁸¹

At the international level, treaties are instrumental in the promotion human rights by providing a framework that encourages accountability and adaptability of domestic laws with international standards.⁸² Lesotho has ratified several key treaties, such as the International Covenant on Civil and Political Rights (ICCPR),⁸³ the International Covenant of Economic, Social and Cultural Rights (ICESCR),⁸⁴ the Convention Against Torture, and other Cruel, Inhumane and Degrading Treatment or Punishment (CAT),⁸⁵ demonstrating the government's commitment to be bound by these international agreements. The ratification of treaties is fundamental as it does not only signify a state's commitment to uphold international obligations in areas such as human rights and trade but also facilitates trust and cooperation among states in promoting economic development.

⁷⁹ The Constitution of Lesotho 1993, s 2.

⁸⁰ Stiftung Konrad Adenauer, "The Constitution of Lesotho: Constitutional Supremacy and Human Rights" (2021) 2 *Media Law Handbook* 453.

⁸¹ 'Nyane H, "The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life" (2022) *African Human Rights Law Journal*, 22.

⁸² European Commission for Democracy, Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts (adopted by the Venice Commission at its 100th plenary session, Rome 10-11 October 2014).

⁸³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁸⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁸⁵ Convention Against Torture, and other Cruel Inhumane Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

2.2 International Law in the Legal System of Lesotho

The position of international law in Lesotho varied in terms of five categorical events. These are prior to independence denoting the period from the 1800s to the independence of Lesotho in 1966, the post-independence from 1966 to the state of emergency in 1970, during the state of emergency from 1970 to 1986, during the military rule from 1986 to 1993 and lastly through the period of democratic rule from 1993 to the present.⁸⁶ The 1800s were a period of wars and conflicts wherein King Moshoeshoe I unified various clans seeking refuge from the invasions of King Shaka and the *Boers* into one community in the fortress of Thaba Bosiu. There were conflicts over landownership which resulted in the conclusion of several peace and boundary treaties between Basutoland (as the country was formerly known at the time) and Britain. The wars continued and Lesotho (Basutoland) sought protection from Britain, of which it became a British protectorate in 1868. Well ahead, in 1884, Britain handed the administration of the Basutoland to the Cape Colony of Good Hope legislature. At the realm of this, the High Commissioner issued a General Proclamation 2B of 1884 providing that applicable law in the Cape was equally applicable in Lesotho.⁸⁷

Lesotho subsequently, gained independence on 4 October 1966 and adopted a Constitution on the basis of the Independence Order which was passed by the Parliament of Lesotho.⁸⁸ The Lesotho Constitution of 1966 did not contain any express provision on the recognition of international law, but it had a constitutional supremacy clause which inferred that international instruments that Lesotho was a party to would be applicable only to the extent that they did not contradict provisions of the Constitution.⁸⁹

Moreover, the position of international law post-independence to the state of emergency was characterised by the full realisation of international law in the legal system of Lesotho. After gaining independence, Lesotho ratified three Conventions of the International Labour Organisation on the 31 October 1966 and later domesticated through the Labour Code Order of

⁸⁶ Shale Itumeleng, "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*, 199-210.

⁸⁷ *Ibid* 201.

⁸⁸ Maqutu W.C.M, *Contemporary Constitutional History of Lesotho* (Mazenod Institute 1990) 17.

⁸⁹ The Constitution of Lesotho 1966.

1992.⁹⁰ These were the Convention Concerning Forced or Compulsory Labour of 1930,⁹¹ the Right to Organise and Collective Bargaining Convention of 1949⁹² and the Freedom of Association and the Right to Organise Convention of 1948.⁹³

Lesotho continued to ratify international treaties, including some aspects of the Geneva Conventions in its domestic legislations, for example in sections 94 and 95 of the Penal Code of 2010. Continued ratification of treaties was after Lesotho had proposed a 24 months' period to review its obligations under the treaties that Britain had ratified on its behalf during the protectorate period. Lesotho subsequently, expressed its intent to continue to be bound by prior treaties and thereby, continued to ratify other international treaties. This in effect, demonstrates the recognition of international law by Lesotho through the years.

The state of emergency regime (1970-1986) was characterised by multiple human rights violations and the rejection of international law. During this period, the treaties ratified by Lesotho lacked domestic implementation with the exception of the UN Refugee Convention.⁹⁴ The state of emergency was declared following the second democratic elections in 1970 by the then Prime Minister, Leabua Jonathan on the basis that the elections were unfair, resulting in detrimental violence against the BNP supporters.⁹⁵

The democratic period (1993-present) is characterised by a clear human rights framework. Although demonstrating a similar model to the 1966 Constitution, the new constitution aimed to align Lesotho's legal system with international human rights standards by repealing oppressive laws. Lesotho ratified numerous treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁹⁶ the Optional Protocol to the CEDAW adopted in

⁹⁰ Ibid.

⁹¹ Convention concerning forced or Compulsory labour 1930 (adopted 28 June 1930, entered into force 1 May 1932) CO29.

⁹² Right to Organise and Collective Bargaining Convention of 1949 (adopted 1 July 1949, entered into force 18 February 1951) CO98.

⁹³ The Freedom of Association and the Right to Organise Convention of 1948 (adopted 9 July 1948, entered into force 4 July 1950) CO87.

⁹⁴ United Nations Refugee Convention (adopted 28 July 1951, entered into force 22 April 1954) 2545 UNTS 149.

⁹⁵ Maqutu (n 88) 44.

⁹⁶ 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).

1999,⁹⁷ and the Convention on the Rights of Persons with Disabilities (CRPD)⁹⁸ and began submitting state party reports to the treaty bodies and committees, demonstrating a nuanced appreciation of international law. While the Constitution is not clear on the status of international law, the courts have applied international human rights treaties in protecting human rights in Lesotho.

2.3 Theories of incorporation

In terms of the theory of monism, when confronted with a case, municipal courts are obliged to directly apply rules of international law in the same manner as municipal laws.⁹⁹ Where there is clash between two legal systems, monism gives preference to international law rules.¹⁰⁰ Monism thereby regards international law to be supreme over domestic law and this is irrespective of whether the domestic law is the supreme law.¹⁰¹

In contrast, dualism encompasses the theory that international law and state law do not constitute a unified system of law, but exist independently of one another.¹⁰² The dualist theory emphasises that international law should only be limited to international decisions and not prevail over domestic law.¹⁰³ This was the case in *Mohollo Tšoenyane*¹⁰⁴ where the high court of Lesotho ruled that international agreements need to be endorsed by domestic legislation before they can become applicable in the domestic jurisdiction.¹⁰⁵ The court emphasised that this happens regardless of whether such agreements are bilateral or multilateral treaties.¹⁰⁶

⁹⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, came into effect 25 November 2000) (African Women's Protocol).

⁹⁸ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁹⁹ O'Connell, D.P. "The relationship between international law and municipal law" (1960) 4 *Georgetown Law Journal*, 432.

¹⁰⁰ Coyle J.K., "Incorporative statutes and the borrowed treaty rule" (2010) 50 *Virginia Journal of International Law* 656

¹⁰¹ Shale I, "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*, 196.

¹⁰² Spaak Torben, *Basic Concepts of Public International Law: Monism and Dualism* (Marko Novakovic ed, 2013).

¹⁰³ O'Connell (n 99).

¹⁰⁴ *Director of Public Prosecutions v Mohollo Tšoenyane & Others* CR/299/99 (High Court of Lesotho) unreported 25 February 2000 para 6.

¹⁰⁵ Shale (n 86) 146.

¹⁰⁶ *Ibid.*

The scope of international law is however, not entirely restricted. Recourse may be had to international law as a “guide” to interpret domestic law in situations where a need arises.¹⁰⁷ This was illustrated in the case of *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others*¹⁰⁸ where the court held that international human rights instruments such as the ICCPR, CEDAW, the African Charter and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol) were not completely irrelevant in determining whether the law on succession is discriminatory on the basis of sex¹⁰⁹ but can be used as “interpretative guides” where there is uncertainty in the interpretation of the domestic law, which was section 10 of the Chieftainship Act.¹¹⁰ In terms of this, Lesotho relieved itself from the obligations of international human rights instruments and in the process failed to observe the customary international law principles that binds all states irrespective of whether they have ratified treaties or not. It upheld the Chieftainship Act, despite its discriminatory nature which does not conform with international human rights standards.¹¹¹

The above cases illustrate that Lesotho maintains a clear separation between international law and domestic law, reinforcing the requirement that for legal effect and validity, international treaties should be domesticated before they become enforceable at the national level. This principle of dualism demonstrates Lesotho’s strict commitment to maintaining constitutional sovereignty and legislative supremacy.

2.4 National Legal Framework

As mentioned earlier, the Constitution of Lesotho is the “supreme law, and all other laws derive their validity from it”.¹¹² The Constitution envisages a bifurcated system that delineates civil and political rights in Chapter II as enforceable fundamental human rights and freedoms, and categorises socio-economic rights in Chapter III as non-justiciable directive principles of state

¹⁰⁷ Shale (n 86) 147.

¹⁰⁸ *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others* C of A (CIV) 29/2013 [2014] LSCA.

¹⁰⁹ Chieftainship Act of 1968, s 10.

¹¹⁰ Shale I, “Domestic Implementation of International Human Rights Standards Against Torture in Lesotho” (LLD thesis, University of the Witwatersrand, 2017) 136.

¹¹¹ *Ibid.*

¹¹² Constitution of Lesotho 1993, s 2.

policy.¹¹³ Civil and political rights are provided for in section 4 to section 20 while socio-economic rights are contained in section 25 to section 37 of the Constitution.

The judicial effect of the division between the two regime of rights is that socio-economic rights are not judicially enforceable. The courts have been firm in maintaining this division. For example, *Khathang Tema Baitsoke v Maseru City Council*,¹¹⁴ where the legal issue was whether the right to life could be interpreted to include the right to livelihood. The facts of the case are that street vendors were denied permits to trade along Kingsway Street in Maseru. The vendors through the applicant organisation, approached the courts of law to challenge the prohibition and the denial of permits. Their claim was founded on the basis that their removal from trading on the streets was a violation of the right to life as envisaged under section 5 of the Constitution.¹¹⁵ They urged the court to read the right to life as an embodiment of the right to livelihood. In making its judgement, the court held that the right to life was limited to physical existence and does not extend to social and economic rights. The Court of Appeal also upheld the High Court's decision and highlighted that the vendors lacked a constitutional right to operate on the streets without proper licensing. The court acknowledged the need for fair treatment in the eviction processes but maintained that the government's actions were lawful.

In another case of *Lesotho Medical Association v Minister of Health*,¹¹⁶ the high court determined the impact that the right to health, a state policy right, has on the right to life, which is a legally enforceable right in Chapter II. In this case, health practitioners challenged the governments short supply of protective equipment during the COVID-19 pandemic. The practitioners alleged amongst others that the short supply of protective gear was a violation of their right to life.¹¹⁷ The court in making its judgement held that the failure by the Ministry of Health to provide protective clothing to workers was a violation of the right to life protected under section 5 of the Constitution of Lesotho.¹¹⁸

¹¹³ 'Nyane (n 81) 1.

¹¹⁴ *Khathang Tema Baitsoke & Another v Maseru City Council* (CONST/C/1/2004) LSHC 25.

¹¹⁵ *Ibid* 44.

¹¹⁶ *Lesotho Medical Association v Minister of Health* CC 19/2019.

¹¹⁷ 'Nyane (n 81) 269.

¹¹⁸ *Ibid*.

The above cases demonstrate the justiciability of rights within the Lesotho's Constitutional framework, with the *Khathang Tema Baitsooli* case demonstrating the non-justiciability of social and economic rights whereas the *Lesotho Medical Association case*, challenged the restrictive approach that kept socio-economic rights unenforceable, introducing a potential shift towards a liberal interpretation of both civil and political rights, and socio-economic rights.

Considering that the Lesotho Constitution is the supreme law, all other legislation, including customary law and common law derive their validity from it. Domestic legislation that incorporates the international human rights framework include amongst others, the Legal Capacity of Married Persons Act,¹¹⁹ the Human Rights Commission Act¹²⁰ and the Persons with Disability Equity Act.¹²¹

With the above, The Constitution of Lesotho is conclusively considered to follow a model of negative constitutionalism,¹²² with chapter II dedicated to negative rights (civil and political rights), which are rights that serve to limit state power and protect individual freedoms. The framing of sections in Chapter II suggests that the drafters had in mind the restrictive application of the rights, including for example, the right to life which is expressed in a manner that protects life against the arbitrary deprivation of life and nothing else. This is the characteristic feature of liberal constitutions.¹²³

2.5 International Legal Framework

Like many other countries, Lesotho is a signatory to various international human rights treaties that create both general and specific obligations for state parties.¹²⁴ It is important that these treaties benefit the individuals whom they are meant to protect, which necessitates domesticating the treaty provisions into national legislation. This affords such individuals, capabilities to enforce the rights in those agreements.¹²⁵

¹¹⁹ Legal Capacity of Married Persons Act No. 9 of 2006.

¹²⁰ Human Rights Commission Act No. 2 of 2016.

¹²¹ Persons with Disability Equity Act No. 2 of 2021.

¹²² Hoolo 'Nyane (n 81) 282. See also Barber S, "Fallacies of negative constitutionalism" (2006) 75 *Fordham Law Review*, 651.

¹²³ *Ibid.*

¹²⁴ Shale (n 86) 194.

¹²⁵ *Ibid.*

2.5.1 International Covenant on Civil and Political Rights (ICCPR)¹²⁶

The ICCPR was adopted by the UN General Assembly with the aim of protecting the inherent dignity of the human person.¹²⁷ The treaty was adopted on 16 December 1966 and entered into force on 23 March 1976.¹²⁸ The ICCPR has two additional protocols which are the First Optional Protocol and the Second Optional Protocol. The former allows individuals to submit complaints to the UN Human Rights Committee regarding violations of their rights under the ICCPR provided that all domestic remedies have been exhausted.¹²⁹ The latter aims to abolish the death penalty, prohibiting its application and allowing states to make reservations concerning military crimes during wartime.¹³⁰

Lesotho ratified the ICCPR on 9 September 1992 and to that effect, recognises in accordance with the principles declared in the Universal Declaration, to guarantee civil and political freedom to every human being equally and without any discrimination.¹³¹ Lesotho subsequently ratified the First Optional Protocol to the ICCPR on 6 September 2000.¹³² Moreover, Lesotho has not ratified the Second Optional Protocol to the ICCPR.¹³³ This is due to the fact that Lesotho has not abolished the death penalty and its domestic legislation recognises capital punishment for offences such as murder, rape and treason.¹³⁴ The Criminal Procedure and Evidence Act provides that murder shall

¹²⁶ ICCPR (n 83).

¹²⁷ ICCPR preamble para 2.

¹²⁸ Centre for Civil and Political Rights, “The International Covenant on Civil and Political Rights (ICCPR) and the Human Rights Committee” A Guide for Civil Society Engagement, 5
https://ccprcentre.org/files/media/DGITAL_VF_F_5_the_International_Covenant_on_Civil_and_Political_Rights_V3.pdf accessed 21 January 2025.

¹²⁹ Ibid 8.

¹³⁰ Ibid.

¹³¹ Human Rights Committee, in General Comment 31 para 10 emphasised that the rights apply to all individuals including asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of a particular state party.

¹³² United Nations Human Rights Treaty Bodies
https://ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=97 accessed 21 January 2025.

¹³³ Joint Stakeholders Report for the United Nations Universal Periodic Review, The Death Penalty, 49 session of the Working Group on the Universal Periodic Review April-May 2025, submitted 11 October 2025.

¹³⁴ Cornell Center on the Death Penalty Worldwide, “Kingdom of Lesotho” 2014,
<https://deathpenaltyworldwide.org/database/#/results/country?id=91fn-19380-U21J55V590280> accessed 21 January 2025.

be punishable by death in the absence of extenuating circumstances and authorises but does not require the death penalty for treason and rape.¹³⁵ In addition, the Lesotho Defence Force Act of 1996¹³⁶ allows the death penalty as a non-mandatory punishment for certain military crimes: aiding the enemy, communication with the enemy, cowardly behaviour, mutiny, and failure to suppress mutiny with the intention to assist the enemy.¹³⁷

Article 2 of the ICCPR obligates states to respect and guarantee the rights recognised in the Covenant for all individuals within their jurisdiction without discrimination. This fosters an environment that is conducive for development, entailing the putting in place of legislative measures to give effect to those rights and provide effective remedies for violations.

2.5.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³⁸

The ICESCR is the primary international instrument on socio-economic rights.¹³⁹ As alluded to earlier, the enforcement of social and economic rights at the domestic level is very weak given that this set of rights are categorised as principles of state policy. A commentary report by the ICESCR Committee¹⁴⁰ notes that legally binding international human rights standards should operate directly and immediately within the domestic legal system of each state party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.¹⁴¹ With this, it is important that socio-economic rights be regarded as equally justiciable as civil and political rights. In relation to development, the ICESCR recognises in article 11, the right to an adequate standard of living, linking development directly to the fulfilment of basic human needs.

¹³⁵ Criminal Procedure and Evidence Act 1981, s 297.

¹³⁶ Lesotho Defence Force Act 4, 1996.

¹³⁷ The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018, 98.

¹³⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹³⁹ Ontario Human Rights Commission, "Human Rights and economic and social rights" <https://ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-cultural-and-economic-rights-under-international-law> accessed 25 January 2025.

¹⁴⁰ ICESCR Committee, General Comment 9 "The domestic application of the Covenant" 8 December 1998, UN Doc E/C.12/1998/28 (ICESCR Committee GC 9).

¹⁴¹ Ibid.

2.5.3 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁴²

The CEDAW was adopted as a step towards the recognition of women's rights as human rights.¹⁴³ Adoption of the CEDAW was based on the concern that despite an earlier international human rights framework, which prohibited discrimination on the basis of sex, women continued to suffer discrimination and disadvantages, which affected their access to food, health education and opportunities for employment.¹⁴⁴ Earlier human rights frameworks reflected a male perspective which overshadowed the protection of women's dignity,¹⁴⁵ and when such need for protection was recognised, the perpetrators were often not punished and no remedy was afforded to the victims.¹⁴⁶

Lesotho has made a reservation to article 2 of the CEDAW treaty, which mandates member states to take all measures, including legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. In making the reservation, the Government of Lesotho declared:

the Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship.¹⁴⁷

In effecting this, the government of Lesotho declared that it does not consider itself to be bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship.¹⁴⁸ The CEDAW emphasises the need for women's full participation in the social, economic, and political spheres. It recognises the right to development by mandating state parties

¹⁴² CEDAW (n 96).

¹⁴³ Shale (n 110) 66.

¹⁴⁴ Ibid, 67.

¹⁴⁵ Askin K.D and Koenig D.M, *Women and International Human Rights Law* (Transnational Publishers 2001) 3.

¹⁴⁶ Cook R, "State Responsibility under CEDAW" in Cook, R. (ed) *Human Rights of Women: National and International Perspective* (1994) 228.

¹⁴⁷ Ibid, art 2.

¹⁴⁸ Mamashela M.P, "The significance of the Convention on the Elimination of All Forms of Discrimination Against Women for a Mosotho Woman" (1993) 5 *ASIL Proc*, 153.

to take all necessary measures to eliminate discrimination against women, ensuring their equal access to resources and opportunities that are essential for development.¹⁴⁹

2.5.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁵⁰

The CAT was adopted by the UN General Assembly on 10 December 1984, and it entered into force on 26 June 1987. It was the first legally binding instrument to focus entirely on torture, and other cruel, inhuman and degrading treatment.¹⁵¹ The aim of the CAT was to strengthen existing prohibitions of torture and related offences by a number of supportive measures.¹⁵² Lesotho ratified the CAT on 1 November 2001, and by such action devoted to criminalise torture in its national laws, to investigate and prosecute complaints, and ensure that victims receive redress. The CAT contributes to development by mandating states to prevent torture, contributing to a stable environment where human rights are respected. A stable and enabling environment is essential for sustainable development, since it allows individuals to thrive without fear of violence or repression.

2.6.5 Convention on the Rights of Persons with Disabilities (CRPD)¹⁵³

The CRPD aims at promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity.¹⁵⁴ Lesotho ratified the CRPD on 2 December 2008 and thereby, undertook to adopt legislative measures to implement the rights recognised in the Convention, including abolishing discriminatory laws and practices. With regards to development, article 4 of the CRPD calls for states to promote the full realisation of all human rights for persons with disabilities, ensuring their inclusion in development processes.

¹⁴⁹ Subedi Surya P, “Declaration on the Right to development” (2021) *United Nations Audiovisual Library of International Law*, 4 <https://legal.un.org/avl/> accessed 05 February 2025.

¹⁵⁰ CAT (n 85).

¹⁵¹ Shale (n 110) 70.

¹⁵² Burgers J.H and Danelius H, “The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment” (Martinus Nijhoff Publishers 1988) 1.

¹⁵³ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

¹⁵⁴ CRPD, art 1.

2.6 Regional Legal Framework

The pressure to establish a regional human rights regime in Africa came in the wake of the dismantling of the colonial system.¹⁵⁵ Having removed the yoke of colonialism, African states established the Organisation of African Unity (OAU) to promote solidarity in Africa; to cooperate in an attempt to better the lives of Africans; to defend State sovereignty and territorial integrity; to eliminate all forms of colonialism from Africa; and to promote international cooperation with regard to the UN and the Universal Declaration of Human Rights.¹⁵⁶

The African Court of Human and Peoples' Rights, which was agreed upon in 1996, was given formal consent by African states through the signing of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's rights during the 34th Ordinary Session of the Assembly of Heads of States and Governments of the OAU in June 1998.¹⁵⁷

2.6.1 African Charter on Human and Peoples' Rights (African Charter) 1981

The African Charter is the first key regional human rights instrument that includes both civil and political rights, and socio-economic rights, which were previously separated, as equally justiciable rights.¹⁵⁸ The preamble to the African Charter on Human and Peoples' Rights emphasises the commitment of African states to promote and protect human rights and freedoms rooted in African traditions and values.¹⁵⁹ The Charter was adopted by the Organisation of the African Unity (OAU) during its Eighteenth Assembly of Heads of State and Government in Nairobi Kenya, on the 27 June 1981 and entered into force on 21 October 1986.

2.6.2 The Right to Development under the African Charter

Lesotho ratified the African Charter on 10 February 1992. Regarding the right to development, the African Charter provides that

¹⁵⁵ Mutua M.W, "The African Human Rights System: A Critical Evaluation" (2000) <https://hdr.undp.org/system/files/documents/mutua.pdf> accessed 04 February 2025.

¹⁵⁶ Article 2, Charter of the Organisation of African Unity, 23 May 1963, International Legal Materials, Vol. 2, 1963, p. 776.

¹⁵⁷ By the end of 1999, 35 States had signed the Protocol and 3 States had ratified it: Burkina Faso, Gambia, and Senegal. Information received from Ben Kioko, Legal Counsel, the Organisation of African Unity.

¹⁵⁸ Strydom H (ed), *International Law* (Oxford University Press 2016) 347.

¹⁵⁹ African Charter on Human and Peoples' Rights, 1981, preamble.

1. All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.¹⁶⁰

This provision of the African Charter recognises development as a collective human right that compels state parties to facilitate its recognition and adopt suitable policies to ensure equal entitlement to the common heritage.¹⁶¹ By ratifying the African Charter, Lesotho is accordingly enjoined to ensure domestic enforcement of the provisions enshrined in the Charter. It is crucial to note that Lesotho has not domesticated the African Charter. Nonetheless, the lack of domestication and the absence of any constitutional basis for applying the Charter at the domestic level does not insulate any state party, including Lesotho from its obligations under the African Charter as evidenced by case law.¹⁶²

It is therefore important to note that even though the legal and constitutional frameworks in Lesotho do not enshrine any specific provision on the right to development, it however, recognises that every Mosotho has a right to contribute to social, cultural, political and economic development which shall ensure that all human rights and fundamental freedoms are recognised.¹⁶³ The government of Lesotho, has in accordance with article 21 of the African Charter, allowed the participation of local communities when adopting laws and policies aimed at exploring natural resources.¹⁶⁴ This ensures that the community is considered and included in the equitable distribution benefits and the development process.

2.6.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁶⁵

¹⁶⁰ African Charter on Human and Peoples' Rights, 1981, Art. 22.

¹⁶¹ Ngang Carol Chi and others, "Land Entitlement and the Right to Development in Lesotho" (2023) 53 (1) *Africa Insight*, 5.

¹⁶² *Ibid*, 10.

¹⁶³ The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018, 98.

¹⁶⁴ *Ibid*.

¹⁶⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (African Women's Protocol).

The preamble of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa highlights the commitment to eliminate all forms of discrimination and harmful practices against women in Africa. This Protocol was adopted on the basis that there was a gap in the recognition of women rights as enforceable human rights¹⁶⁶ as the majority of African states had ratified the African Charter and other international human rights instruments that protect women's rights, but women in Africa still continued to be victims of discrimination and harmful cultural practices.¹⁶⁷ The Protocol was subsequently, adopted to complement the African Charter and to reinforce the states' obligations in the protection of women's rights.¹⁶⁸

Lesotho ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on the 26 October 2004. Since Lesotho applies a dualist approach to international law, the Protocol is ordinarily not applicable in the courts of law until there is an Act of Parliament incorporating the Protocol into the domestic legal framework.¹⁶⁹ The general rule notwithstanding, the Constitutional Court applied the Protocol in the case of *Molefi Tsepe v IEC*,¹⁷⁰ emphasising that the Constitution and other subsidiary laws must be interpreted in accordance with Lesotho's international human rights obligations.¹⁷¹ In this case, the legal issue was whether the reservation of 1/3 quota of seats for women in local government councils amounts to discrimination against men in violation of section 18 of the Constitution. In making its judgement, the court held that affirmative action in terms of which 30 percent of seats in local government elections are reserved to women was justifiable discrimination and in accordance with the Constitution and Lesotho's obligations under international human rights instruments framework, including the African Women's Protocol.

¹⁶⁶ Wangrawa Sadia Rita Sonia, "Women's rights in Africa-Progress. Problems! Prospects?" (2021) *Euro Asian Law Congress*, 30.

¹⁶⁷ African Women's Protocol, preamble, para 12.

¹⁶⁸ Nsibirwa M.S, "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (2001) 1 (1) *African Human Rights Law Journal*, 41.

¹⁶⁹ *Sello v Commissioner of Police and Others* CIV/APN /10/1980. See also *Law Society of Lesotho v Right Honourable Prime Minister C of A* (CIV) No. 5/1985 court of Appeal Judgement.

¹⁷⁰ *Molefi Tsepe v IEC & Others* (2005) LSHC 96.

¹⁷¹ Joint Stake Holders Report for the United Nations Universal Periodic Review, The Death Penalty, 49 Session of the Working Group on the Universal Periodic Review April-May, submitted 11 October 2025, 109.

The African Women Rights' Protocol protects women against violence and calls upon states to “prohibit harmful traditional practices such as female genital mutilation, which has for a long time been justified by those who practice it as part of the African culture”.¹⁷² Domestic legislation include the Anti-trafficking in Persons Act,¹⁷³ which aims at preventing trafficking of persons, in particular women and children, as well as prosecution and punishment of those who commit the offence of trafficking as well as those who participate in trafficking by other means such as incitement to commit the offence. Since its enactment, there has been some convictions and a number of victims who have been rescued.

There is also the Marriage Act,¹⁷⁴ which provides for protection against early and forced Child marriages by stipulating the minimum age of marriage to be 21 years old.¹⁷⁵ There is also recognition of marriage of boys at 18 and 16 with the written permission from the minister.¹⁷⁶ The problem with early and forced child marriages is that it does not only hinder the achievement of the sustainable development goals but also violates or infringes on the girl's freedom to choose their partner at an appropriate age, their rights to health and education.¹⁷⁷

2.7 Case Law on the Application of Human Rights Instruments in Lesotho

Domestic courts play an important role in applying international treaties and they often interpret and enforce these agreements within the legal system. With Lesotho taking a dualist approach to international law, it is imperative to examine some case law to determine how and to what extent international instruments are applied in domestic courts.

2.7.1 Joe Molefi v Legal Advisor and Others¹⁷⁸

This is the earliest case that determined the application of international treaties post-independence. The appellant in this case, sought an order declaring that he is a refugee as envisaged by the United Nations Convention Relating to the Status of Refugees.¹⁷⁹ The Convention had been ratified by

¹⁷² Shale (n 110)109.

¹⁷³ Anti-trafficking in Persons Act 2011.

¹⁷⁴ Marriage Act 1974.

¹⁷⁵ Ibid, s 25.

¹⁷⁶ Ibid, s 27.

¹⁷⁷ Joint Stake Holders (n 171) 128.

¹⁷⁸ *Joe Molefi v Legal Advisor & Others* [1970] 3 ALL ER 724.

¹⁷⁹ Shale (n 110) 146.

the United Kingdom at the time when Lesotho was still its protectorate and therefore, extended the application of the treaty to Lesotho. One of the questions raised in this case was whether “the Convention could be regarded as part of the municipal law and hence, applicable to the Petitioner as contemplated by section 38 of the Aliens Control Act on which the Petitioner relied”.¹⁸⁰

The court acknowledged that the United Kingdom ratified international instruments that applied to its protectorates, including Lesotho prior to its dependence. It noted on that basis, that the appellant was accordingly a refugee in terms of United Nations Refugee Convention. The court however, highlighted that the applicant’s circumstances did not fall within those contemplated in section 38 of the Aliens Control Act, warranting that he could not at the domestic level, be declared a refugee in terms of the Act.¹⁸¹ The Refugee Convention was held to be binding on Lesotho for the reason that it had been incorporated through section 38 of the Aliens Control Act, which was a domestic Act in Lesotho.

2.7.2 *Makhasane v Commissioner of Police & Others*¹⁸²

This was a trial for damages that ascended from an unlawful arrest and detention. In determining the amount for damages due to the complainant, the court took cognisance of the fact that the African Charter protects a number of civil and political rights, including the right to dignity.¹⁸³ The court held that the police infringed those fundamental rights when they unlawfully arrested and detained the complainant.

2.7.3 *Basotho National Party v Government of Lesotho*¹⁸⁴

In an application for recusal of the Chief Justice, the applicant questioned the compliance of domestic standards for judicial appointment with international standards. It requested the high court to order the “government” to enact legislation to give effect to international treaties, including the African Charter and the ICCPR.¹⁸⁵ Openly departing from its dualist stance, the court held that the said instruments do not form part of Lesotho’s municipal law unless and until

¹⁸⁰ Ibid.

¹⁸¹ Shale I, “Country Report: Lesotho” (2015) 3 *African Disability Rights Yearbook*, 188.

¹⁸² *Makhasane v Commissioner of Police & Others* CIV/T/401/2006 [2011] LSHC 20.

¹⁸³ Shale (n 45) 215.

¹⁸⁴ *Basotho National Party v Government of Lesotho* (2005) 11 BCLR 1169 (LesH).

¹⁸⁵ Viljoen J, *International Human Rights Law in Africa* (Oxford University Press, 2011) 532.

incorporated into municipal law by legislation. The court declined to order the legislature to enact the relevant legislation on the basis that it was the legislature's "prerogative" to do so.¹⁸⁶

2.7.4 *Mapetla v Leboela*¹⁸⁷

In this case, where the custody of minor children was adjudicated upon, the Court affirmed that the African Charter and the Convention on the Rights of the Child are applicable in Lesotho, since they recognise the principle of the "best interests of the child" in the Children's Protection and Welfare Act of 2011. With this, the application of international instruments at the domestic level was further reinforced.

Summarily, the above cases illustrate that the courts are persuaded by international instruments when the courts are satisfied that Lesotho has ratified such instruments.¹⁸⁸ While on the other hand, significant cases such as the *Makhasane v Commissioner of Police*¹⁸⁹ and the *Fuma v Commander LDF*¹⁹⁰ marked a substantial recognition of international human rights instruments as sources of rights for the people of Lesotho.¹⁹¹ The courts' position in regards to the historical perception of Lesotho as a dualist regime seems to change with later cases such as *Makhasane*, recognising the direct applicability of international human rights treaties. This indicates a shift from the traditional dualist approach to a more flexible approach that prioritises human rights protection irrespective of whether the norms are derived from international or domestic laws.¹⁹²

2.8 Human Rights and Development

Human rights frameworks are fundamental to development, as they promote the realisation of economic, social and cultural rights alongside civil and political rights. The United Nations Declaration on the Right to Development connects rights with development by stating that every individual has the right to participate in and benefit from development.¹⁹³ It emphasises state

¹⁸⁶ Shale (n 45) 211.

¹⁸⁷ *Leboela v Mapetla C of A (CIV) 44/2011 [2012] LSCA 2.*

¹⁸⁸ Shale (n 45) 193.

¹⁸⁹ *Makhasane v Commissioner of Police & Others CIV/T/401/2006 [2011] LSHC 20.*

¹⁹⁰ *Fuma v Commander LDF Cons Case 08/2011 [2013] LSHC 68.*

¹⁹¹ Shale (n 45) 215.

¹⁹² Shale (n 45).

¹⁹³ United Nations General Assembly, Declaration on the Right to Development (adopted 4 December 1986) A/RES/41/128, art 2.

responsibilities in creating conditions favourable for realising this right, reinforcing that development must adhere to human rights norms.¹⁹⁴ The preambles to the UN Charter, the Universal Declaration, ICCPR and ICESCR, recognise that “the effective protection of human rights at the national level is the foundation of justice and peace, and of social as well as economic development throughout the world”.¹⁹⁵

Through the 2030 Agenda for Sustainable Development, states commit to work together by for example, guaranteeing decent means of livelihood to ensure that the world is a habitable place for everyone.¹⁹⁶ The 2030 Agenda generally aims at ensuring the full realisation of the Sustainable Development Goals (SDGs), including in particular, the alleviation of poverty, health care and social issues like education and nutrition.¹⁹⁷

The international treaties discussed above collectively demonstrate the balance between human rights and development. Treaty instruments such as the ICESCR for instance, recognise rights such as the right to adequate living standards¹⁹⁸ and education¹⁹⁹ as essential for development.

2.9 Conclusion

The human rights framework in Lesotho plays a crucial role in promoting development by ensuring that fundamental human rights and freedoms are realised. The dualist approach to international law does not only emphasise the need for domestication of the human rights treaties that Lesotho has ratified, but also demonstrates the immediate need for clear stipulations to what extent may international law be invoked by the domestic courts and also enable the courts to adopt a uniform approach in regard to the domestic application international human rights treaties.²⁰⁰ Additionally, observing human rights protection is integral to achieving sustainable development.

¹⁹⁴ Ibid, art 6.

¹⁹⁵ Shale (n 45) 194.

¹⁹⁶ Lipholo Tšepo, “Towards the Justiciability of Socio-economic Rights in the Legal System of Lesotho” (LLM thesis, National University of Lesotho, 2022) 28.

¹⁹⁷ Transforming our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015) A/RES/70/1.

¹⁹⁸ ICESCR, art 11.

¹⁹⁹ ICESCR, art 13.

²⁰⁰ Shale (n 45) 218.

The right to development embodies the human rights principles of “equality, non-discrimination, participation, transparency and accountability, as well as international cooperation” which can provide guidance to contemporary issues in the achievement of sustainable development.²⁰¹

²⁰¹ OHCHR, “Development and Human Rights” <https://ohchr.org/en/development/development-and-human-rights?> accessed 28 January 2025.

CHAPTER THREE

HUMAN RIGHTS VIOLATIONS IN LESOTHO AND THEIR IMPACT ON DEVELOPMENT

3.1 Introduction

The constitution is an important document that defines the basic principles of good governance, intended for the welfare of the people.²⁰² The constitution is a legal framework adopted by a representative body elected by the people which holds supreme legal authority.²⁰³ Since the Constitution holds a paramount status under the law, it is important therefore, that this framework should amongst other things, focus on alleviating poverty and providing mechanisms for holding leaders accountable.²⁰⁴

In most countries, socio-economic and cultural rights are rarely recognised or guaranteed by the constitution,²⁰⁵ lest to talk of the right to development. The right to development is an important means of achieving social, economic and cultural rights. Although Lesotho has ratified the African Charter, which safeguards the right to development by emphasising the need to prioritise socio-economic and cultural rights, the Lesotho national development plan,²⁰⁶ however, it only endorses civil and political rights as a main priority and makes no mention of the right to development.²⁰⁷

It is important to bridge the gap between the protection of human rights protection and the attainment of development goals. The violation and non-implementation of human rights of citizens is detrimental to national development.²⁰⁸ The former may occur through restrictions/failure to uphold fundamental right and the latter on the other hand may occur due to

²⁰² Saha Tushar Kanti, *Constitution of Lesotho: A text of Comparative Research Study*, (R. Combray & Co. Private Ltd 2010) 162.

²⁰³ *Ibid*, 1.

²⁰⁴ *Ibid*, 162.

²⁰⁵ *Ibid*.

²⁰⁶ Government of Lesotho, “National Strategic Development Plan II, 2018/19–2022/23: In Pursuit of Economic and Institutional Transformation for Private Sector-led Jobs and Inclusive Growth” (Lesotho Government 2018).

²⁰⁷ Ngang Carol Chi and others, “Right to Development Governance: A Policy Proposition for the Kingdom of Lesotho” (2023) 15 (3) *African Journal of Legal Studies*, 395.

²⁰⁸ Lankford McInerney and others, “Human Rights Indicators in Development: An introduction” (2010) World Bank Study <https://openknowledge.org> accessed 12 March 2025.

the non-justiciability of a category of social and economic rights.²⁰⁹ This practice, hinders popular participation of the people in development and undermines prospects for mobilising them. This often leads to conflict and fragility, which diverts resources from development priorities and increase gaps in achieving development goals.²¹⁰

This chapter examines sex-affiliated human rights violations in Lesotho, including those that arise from discrimination and societal stigma, violations that arise from the non-justiciability of socio-economic rights such as inadequate access to healthcare and others, and lastly, violations linked to police torture. These violations are central to development as they hinder progress, perpetuate inequalities and undermine the country's potential for development.²¹¹ Furthermore, underlying factors contributing to these human rights violations are examined. Lastly, their impacts on Lesotho's social, economic and political development are also observed.

3.2 Human Rights Violations in Lesotho

3.2.1 Torture by Police Officers

The Constitution of Lesotho guarantees the right to freedom from torture, cruel, inhuman degrading punishment or other treatment in section 8 (1). Subsection (2), however, excludes lawful punishment from being viewed as torture.²¹²

Section 22 of the Constitution provides a mechanism of redress by which victims of human rights violations, including torture to approach the high court.²¹³ However, these victims, are only able

²⁰⁹ Violations and non-implementation of human rights hinders development by promoting inequality, exclusion and social unrest. Failure to uphold constitutionally protected rights forming part of the category of civil and political rights such as the freedom of peaceful assembly undermines participatory governance, as is observed in most situations where dissenting voices are suppressed. Equally, the non-implementation of socio-economic rights such as access to healthcare exacerbates poverty and inequalities. Lankford (n 7). See also, United Nations office of the High Commissioner, "Development and Human Rights" (2006) <https://ohchr.org/sites/default/files/Documents/Publications/FAQen.pdf>> accessed 12 March 2025.

²¹⁰ Ibid.

²¹¹ Killen M and others, "Developmental Perspectives on Social Inequalities and Human Rights" (2022) 66 (4-5) Human Development Journal, 329-342.

²¹² "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Lesotho before the coming into operation of this Constitution." See Constitution of Lesotho, s 8 (2).

²¹³ Shale (n 110) 160.

to approach the high court for a civil remedy and are not availed the opportunity of criminal prosecution against the perpetrators since the Constitution does not recognise torture as a criminal offence.²¹⁴

The Penal Code Act in sections 94 and 95, categorises torture as part of crimes against humanity (war crimes).²¹⁵ The definition, restricts torture to war crimes, resulting in officials implicated in cases of torture evading punishment.²¹⁶ In instances where they are prosecuted, the prosecution would be for offences such as assault, or murder, where such torture resulted in the death of the victim.²¹⁷

Even though various trainings have been conducted to discourage police officers from using torture as an interrogation tool, the prevalence of torture remains high.²¹⁸ When the police commit torture, the state has to settle damages awarded to victims in respect such violations.²¹⁹ This was illustrated in the case of *Morie Motiane v Officer Commanding Mabote Police & Others*²²⁰ where an action for damages for both physical and psychological torture was lodged by the plaintiff against the police. The said plaintiff was arrested on suspicion of committing murder. In detention, he was severely assaulted and suffocated, handcuffed and tied with a rope.²²¹

While he was on the ground, one police officer sat on his back, and he was suffocated with a tube, he was also not allowed to use the toilet, given stale bread whilst in detention and then released three days later without any charge.²²² Medical reports showed swollen genitals, abrasions on both

²¹⁴ Ibid, 161.

²¹⁵ The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Although a subsequent case, the court affirmed this in the case of *Taole v Sehloho and others* (2012) LSHC 68, where, in expressing a concern about torture in Lesotho police stations noted that "it is a pity that it is always money coming from the government coffers that is going to be paid as compensation".

²²⁰ *Morie Motiane v Officer Commanding Mabote Police & Others* CIV/T/507/2007.

²²¹ Shale (n 110) 216.

²²² Ibid.

knees, wrist, chest and back.²²³ The plaintiff's claim was upheld and he was awarded M50,000.00 for pain and suffering, M30,000.00 for *contumelia* and M605.00 for medical expenses.

In another case of Mateboho Matekane documented by the Amnesty International, a textile worker was arrested on suspicion of theft of money belonging to her community savings group on the 30th November 2021.²²⁴ While in custody, she was beaten by the police to a point that she urinated on herself and she passed out. Matekane was subsequently released on the 1 December 2021 after her family went to the police station to request for her release so that she could be taken to the hospital. She sued the police for damages but she discovered that the police laid a counter-charge of robbery against her when she went for trial, on the 21 July 2022. Following the torture, Matekane lost her job as she was not able to report for work due to the injuries she suffered from the torture. She informed the Amnesty International that she could not afford to send her children to school for the academic year 2022 as she had lost her job.²²⁵

The above cases illustrate that the government faces a magnitude of legal claims for damages resulting from torture and ill-treatment done by the police. The government has to foot these claims and provide compensation to victims.²²⁶ The problem with this is that the financial burden of these pay-outs can divert resources from other essential public services and in the long-run strain the government's budget.²²⁷ While the compensation may be crucial to providing redress to the victims,²²⁸ their impact on development highlights a need for preventative measures to prevent torture by the police from even happening in the first place.

Consequently, the absence of legislation prohibiting torture as a separate crime, coupled with the granting of immunity and pardons for torture motivated by political reasons (legal mechanisms

²²³ The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018, 178.

²²⁴ Amnesty International "Turn a new chapter: A human rights agenda for the new Lesotho government" (2022) www.amnesty.org/en/latest/news/2022/09/lesotho-authorities-must-tackle-police-brutality accessed 13 March 2025.

²²⁵ Ibid.

²²⁶ Taole (n 219) para 33.

²²⁷ Amnesty International (n 224).

²²⁸ See the cases of *Morie Motiane v Officer Commanding Mabote Police & Others* CIV/T/507/2007; *Commissioner of Police and the Attorney General v Neo Rantjanyana* (2011) LSCA 42; *Taole v Sehloho and others* (2012) LSHC 68.

that protect perpetrators of torture from prosecution and punishment, on acts of torture committed with political motive), has led to a continued practice of torture, immunity for perpetrators and inadequate redress for the victims of torture.²²⁹

3.2.2 Discrimination

The act of discrimination can be committed either by the state or by private individuals.²³⁰ Discrimination happens in the form of laws or practices that exclude or restrict individuals on the basis of sex,²³¹ race, religion, political or other opinion, national or social origin, property, birth or other status.²³² The rights however as stated in the Constitution are not absolute, and may be reasonably limited.²³³ Therefore, the limitations on the right to freedom from discrimination are subsequently observed as follows.

3.2.2.1 Men

Lesotho practices a dual land tenure system, where customary land tenure and leasehold systems operate concurrently,²³⁴ with customary rules still applicable in the rural areas.²³⁵ The customary land tenure is regarded as a system of land ownership where individuals have no ownership rights²³⁶ and the communal land is administered in terms of rules and norms of a particular community.²³⁷ In Lesotho, the customary law practice denies unmarried men access to land.²³⁸ This demonstrates a form of discrimination on the basis of sex.

²²⁹ Shale (n 9) iv.

²³⁰ Yusuf C. and Fessha T, “Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania” (2013) 13 *African Human Rights Law Journal*, 364.

²³¹ Ibid.

²³² According to the law in Lesotho, discriminatory practices are those that favour one individual based on inherent characteristics and affiliations, and often disadvantage another. Everyone is treated equally regardless of their background or status. See Constitution of Lesotho, 1993, s 18(3).

²³³ Section 4(1) of the Constitution of Lesotho, 1993 specifically provides that the various rights provided for in Chapter II are “subject to such limitations ... designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest”.

²³⁴ Mapeshoane M.J, “A Critical Analysis into the Land Tenure System in Lesotho and its Implication on Foreign Investment” (Master of Laws, North-West University 2020) 30.

²³⁵ Thabane Kuenta, “Land Tenure, Housing Rights and Gender in Lesotho” in Benschop, M.L. *Law Tenure and Gender Review Series: Southern Africa* (UN-HABITAT, 2005) 29-75.

²³⁶ Mapeshoane (n 234) 8.

²³⁷ Payne G, *Urban Land Tenure and Property Rights in Developing Countries: A review of the literature* (Intermediate Technology Publications 1997)

²³⁸ Ngang Carol Chi et al, “Land Entitlement and the Right to Development in Lesotho” (2023) 53 (1) *Africa Insight*, 7.

The principle on land tenure system is enshrined in section 108 of the Constitution of Lesotho, which provides that the land belongs to the Basotho Nation and is held in trust by the King.²³⁹ This ultimately means that the King, is only constitutionally vested with the custodianship to hold the land in trust for the people.²⁴⁰ This constitutional provision laid a foundation for land governance by affirming the collective ownership of land by the nation.

Subsequently, the case *Maseela v Minister of Home Affairs and others*²⁴¹ although primarily focussed on addressing women's entitlement to land, played a significant role in influencing the drafting of the 2010 Land Act.²⁴² This Act aimed at addressing inequalities in the administration and land access.²⁴³ The progression from the Constitutional framework in 1993 to the enactment of the land Act in 2010 reflected a deliberate effort to reforming Lesotho's land laws.²⁴⁴ Notwithstanding, the introduction of statutory law presented a range of land legislation that conflicted with customary law on the question of land governance.²⁴⁵ The overlap would necessitate that the customary land tenure system be reformed to eliminate parts of it that are repugnant to social justice and equity considerations in regard to the administration of land.²⁴⁶

The challenge of lack of access to land by unmarried men remains unresolved neither by customary law nor the Land Act of 2010.²⁴⁷ That is, while the question of gender equality has been addressed to a certain extent by statutory law, the inadequacies such as those presented earlier by customary law remain unresolved.²⁴⁸

3.2.2.2 Women

²³⁹ Constitution of Lesotho, 1993, s 108.

²⁴⁰ Ngang (n 238) 7.

²⁴¹ *Maseela v Minister of Home Affairs and others* (CIV/APN/380/95) [1997] LSHC 79.

²⁴² Ngang (n 238) 6.

²⁴³ Ibid.

²⁴⁴ De Satge, Rick and Johnson Sean, "Lesotho-Context and Land Governance" (2021) <https://landportal.org> accessed 11 March 2025.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ngang (n 238).

²⁴⁸ Ibid, 8.

Bunch asserts that a vast number of women's human rights violations are caused by being female, that is, women are discriminated against and abused on the basis of their gender.²⁴⁹ She notes that women suffer such abuses as political repression equally as men do, but the recognition for female victims is often invisible due to the fact that the dominant image of the "political actor" is male.²⁵⁰ International human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural rights, Convention on the Elimination of All Forms of Discrimination Against Women entrench and guarantee various rights.²⁵¹ This includes equality on the basis of sex, equal and full dignity of a person, and freedom from inhuman and degrading treatment. With this, it is expected that women would be able to fully enjoy their rights.²⁵² Kisaakye, however notes that women's rights remain elusive for the majority of women, particularly in sub-Saharan Africa.²⁵³ That is, women's rights remain unfulfilled due to cultural, legal and socioeconomic barriers.²⁵⁴

In Lesotho, there is wide-spread reluctance in eliminating cultural discrimination against women in matters of succession to chieftainship.²⁵⁵ This is due to the fact that section 18(4) (c) of the Constitution is protective of the socio-cultural setting of patrilineality (descent from the father's side), which has been an inherent traditional practice, in matters of chieftainship and monarchy.²⁵⁶ Similarly, the constitution in section 44 establishes the office of the King and makes no provision for a biological female child of the royal family to succeed the King when he dies.²⁵⁷ This reflects another discriminatory practice against women since only males are designated to hold office as Kings and females can only act as regents.²⁵⁸ The courts have refused to declare these

²⁴⁹ Bunch, Charlotte, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights" (1990) 12 (4) *Human Rights Quarterly*, 486-498.

²⁵⁰ *Ibid.*

²⁵¹ Kisaakye E, "Women, culture and human rights: Female genital mutilation, polygamy and bride price" in Benedek, W. (ed) *Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002) 268.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ This is demonstrated by a lack of properly articulated legal rights, and recognition of customary law that gives legal basis some discriminatory practices. See Kisaakye (n 251) 268.

²⁵⁵ Shale Itumeleng, "The impact of the Maputo Protocol in Lesotho" in Thabane T and Shale I (eds) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria University Law Press 2012) 186.

²⁵⁶ *Ibid.*, 187.

²⁵⁷ McPherson Puseletso, "Economic Cost of Gender Based Violence against Women and Girls in Lesotho: A Critical Analysis of Lesotho's Dual Legal System" (LLM thesis, National University of Lesotho, 2023) 31.

²⁵⁸ *Ibid.*

discriminatory sections unconstitutional and instead women do not enjoy the full privilege of governing nations simply because they are women.²⁵⁹

Whereas crucial women's rights issues could be addressed through the civil liberties framework,²⁶⁰ it is imperative to note that many abuses against women form part a wider spectrum of socio-economic issues that entrap women and makes them vulnerable.²⁶¹ An effective approach to solving complexities surrounding women's vulnerability, is therefore, to implement comprehensive gender-responsive strategies that focus on social and economic empowerment.²⁶² This may amongst others, be achieved by including the socio-economic rights such as rights to food, shelter and work as justiciable rights.²⁶³

3.2.3 Socio-Economic Rights

Principles of state policy are regarded as instruments of instruction.²⁶⁴ These rights are not justiciable in the courts of law.²⁶⁵ The non-justiciability of socio-economic does not only affect the economic wellbeing of citizens and their mandatory participation in development,²⁶⁶ but also promotes gross violations of socio-economic rights.²⁶⁷

Often, in states where there is no express provision on socio-economic rights, the values and interests underlying these rights are frequently protected through civil and political rights.²⁶⁸ This is achievable in two main ways, with the first being the right to life, a civil right, being interpreted broadly to incorporate a socio-economic right, such as the right to health.²⁶⁹ The second situation entails the application of rights such as equality rights or administrative justice rights to protect

²⁵⁹ Ibid.

²⁶⁰ Bunch (n 249) 488.

²⁶¹ Ibid.

²⁶² Duflo, E. "Women empowerment and economic development" (2012) 50 (4) *Journal of Economic Literature*, 1051-1079.

²⁶³ Ibid.

²⁶⁴ Tushar (n 202) 164.

²⁶⁵ Shale I, "Country report: Lesotho" (2015) 3 *African Disability Rights Yearbook*, 201. <https://dx.doi.org/10.17159/2413-7138/2015/v3na8> accessed 17 February 2025.

²⁶⁶ Nwogbo David C. and Eze Marcel, "Human rights violations in Nigeria and implication for national development" (2021) 57 (2) *Journal of the Management Sciences*, 292.

²⁶⁷ Shale (n 255).

²⁶⁸ Liebenberg Sandra, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co. Ltd 2010) 121.

²⁶⁹ Ibid.

socio-economic interests.²⁷⁰ Scott demonstrates that this can happen through organic independence and related independence between civil and political rights, and socio-economic rights. The former refers to a situation where one right is interpreted to incorporate another right, for example, the right to life is interpreted to include the right to adequate standard of living or livelihood. The latter on the other hand involves the enquiry into whether a civil and political right like the right to a fair hearing for example, applies to a socio-economic right such as social security.²⁷¹ In this case, the two set of rights are treated as equally important and complementary, but autonomous.²⁷²

In Lesotho, this theoretical framework is reflected in the case of *Khathang Tema Baitsooli*²⁷³ which has described principles of state policy as mere principles attainable by legislation in tune with the economic status of the nation, which do not create any enforceable rights.²⁷⁴ State policy rights are not justiciable in a court of law but have an influence on ground-level realities.²⁷⁵

3.2.3.1 Health

The Constitution of Lesotho recognises the right to health as a principle of state policy instead of a fundamental human right.²⁷⁶ With respect to healthcare, these principles are used as guidelines for creating policies that guarantee the best possible level of physical and mental health for its people.²⁷⁷ This includes among others, measures to lower the rate of stillbirths and infant deaths and to support a child's healthy development, measures to enhance industrial and environmental hygiene, and establish systems to guarantee that everyone has access to healthcare when ill.²⁷⁸ Despite the constitutional guarantee to ensure adoption of these policies, Lesotho generally suffers

²⁷⁰ Ibid.

²⁷¹ Scott Craig, "The interdependence and permeability of human right norms: Towards a partial fusion of the international covenants on human rights" (1989) 27 *OHLJ*, 769-878.

²⁷² Sandra (n 268).

²⁷³ *Khathang Tema Baitsooli & Another v Maseru City Council* (CONST/C/1/2004) LSHC 25.

²⁷⁴ Tushar (n 202) 164.

²⁷⁵ Ibid.

²⁷⁶ Koetlisi Mphunyetsane, "Female genital mutilation in Lesotho: A cultural hazard to women's right to health and Dignity" (LLM thesis, National University of Lesotho, 2024) 24.

²⁷⁷ Ibid, 25. See also Constitution of Lesotho, s 27.

²⁷⁸ Ibid.

from a weak healthcare system and the country lacks qualified human resources in the health sector.²⁷⁹ This has resulted in a progressive worsening of health indicators.²⁸⁰

3.2.3.2 The environment

Section 36 of the Constitution of Lesotho recognises the duty to protect the environment for the benefit of the people. This is guaranteed by the adoption of policies that protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations.²⁸¹ Environmental rights are not distant and irrelevant concepts but are distinctive and functional aspects of a society and its ecology.²⁸² That is, environmental rights are essential for ensuring a safe and healthy environment. Equally, environmental issues such as pollution violate human rights.²⁸³

Lesotho lacks a sanitary landfill. The site in Ha Ts'osane, which is labelled a land fill, functions more as an open dump than a land fill. The location of this disposal site affects the socio-economic stability and safety of surrounding communities. These communities are exposed to an increased risk health outcomes and environmental pollution. Siddiqui notes that the residential area near these disposal sites often experience issues such as methane (CH₄) gas accumulation,²⁸⁴ which contributes to environmental risks such as global warming, land and vegetation degradation, wildlife depletion, and decreased property values.²⁸⁵

The state has a primary obligation to ensure that the environment is protected and preserved.²⁸⁶ When laws are deficient from an environmental perspective, this often times reflects a state's

²⁷⁹ Compilation of UN info for the second cycle of the Universal Periodic Review (UPR) Mechanism Lesotho (2013) 7.

²⁸⁰ The 2013 Annual Report of the Resident Coordinator indicated that Lesotho is unlikely to achieve MDGs 4, 5 and 6 due to high rates of infant and maternal mortality. While infant mortality rose from 81 in 2001 to 91 in 2009, under-five mortality also increased from 113 to 117 in the same period. See Universal Periodic Review (n 62) 7.

²⁸¹ Constitution of Lesotho 1993, s 36.

²⁸² Motaung M and others, "The Environmental and Health Implications of Waste Disposal Sites in The Lesotho Lowlands" (2024) 6 (2) *Innovation Journal of Social Sciences and Economic Review*, 2223.

²⁸³ Ibid.

²⁸⁴ Siddiqua A. and others, "An overview of the environmental pollution and health effects associated with waste landfilling and open dumping" (2022) *Environmental Science and Pollution Research* 29, 58514-58536.

²⁸⁵ United Nations Development Programme (2022). Integrated waste management strategy for Lesotho. United Nations Development Programme, Lesotho.

²⁸⁶ Tushar (n 202) 181.

deliberate choice to prioritise economic gains over environmental protection, even if particular communities must bear a disproportionate burden as a result.²⁸⁷ The state's failure to protect or address environmental concerns by establishing adequate enforcement mechanisms fails to recognise that many activities utilise the scarce resources, produce emissions and waste that inevitably impacts not only on nature, but on human rights as well.²⁸⁸

Lesotho is rich in mountains, which are home to ecosystems that are crucial for biodiversity, cultural diversity and water supply.²⁸⁹ The mountains are a source of great rivers and providers of the "much-needed" fresh water.²⁹⁰ Nonetheless, the mountain regions face significant challenges, including environmental degradation, urban development and climate change, all which affect their viability.²⁹¹ These regions are often neglected in conservation efforts, and there is a lack of comprehensive legal protection of these areas.²⁹² Existant agreements such as the Alpine Convention of 1991, remain underdeveloped.²⁹³ In summary, the failure to adequately protect the environment demonstrates the gap between aspirational environmental protection and actionable legal protection. This gap highlights the structural challenges in addressing environmental concerns as a human rights issue.

3.2.3.3 Persons with disabilities

Persons with disabilities suffer discrimination due to both attitudinal and institutional barriers that preclude them from accessing human rights.²⁹⁴ For women with disabilities, the effect is made worse by discriminatory justifications of culture and custom, and their overall disability.²⁹⁵ This discrimination consequently, leads to denial of sexual and reproductive rights and a lack of access to education for the female counterparts.²⁹⁶

²⁸⁷ Shelton Dinah, "Legitimate and necessary: Adjudicating human rights violations related to activities causing environmental harm or risk" (2015) 6 (2) *Journal of Human Rights and the Environment*, 142.

²⁸⁸ *Ibid.*, 155.

²⁸⁹ Tushar (n 202) 183.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ The Alpine Convention is the first transnational agreement relating to mountain range. Mountain ranges are often cross national, so the issues involving them are inherently transnational. See Tushar (n 202) 183. See also Alpine Convention 1991.

²⁹⁴ Shale (n 255) 190.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

Since there is only one provision that directly addresses persons with disability,²⁹⁷ section 33 of the Constitution enjoins the government to put in place measures aimed at the promotion and protection of the rights of persons with disabilities as well as their rehabilitation. This includes the adoption of policies that provide for training facilities, including specialised institutions, public or private, and place disabled persons in employment, encourage employers to admit disabled persons to employment.²⁹⁸

Moreover, the categorisation of socio-economic rights as directive principles of state-policy leads to gross violations of the rights of persons with disabilities as these rights are not justiciable in the courts of law.²⁹⁹ Persons with disabilities do not have equal access to health, and other social services when compared with other non-disabled members of the society.³⁰⁰ A feasibility study undertaken in 1993 by the Ministry of Education reflected that there are children with special needs and disabilities in schools such as psychosocial disabilities, epilepsy, hearing, visual and physical impairments.³⁰¹ The practical challenge was that; these children are rather enrolled in specialised schools instead of their needs being integrated in mainstream schools, disrupting the family life of such children.³⁰² While the study was conducted a few decades ago, the challenge still exists.³⁰³

3.3 Factors that Contribute to Human Rights Violations

Human rights violations are influenced by various factors, which include the historical, political, cultural, economic, religious, ethnic and technical aspects.³⁰⁴ The factors shape the extent to which human rights are protected or hindered, determining the conditions in which the violations occur.³⁰⁵ The following sections explore how these factors contribute to human rights violations and to demonstrate their effects on development. These factors are also separately examined under the impacts of human rights violations on development.

²⁹⁷ Shale (n 255) 190.

²⁹⁸ Constitution of Lesotho 1993, s 33.

²⁹⁹ Shale (n 255).

³⁰⁰ Shale (n 181) 201.

³⁰¹ Ibid.

³⁰² Ministry of Education Feasibility Study 1993.

³⁰³ Shale (n 181) 201.

³⁰⁴ Konese (n 55) 17.

³⁰⁵ Ibid.

3.3.1 Corruption

Corruption is defined as the behaviour on the part of officials in the public and private sectors where they improperly and unlawfully enrich themselves, or those close to them, by misuse of the public power entrusted to them.³⁰⁶ Corruption has evolved into a global problem that cuts across national, regional and international boundaries.³⁰⁷ It affects individuals, groups, syndicates and various sectors such as the political, administrative and financial sectors.

International regional instruments such as the African Union Convention on Preventing and Combating Corruption³⁰⁸ and the African Charter on Human and People's Rights.³⁰⁹ Commentators have generally focussed on how corrupt conduct may violate or undermine a range of civil, political, economic, social, and cultural rights that are enshrined in other human rights instruments.³¹⁰ Mantzaris, holds that the adverse effects of corruption on human rights of the majority of the population goes much deeper than the "journalistic headlines and the hysterics of the social media unveiling intrigues of state capture".³¹¹

The Constitution of Lesotho does not have any provision on corruption, neither does it make provisions for the establishment of anti-corruption agencies.³¹² As with other African countries where corruption is prevalent,³¹³ the severity of corruption is felt in the process of procurement of goods and services by the government to sustain the daily operations of the state.³¹⁴

³⁰⁶ Lehobo Limakatso Martinah, "Good Governance in Lesotho: An analysis of the relationship between the rule of law and control of corruption" (Masters of Governance and Political Transformation, University of the Free State, 2017).

³⁰⁷ Mantzaris E.A, "Corruption as a Violation of Basic Human Rights in South Africa and Russia" (2017) 9 (8) *African Journal of Public Affairs*, 16.

³⁰⁸ African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force on 5 August 2006).

³⁰⁹ Article 22 of the African Charter does not directly provide for corruption but it provides foundational basis for corruption-related rights violations. The African Court on Human and People's Rights has increasingly interpreted the African Charter in ways that relate systematic corruption to the breaches of numerous rights such as right to healthcare. See African Charter (n 170) art 22.

³¹⁰ Rose Cecily, "The Limitations of a Human Rights Approach to Corruption" (2015) *International & Comparative Law Quarterly*, 6.

³¹¹ Mantzaris (n 307) 15.

³¹² Lehobo (n 306) 63.

³¹³ Toebea Thato, "Corruption in Public Procurement in Lesotho" (2017) *Law and Development Conference*, 3.

³¹⁴ *Ibid*.

In terms of access to healthcare, the United Nations Development Program 1997, highlights that corruption arises when the bribes given to doctors, nurses or administrators restrict access to public service for the poor.³¹⁵ Equally, the lack of funds for public hospitals, operational malfunctions and collusion with pharmaceutical companies lead to the violations of human rights in the health sector.³¹⁶

Corruption in various ways strains a state's economic growth and development. In this context, development is not construed as or confined to the establishment of state infrastructure. Rather, it is used to mean a pyramid made up of various components for the well-being of the people and the realisation of their rights. Residing as an "invisible enemy amongst the people", corruption adversely affects the components of the development pyramid, which cuts across political culture such as democracy, the separation of powers such as having a corrupt and venal judiciary, and, lastly a service delivery sector that operates solely on whoever is willing to pay a bribe.³¹⁷

Corruption on the part of government officials results in poor construction of schools and in some cases, total failure of construction. In the case of the *Ministry of Education v Thuto Ntsekhe*,³¹⁸ a public servant was dismissed for her involvement in corruption, which ended in the Ministry of Education losing 17 Million Maloti for schools that were reported to have been constructed to finality while in essence there was no construction at all.³¹⁹ It is well known that citizens' socio-economic rights are negatively affected by corruption, especially, in countries where poverty and inequality is wide spread.³²⁰ Through corruption, considerable sums of financial resources are wasted, which is a serious impediment to efforts to deliver basic services such as proper education, health, food, water and sanitation.³²¹

³¹⁵ Mantzaris (n 307) 18.

³¹⁶ Holmberg S. and Rothstein B, "Dying of Corruption" (2011) 6 *Health Economic and Policy Law*, 549-47.

³¹⁷ Munyai Anzanilifuno and Agbor Avitus A, "The impact of corruption on the right to development in Africa" in Ngang Carol C. et al (ed) *Perspectives on the Right to Development* (Pretoria University Law Press 2018) 71.

³¹⁸ *Ministry of education v Thuto Ntsekhe* PST 3/2015.

³¹⁹ The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018, 83.

³²⁰ OHCHR, "The negative impact of corruption on the enjoyment of human rights" (2015) www.ohchr.org/sites/default/files/documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf accessed 11 March 2025.

³²¹ Mantzaris (n 307) 19.

3.3.2 Culture

Culture has often been cited as a “key obstacle to the enjoyment of women’s human rights, and the major reason underlying this resistance from the communities”.³²² The cultural and traditional practices that violate women’s human rights include early marriage of young girls, forced marriage, female genital mutilation, polygamy, bride price, widow inheritance, widowhood rites, the *trocosi* system (female religious slavery), wife sharing, husband sharing, killing of twins and albinos, food taboos for women, land/property acquisition and ownership, male/boy preference and wife replacement.³²³

As previously stated, the CEDAW is a foundational instrument that sets both legally binding standards and measures to achieve equal rights for women everywhere.³²⁴ The Convention does not only call for national legislation banning discrimination but also emphasises the equal responsibilities of men and women in the context of family life, stressing the need for combining family obligations with work responsibilities.³²⁵ The Convention in essence, affirms the action for acceleration of the achievement of equality, and the adaptation of social and cultural patterns that perpetuate discrimination. In Africa, there is absence of national legislation outlawing cultural practices. Political commitments to outlaw these practices have been highlighted to be “lukewarm”.³²⁶ In addition to this, Kisaakye notes

the efforts that are made to outlaw these practices, are further confronted with resistance from not only the community but in some cases also from women who are victims of these practices that violate their rights can be explained by their socialisation which leads them to accept the status quo, or their fear of becoming outcasts in their communities, as well as the fact that many of these practices are embedded in the value systems of their respective communities.³²⁷

³²² Kisaakye (n 251) 269.

³²³ Ibid, 268.

³²⁴ Makubuya Apollo N, “Armed forces in Uganda: Human Rights Issues” in Benedek, W. et al (ed) *Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002) 298.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid.

Section 18 of the Constitution protects citizens generally against discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³²⁸ However, it derogates from this general right by providing that it will not apply to any law of persons; this includes issues of adoption, marriage, divorce, burial and devolution of property on death.³²⁹ Customary law is also regarded as a justifiable limitation of the right to freedom from discrimination.³³⁰ Since no fundamental rights and freedoms enshrined in chapter II of the constitution may be amended without the majority votes of the entire electorate, which is mandatory before passing such amendment to the King for his assent, it is often difficult to implement constitutional changes in Lesotho.³³¹

3.3.3 Non-Justiciability of Socio-Economic Rights

The implementation of socio-economic rights is a major challenge.³³² This is because these rights are confined to subordinate status as only mere principles of state policy, which allows the government to fulfil the rights at its own pace. Programmes, actions and visions for the realisation of socio-economic rights are implemented as mere policies, necessitating appropriate legislation for their enforcement through judicial processes. With respect to legislation, the Children’s Protection and Welfare Act of 2011 is the only legislation that recognises socio-economic rights for children.³³³ With these being referred to as rights, the presumption is that there would be remedies when such rights are violated.³³⁴ However, since legislation is subservient to the Constitution, these rights are considered as mere policies that lack enforceability in the local courts.³³⁵

3.4 Impact of Human Rights Violations on Development

³²⁸ Constitution of Lesotho 1993, s 18.

³²⁹ Ibid, s 18 (4) (b).

³³⁰ Ibid, s 18 (4) (c).

³³¹ The Constitution of Lesotho in section 85 (3) of the Constitution of Lesotho 1993, requires that a Constitutional amendment of Chapter II must have the support of the majority of the entire electorate, after it has been passed by the parliament. It is therefore that in respect of fundamental rights and freedoms, there has to be a national referendum for such amendment. See Justine Limpitlaw, “Lesotho” (2013) 2 *Media Law and Handbook for Southern Africa*, 461 www.kas.de accessed 13 March 2025.

³³² Lipholo Tšepo, “Towards the Justiciability of Socio-economic Rights in the Legal System of Lesotho” (LLM thesis, National University of Lesotho, 2022).

³³³ Ibid, 50.

³³⁴ Ibid.

³³⁵ Ibid.

Human rights are the foundation on which sustainable development is built. To achieve development, there is a need to protect human rights and to balance economic, social and environmental factors.³³⁶ Since the adoption of the Universal Declaration of Human Rights in 1948, there has been a global recognition of the nexus between human rights and development.³³⁷ The connection was secured by the subsequent adoption of the Declaration on the Right to Development in 1986,³³⁸ wherein, development is defined in the preamble as:

a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting from therefrom.³³⁹

Attempts at creating a link between human rights and development is noted to be subject to significant challenges.³⁴⁰ Human rights and development have a mutually reinforcing link envisaged to drive development initiatives to a greater level of excellence.³⁴¹ As with other African countries, Lesotho bears legal obligations under the African Charter on the right to development.³⁴² Its duty is to create conditions and an enabling environment³⁴³ that guarantees better living standards for its people.³⁴⁴

Nonetheless, with rigid mechanisms in place, human rights violations still continue.³⁴⁵ This ultimately affects development, which is intended to make living conditions increasingly better.³⁴⁶ Although these factors have previously been discussed in relation to their contribution to human rights violations, the following section now examines their impact on development.

³³⁶ Konese (n 55) 48.

³³⁷ Konese (n 55) 17.

³³⁸ Ibid.

³³⁹ Declaration on the Right to Development, (adopted 4 December 1986) UN 41/128, preamble. African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi Kenya on 28 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217: preamble.

³⁴⁰ Janusz Symondies, *Human Rights Concept and Standards* (UNESCO Publishing, 2000) 170.

³⁴¹ Konese (n 55) 17.

³⁴² Ngang (n 207) 395.

³⁴³ African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi Kenya on 28 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217: art 22.

³⁴⁴ Ngang (n 207).

³⁴⁵ Nwogbo (n 266) 296.

³⁴⁶ Ibid.

3.4.1 Economic Development

Economic development refers to programs, policies or activities that seek to improve the well-being and quality of life for a community.³⁴⁷ From a human rights approach, economic development focusses on equitable access to resources and distribution of benefits.³⁴⁸ Violations in this respect, such as the non-justiciability of socio-economic rights shall be determined in terms of how they shield government from accountability, exacerbate poverty, limit economic opportunities and stall progress towards sustainable development.³⁴⁹

3.4.1.1 Corruption

Historically, the fight against corruption in the authoritarian rule³⁵⁰ was characterised by media suppression and ineffective law enforcement.³⁵¹ This made corruption an accepted practice. However, post the democratic phase in 1993, successive governments have actively worked to combat corruption through a number of legislations and institutional frameworks.³⁵² This includes the Prevention of Corruption and Economic Offence Act,³⁵³ which requires public officials to declare their assets, the Income Tax Act (as amended),³⁵⁴ which counters tax evasion and fraud, and the Money Laundering and Proceeds of Crime Act³⁵⁵ whose mandate is to combat money laundering and terrorist financing offences.³⁵⁶

³⁴⁷ British Columbia, “What is Economic Development?” (2024) www.gov.bc.ca accessed 14 March 2025.

³⁴⁸ OHCHR, “Development and human rights” <https://ohchr.org/en/development/development-and-human-rights?utm> accessed 13 March 2025.

³⁴⁹ Marslev K. and Hans-Otto Sano, “The economy of human rights: Exploring potential linkages between human rights and development” (2016) 2 *Danish Institute for Human Rights*, 17 www.humanrights.dk accessed 13 March 2025.

³⁵⁰ The authoritarian rule was a 23-year period from independence in 1996 including the military rule in 1986 to 1993. See Heyns, Christof van der Linde, Morne and Tvernier Paul, “Lesotho” et al *International Human Rights Law in Africa*, (Kluwer Law International 2001) 1203-1225 https://doi.org/10.1163/9789004532007_030 accessed 11 March 2025.

³⁵¹ Letete Emmanuel M, “Tackling Corruption in Commonwealth Africa: Case studies of Botswana, Lesotho, Mauritius, Rwanda and Seychelles” in Korateng Roger (ed) *Commonwealth Secretariat*, 2018 67.

³⁵² Ibid.

³⁵³ Prevention of Corruption and Economic Offences Act No. 5 of 1999.

³⁵⁴ Income Tax (as amended) Act No.10 of 1993.

³⁵⁵ Money Laundering and Proceeds of Crime Act No. 4 of 2008.

³⁵⁶ Letete (n 351).

These mechanisms presented a foundation for the improvement of the capacity of the civil service to curb nepotism and cronyism,³⁵⁷ which often undermines meritocracy.³⁵⁸ Nevertheless, corruption continues to hit hard in some sectors of the economy and remains a dominant discourse of complainant in the country.³⁵⁹

As with other African countries, the severity of corruption is felt in the process of procurement of goods and services by the government to sustain the daily operations of the state.³⁶⁰ Corruption is stigma that destroys the reputation of the country concerned in that it lowers investment opportunities.³⁶¹ For example, the World Trade Organisation (WTO) increases impediments on trade if a country maintains a high level of corruption or extortion.³⁶² This strains a state's economic growth and development,³⁶³ as the national prestige and respect is diminished by such presence of corruption.³⁶⁴ Equally, the inability to enforce socio-economic rights exuberates inequality and poverty, which is often linked to systemic corruption.³⁶⁵ Non-justiciability of these socio-economic rights promotes corruption as there is no accountability by governments and mismanagement continues unchecked.³⁶⁶ Justiciability on the other hand, will hold governments accountable for resource allocation and service delivery failures,³⁶⁷ reinforcing the critical role of having enforceable rights.³⁶⁸

There is an urgent need for awareness to discourage excessive materialism and the culture of “get rich quickly” mind set among the youth. There is also need for incorporating human rights and

³⁵⁷ Nepotism and Cronyism are forms of corruption wherein the former involves the abuse of power by favouring family members and the latter involves abuse of power by favouring friends and associates over qualified candidates for jobs or other benefits.

³⁵⁸ Letete (n 351).

³⁵⁹ Holmberg (n 316) 70.

³⁶⁰ Ibid.

³⁶¹ Obayelu Abidum Elijah, “Effects of Corruption on Economic Growth and Development: Lessons from Nigeria” (2007) 21 <https://afdb.org> accessed 16 February 2025.

³⁶² Ibid, 18.

³⁶³ Ibid.

³⁶⁴ Ibid, 19.

³⁶⁵ Silva Castroand Bruna, “Harmonizing (Anti)Corruption: The Socio-Legal values of a Human Rights-based Approach to Corruption” (2019) 5 *Kyiv-Mohyla Law and Politics Journal* 59-81.

³⁶⁶ Christiansen Eric C, “Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court” (2007) 48 (2) *Columbia Human Rights Law Review*, 1-42.

³⁶⁷ Ibid.

³⁶⁸ Peters Anne, “Human Rights and Corruption: Problems and Potential of Individualizing a systemic Problem” (2024) 22 (2) *International Journal of Constitutional Law*, 538-561.

development perspectives into anti-corruption measures.³⁶⁹ In terms of economic effects, corruption saps a country's economy by hampering tax collection and undermining the enforcement of important regulation.³⁷⁰ It also creates a loss of tax revenues and monetary problems, leading to adverse budgetary consequences.³⁷¹ The impact of this is that it increases the likelihood of capital flows that make a country more vulnerable to shifts in international investors' sentiment and expectations.³⁷² Summarily, Lesotho remains largely a cash economy, and this makes controlling corruption more challenging.³⁷³

3.4.2 Social Development

Social development refers to the process of improving the well-being of communities by ensuring access to healthcare, education, and social services.³⁷⁴ From a human rights perspective, social development emphasises approaches that uphold principles of non-discrimination and equality.³⁷⁵ Violations of human rights in this domain, are explored in terms of how they affect development.

3.4.2.1 Culture

In Africa, a majority of women are still unable to fully enjoy their basic human rights and are deprived of right to sustainable development. Culture has always been alluded to as a “key obstacle to the enjoyment of women's human rights”.³⁷⁶ Harmful cultural practices affect women's right to sustainable development in ways which if not eradicated, would deprive present and future generations of African women off the fundamental entitlement to improved well-being.³⁷⁷

Lesotho has made progress towards empowering women in many sectors of life. Regardless, the Office of Chieftainship remains exclusively male-orientated due to the customs, practices and

³⁶⁹ Abidium (n 361) 22.

³⁷⁰ Ibid, 18.

³⁷¹ Lambsdroff G, “Background Paper to the Corruption Perceptions Index” (Transparency International and Gottingen University 2000).

³⁷² Abidium (n 372). See also, Lambdroff as above.

³⁷³ Letete (n 361) 90.

³⁷⁴ OHCHR, “Development and human rights” <https://ohchr.org/en/development/development-and-human-rights?utm> accessed 13 March 2025.

³⁷⁵ Killen M and others, “Developmental Perspectives on Social Inequalities and Human Rights” (2022) 66 (4-5) *Human Development Journal*, 329-342 <https://doi.org/10.1159/000526276> accessed 13 March 2025.

³⁷⁶ Kisaakye (n 251) 268.

³⁷⁷ Asika Rhoda and Ngang Carol C, “The right to development: An African feminist view” in Ngang Carol C. and others (eds), *Perspectives on the Right to Development* (Pretoria University Law Press 2018) 115.

traditions that are characteristically patriarchal.³⁷⁸ This system of male primogeniture is rooted in customary law, which the Constitution supports and thus, allows for discriminatory practices.³⁷⁹ With this practice, women are often subjected to a status of minority, which violates their right to human dignity.³⁸⁰ Nonetheless, the Constitution, allows for the promulgation of laws pursuant to the realisation of social and economic rights (state policy) by eliminating any discriminatory laws in order to promote a society based on equality and justice.³⁸¹

The customary law rules of succession have not adjusted to the changing social conditions and values. This has resulted in the laws being outdated and unreasonable. In the case of *Bhe v Magistrate of Khayelitsa*, the court observed that:

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 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.³⁸²

The reliance on outdated, formalised customs and traditions that discriminate against women does not only perpetuate gender inequalities but also prevents women from participating in leadership roles.³⁸³

³⁷⁸ Laws of Lerotholi 1903, s 2 and the Chieftainship Act 1968, s 10.

³⁷⁹ Constitution of Lesotho, s 18 (4) (c)

³⁸⁰ The court held in para 92 of the case of *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) that “[t]he 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.”

³⁸¹ Section 18 (4) of the Constitution provides “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”. See also Lipholo (n 99) 55.

³⁸² *Bhe and Others* (n 296) para 82.

³⁸³ The Amnesty International Report 2022/23, has highlighted that women continue to be excluded from participation in the economy and politics, and have in this respect continued to suffer the “triple” burden of poverty, unemployment

3.4.2.2 Land

The economic status of women is generally limited to their “dependence on men, making them less powerful to meaningfully participate in shaping all development processes, as well as those that specifically affect them”.³⁸⁴

Customary land tenure practices, which deny access to land to both women and unmarried men, deprives them of the ability to use the land for socio-economic and cultural development purposes.³⁸⁵ This consequently, deprives the right holders of the entitlement to comprehensively participate in, contribute to and equitably share the benefits of development³⁸⁶ as embodied in the right to development enshrined in the African Charter.³⁸⁷

The legal dualism, where received law operates side by side with Sesotho customary law, creates an overlap between the two systems, particularly in matters of inheritance. The customary law of inheritance is based on primogeniture, which designates a first born male child as an heir. This principle is sometimes used to disinherit widows despite the clear stipulations in the Land Act that land shall devolve upon the widow.³⁸⁸

It is worth noting that customary land tenure unnecessarily limits women from equitable entitlement. Even though they make up over half of the country’s population, Basotho women, do not have equal access to land as a means of subsistence and a factor of production and, therefore, are hampered in terms of the extent to which they may contribute to the realisation of the right to development.³⁸⁹

and inequality. Amnesty International Report, “The state of the world’s human rights” 2022/23, 234 www.amnesty.org accessed 13 March 2023.

³⁸⁴ Ngang (n 207).

³⁸⁵ Ibid, 6.

³⁸⁶ Ibid.

³⁸⁷ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR), art 22.

³⁸⁸ The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018, 178.

³⁸⁹ Ngang (n 238) 3.

3.4.3 Political Development

Political development refers to the evolution of institutions and values shape the political system within a society.³⁹⁰ Political development enhances the state's capacity to allocate resources, strengthening democratic governance and the rule of law.³⁹¹

3.4.3.1 Rule of law and governance

The rule of law is commonly defined as a form of governance where all persons, including authorities within the state in both public and private sectors should be entitled to benefit publicly and prospectively from the law as promulgated and administered by the courts.³⁹² The rule of law is integral to and necessary for democracy and good governance.³⁹³ It is often associated with economic development, and political stability, which are crucial determinants in human rights performances.³⁹⁴ This is to say, the rule of law is a basic requirement of good governance, without which respect for laws or social order would be impossible.³⁹⁵ The attempts to democratise the rule of law without a functional legal system in place have resulted in social disorders.³⁹⁶

Western societies prioritise civil and political rights as valid grounds for democracy and humanitarian intervention, while economic rights and the right to development are not treated as legally enforceable entitlements.³⁹⁷ This approach fails to observe poverty as a violation of human dignity.³⁹⁸ From a political perspective, poverty is seen as evidence of how the failure of implementation of effective policies by the government and the political structures affect the poor segments of society.³⁹⁹

3.5 Conclusion

³⁹⁰ Political development <https://oxfordreference.com> accessed 13 March 2025.

³⁹¹ Democratization and good governance have been regarded as both constitutive of political development and sustained economic development in developing and post-communist societies. See Political Development (n 401).

³⁹² Bingham T, *The Rule of Law* (Allen Lane 2010) 8.

³⁹³ Peerenboom Randall, "Human Rights and Rule of Law: What is the relationship?" (2004) Research Paper No. 05-31, 5 <http://ssrn.com/abstract=816024> accessed 21 February 2025.

³⁹⁴ *Ibid.*, 4

³⁹⁵ Keping Y, "Governance and good governance: A new framework for political analysis" (2018) 11 *Fudan Journal of the Humanities and Social Sciences*, 1-8.

³⁹⁶ *Ibid.*, 5.

³⁹⁷ Peerenboom (n 393) 146.

³⁹⁸ *Ibid.*

³⁹⁹ Ngang (n 207) 399.

Human rights violations, particularly the prioritisation of civil and political rights over socio-economic rights has profound impact on development by perpetuating cycles of inequalities and poverty.⁴⁰⁰ Socio-economic and cultural rights should be prioritised as a primary guarantee to the enjoyment of civil and political rights.⁴⁰¹

Also, the legal framework has not afforded women protection on the same footing as men. Women's rights, including participation in development through access to land, succession to chieftainship remains constrained by discriminatory practices. This limits their economic empowerment and development potential, making development initiatives that target women fruitless.⁴⁰²

Lesotho is reforming its laws, policies and institutions in order to conform to global, regional and national human rights frameworks.⁴⁰³ However, as Keiso highlights, these changes are “slow and require the right political attitude to effect constitutional reforms that would give all citizens substantive equality and rights”.⁴⁰⁴ Political will and leadership are therefore, on this basis crucial for the achievement of these reforms.

Development has long been considered as strengthening people's ability to influence their own future for the better.⁴⁰⁵ Successful development requires empowering communities with sustainable livelihoods and income opportunities.⁴⁰⁶ No meaningful development can take place in any country if human rights are not respected and fulfilled.⁴⁰⁷ In light of this, it is vital to acknowledge the importance of aligning development initiatives with the promotion and protection of human rights for the benefit of the nation.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid, 395.

⁴⁰² Bunch (n 249) 492.

⁴⁰³ Marite Keiso Matashane, “Women's Rights and Participation: Including women's access to land and inheritance, and the role of lobbying and grassroots organizations in Lesotho” (2005) United Nations Division for the Advancement of Women, 6 <https://un.org> accessed 26 February 2025.

⁴⁰⁴ Ibid.

⁴⁰⁵ Konese (n 55) 51.

⁴⁰⁶ Ibid.

⁴⁰⁷ Nwogbo (n 266) 290.

CHAPTER FOUR

HUMAN RIGHTS AND DEVELOPMENT IN SOUTH AFRICA AND KENYA: A COMPARATIVE PERSPECTIVE

4.1 Introduction

In chapter three, the adverse effects of human rights violations on development in Lesotho were discussed. The chapter emphasises the critical importance of protecting fundamental rights for the purpose of promoting development. This chapter however, shifts focus to a comparative perspective on how South Africa and Kenya have successfully integrated human rights into their legal systems in promoting development. South Africa on the one hand, boasts extensive jurisprudence on how human rights play a role in advancing development, particularly through the justiciability of socio-economic rights. Kenya on the other hand has reinforced the right to development under the African Charter on Human and People's Rights by incorporating its principles into its domestic legislation to enhance development outcomes. The comparative perspective therefore, provides comprehensive strategies to Lesotho, that South Africa and Kenya have employed to leverage human rights as a catalyst for the promotion of development.

4.2 South Africa

South Africa has a history of racial discrimination and the denial of human rights under the apartheid system.⁴⁰⁸ The policies of the apartheid system left a legacy of inequality and poverty, which has been accompanied by low economic growth.⁴⁰⁹ The apartheid system provided health, education and other services to the white minority to the detriment of the black people.⁴¹⁰ Additionally, the system embedded labour market policies that protected the positions through

⁴⁰⁸ Dugard John, "International law and the South African Constitution" (1997) 1 *European Journal of International Law*, 77.

⁴⁰⁹ Mubangizi John C. and Mubangizi Betty C, "Poverty, human rights law and socio-economic realities in South Africa" (2005) 22 (2) *Development Southern Africa* 278.

⁴¹⁰ *Ibid.*

different policies.⁴¹¹ This racial segregation promoted unequal distribution of resources, resulting in a larger sector of the population relegated to poorly paid jobs.⁴¹²

The denial of human rights under the apartheid regime violated the UN Charter and the human rights standards such as non-discrimination and self-determination that were created by the Post-World War II order.⁴¹³ This consequently, placed South Africa in direct conflict with international law, and lead to it being recognised as a pariah state worldwide.⁴¹⁴ At the domestic level, treaties were hardly recognised while, customary international law was selectively applied in political matters.⁴¹⁵ Nonetheless, in 1994, South Africa transitioned to democracy and this marked a significant shift towards appreciating international law into its legal system.⁴¹⁶ Today, South Africa is a democratic state that has embraced and entrenched human rights and equality within its constitutional framework.⁴¹⁷

4.2.1 Adherence to the International Legal Framework

Like Lesotho, South Africa is a signatory to a plethora of international treaties.⁴¹⁸ These include, but are not limited to the International Covenant on Civil and Political Rights,⁴¹⁹ the International Covenant on Economic, Social and Cultural Rights,⁴²⁰ the Convention on the Elimination of all Forms of Discrimination Against Women,⁴²¹ the Convention Against Torture and Other Cruel,

⁴¹¹ These policies include job reservation, anti-discriminatory legislation such as Group Areas Act No. 41 of 1950. See Mubangizi (n 409).

⁴¹² Ibid.

⁴¹³ Dugard (n 408) 77.

⁴¹⁴ A pariah state refers to a nation which is not recognised in the international community. See Dugard (n 1). See also Harkavy, Robert E. "Pariah States and Nuclear Proliferation" (1981) 35 (1) *International Organisation* 135 <https://jstor.org/stable/2706559/> accessed 09 April 2025.

⁴¹⁵ Dugard (n 408) 77.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Gowar Christin, "The status of International Treaties in the South African Domestic Legal System: Small steps towards harmony in light of Glenister?" (2011) 36 *SAYIL*, 308. See also Vienna Convention on the Law of Treaties of 1969, art 26.

⁴¹⁹ International Covenant on Civil Political and Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁴²⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁴²¹ Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Inhuman or Degrading Treatment or Punishment,⁴²² and the Convention on the Elimination of All forms of Racial Discrimination,⁴²³ among others.

International law plays an important part in South African law, predominantly within the framework of the 1996 Constitution.⁴²⁴ Sections 231 and 232 for instance, provide a mechanism for the direct application of international law.⁴²⁵ The courts and tribunals are also required in terms of section 39 (1) (b) to consider “international law when interpreting the bill of rights”.⁴²⁶ Notwithstanding, the legislative guidance on the status and effect of international treaty obligations in national legal systems has remained a multifaceted issue.⁴²⁷

Previously, the South African Constitutional Court in the landmark cases of *Soobramoney v Minister of Health*,⁴²⁸ *Khosa and Others v Minister of Social Development*⁴²⁹ was reluctant to explore the relevance of international human right law in its decisions. In the *Port Elizabeth Municipality v Various Occupiers* case,⁴³⁰ the Court made a momentary reference to international law, seemingly only to comply with the obligation to consider such, without any well considered reasoning on its relevance to the decision.⁴³¹

Contrary to the previous cases, the Constitutional Court in the recent case of *Glenister v President of the Republic of South Africa*,⁴³² made a clear reference to international law. In this case, the Court embarked on a liberal consideration of the role of international agreements in the

⁴²² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁴²³ Convention on the Elimination of All Forms of Racial Discrimination (Adopted 21 December 1965, entered into force on 4 January 1969) 660 UNTS 1.

⁴²⁴ Kapindu Redson Edward, *The Role of International Law in the Enforcement of Socio-economic Rights in South Africa* (Community Law Centre University of the Western Cape 2009) 26.

⁴²⁵ Section 231 notes that South Africa continues to adopt a dualist approach to international law in respect of application of international agreements. Additionally, the section highlights that such law shall be considered the law of the republic to the extent that it is consistent with the constitution or any Act of the Parliament. Section 232 on the other hand vests the executive with the responsibility to negotiate and sign international agreements whose ratification has received prior approval of the Parliament. See Constitution of the Republic of South Africa 1996, s 231 and a 232.

⁴²⁶ Constitution of the Republic of South Africa 1996, s 39 (1) (b).

⁴²⁷ Gowar (n 418) 308. See also *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

⁴²⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* (1998) 1 SA 765 (CC); (1997) (12) BCLR 1696.

⁴²⁹ *Khosa v Minister of Social Development* (2004) ZACC 11 SA 505 (CC).

⁴³⁰ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

⁴³¹ Kapindu (n 424).

⁴³² *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

interpretation of the state's constitutional duties, paving way for the domestic enforcement in certain instances, of the human rights enshrined in international human rights instruments.⁴³³ In doing so, the dualist approach was abandoned and the monist approach has gained momentum, enhancing harmony between international human rights framework and the national legal system. Monism is highly favoured as it is observed that the courts will no longer merely appraise international law when interpreting the bill of rights but also adhere to international obligations.⁴³⁴ The shift will develop the state's constitutional duty to "respect, promote and protect these rights", allowing individuals to rely on a wider range of obligations to enforce their rights.⁴³⁵

Similarly, in Lesotho, there is a marked shift towards monist legal approach. This has been marked by recent cases of *Molefi Tšepe v IEC*⁴³⁶ and *Fuma v Commander LDF*⁴³⁷ which marked international human rights instruments as foundational basis of rights for the people.⁴³⁸ This approach discards the formerly adopted theory of dualism which maintained a clear separation between international law and local law, reinforcing the requirement that for legal effect and validity, international treaties should be domesticated before they become enforceable at the national level. However, Shale has argued that the position of Lesotho transcends beyond the "monist-dualist dichotomy" and instead suggests a flexible approach that protects human rights regardless of whether these norms are contained in international or local law.⁴³⁹ Nonetheless, there has been no constitutional legislation that explicitly endorses the monist dichotomy as the new approach, the current stance is solely shaped by case law.

4.2.2 Compliance with Customary International law

Customary international law comprises of codified or uncodified rules that define the universal concept of justice.⁴⁴⁰ Customary international law is inherently binding on all states irrespective of whether a treaty exists or not.⁴⁴¹ The application of customary international law in South African

⁴³³ Gowar (n 418) 325.

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ *Molefi Tšepe v IEC* CIV/APN/135/2005 [2005] LSHC 96.

⁴³⁷ *Fuma v Commander LDF* Cons Case 08/2011 [2013] LSHC 68.

⁴³⁸ Shale (n 110) 217.

⁴³⁹ Ibid, 193.

⁴⁴⁰ Ngang Carol Chi, "Right to Development in Africa and the Common Heritage" (2020) 45 (1) *Journal for Juridical Science*, 30.

⁴⁴¹ Ibid.

law is provided for in section 232 of the Constitution. In terms of this section, customary international law is considered applicable in the Republic to the extent that it is consistent with the Constitution or any other Act of Parliament.⁴⁴² This demonstrates that South Africa adopts a conventional practice as other dualist common law jurisdictions wherein, customary international law inherently forms part of the domestic law, unless it is inconsistent with the Constitution or any national legislation.⁴⁴³

4.2.3 Adherence to the Regional Legal Framework

At the regional level, South Africa has ratified *inter alia* the African Charter on Human and Peoples' Rights,⁴⁴⁴ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁴⁴⁵ These international instruments, enshrine the right to development, collectively framing development as a participatory process that is both equitable and inclusive.⁴⁴⁶ Central to this discussion is the right to development as enshrined in article 22 of the African Charter on Human and Peoples' Rights.⁴⁴⁷ The Declaration on the Right to Development, although not a legally binding instrument, is used as a model for providing emphasis of the state's dual role as a duty and a right to create an enabling environment for the realisation of the right to development.⁴⁴⁸ This instrument obliges the state to take practical measures, which are characterised by transparency and accountability to ensure equitable access to opportunities by all people.⁴⁴⁹

⁴⁴² Constitution of the Republic of South Africa 1996, s 232.

⁴⁴³ Edward (n 424) 25.

⁴⁴⁴ African Charter on Human and Peoples' Rights (adopted 9 July 1996, entered into force 21 October 1986).

⁴⁴⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (African Women's Protocol).

⁴⁴⁶ The right to development is only legally binding in the African Charter on Human and Peoples' Rights.

⁴⁴⁷ By ratifying the African Charter on Human and Peoples' Rights, South Africa affirmed that the disparate populations, segregated by previous laws of apartheid were now equally entitled to the right to development. See Ngang, Carol Chi "Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order" (2019) 35 (1) *South African Journal on Human Rights*, 44.

⁴⁴⁸ Declaration on the Right to Development (adopted 4 December 1986 UNGA Res41/128).

⁴⁴⁹ Ray B, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's New Wave* (Cambridge University Press 2016) 11. See also Ngang Carol Chi, "Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order" (2019) 35 (1) *South African Journal on Human Rights*, 29.

The right to development in South Africa is an implied entitlement under the South African constitutional framework.⁴⁵⁰ That is, the right to development is not formally enshrined in the Constitution but it is rather read/interpreted through the Bill of rights, which covers civil, political, social, economic, cultural and environmental rights.⁴⁵¹ Similarly, the right to development in Lesotho is not enshrined the constitution either, but is rather shaped by its national development goals and policies.⁴⁵² A challenge often posed by the absence of the right to development in either countries' constitutional frameworks is that there is a lack of clear, enforceable and legal basis for individuals to claim this right.⁴⁵³ This leads to situations where the right to development is interpreted through existing rights or policies, making its implementation subject to the availability of resources and the effectiveness of governmental policies instead of enforceable legal obligations.⁴⁵⁴

Moreover, South Africa's journey towards the realisation of the right to development has been noted to be marred by both progress and persistent challenges, for instance, the government has initiated the Expanded Public Works Programme and other skills development initiatives as a means to address unemployment and poverty.⁴⁵⁵ Nonetheless, these measures often provide short term reliefs without addressing the systemic issues that perpetuate deep rooted inequalities left by the legacies of apartheid and colonialism.⁴⁵⁶ These inequalities have left a significant portion of the population marginalised and disadvantaged, with limited access to resources, opportunities and services.⁴⁵⁷

⁴⁵⁰ Ngang Carol Chi, "Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order" (2019) 35 (1) *South African Journal on Human Rights*, 25-49.

⁴⁵¹ Jonas Ben Sibanyoni, "Regional Consultation on the Practical of the Right to Development: Identifying and Promoting Good Practices" (2010) South African Human Rights Commission, 1.

⁴⁵² See generally the National Strategic Development Plan (NSPD II).

⁴⁵³ With South Africa, the challenge with the indirect articulation of the right to development in the Bill of rights is that it can be open to various interpretations and continue to be contested. See Sibanyoni (n 451) 1.

⁴⁵⁴ Fabosi S.C, "The Protection of Human Rights in South Africa: Unpacking the Duty of State to Realise the Right to Development" (2024) 27 (1) *Potchefstroom Electronic Law Journal (PELJ)*. See also Sibanyoni (n 454) 2.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ There is a predominant division of black and white townships. Whites remain in suburbs and blacks are confined to poor overcrowded townships and informal settlements with limited access to economic opportunities. See Fabosi (n 454). See also World Bank Group, *An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa* (University of Cape Town Press 2018).

It is imperative that the right to development must be explicitly recognised and incorporated in the constitutional framework to provide a stronger foundation for its enforcement.⁴⁵⁸ In this way, the right to development would be able to provide a holistic framework ensures that socio-economic rights are accessible to all persons.⁴⁵⁹

4.2.4 Constitution of the Republic of South Africa 1996

The South African bill of rights is noted to be one of the most progressive and revolutionary bill of rights in the world.⁴⁶⁰ This is due to the fact that it comprises of all categories of human rights that are typically included in most international human rights instruments.⁴⁶¹ Civil and political rights, often referred to as first-generation rights and social, economic and cultural rights (second generation rights) and the right to a healthy environment (third generation rights) are enshrined as justiciable rights in the Constitution of South Africa. The difference between civil and political rights and socio-economic rights is that the former are negative in nature, placing the negative duty/obligation on the state not to interfere with the rights and freedoms of individuals, while the latter refers to the wellbeing of individuals and their enjoyment of an adequate standard of living.⁴⁶² Socio-economic rights require a greater investment from the state and other stakeholders that are obligated to ensure the full realisation of the rights.⁴⁶³

The bill of rights in the south African Constitution addresses some of the dreadful (atrocious) consequences of legally imposed inequalities of the past, such as land ownership.⁴⁶⁴ Furthermore, since the constitution prohibits discrimination on the basis of race, sex and ethnic origin, in cases

⁴⁵⁸ Fabosi (n 454).

⁴⁵⁹ It is important to note that as much as South Africa's Constitution enshrines socio-economic rights in the bill of rights as justiciable rights, these rights often remain out of reach for many persons in South Africa due to systemic inequalities. Therefore, recognising the right to development in the constitutional framework, would assist in addressing a number of challenges South Africa faces.

⁴⁶⁰ Mubangizi John Cantius, "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" (2006) 1 *African Journal of Legal Studies*, 2.

⁴⁶¹ Ibid.

⁴⁶² Ramkissoon Yuri, "The Importance of Realising Economic and Social Rights in Alleviating Poverty and Ensuring Transformation: Reflections on the functions of South African Human Rights Commission" (2016) 17 (1) *ESR Review*, 3.

⁴⁶³ For example, ensuring access to healthcare is the basic obligation in relation to the right to health.

⁴⁶⁴ Given this context, public interest lawyering under apartheid consisted mainly of exploiting the loopholes in racially discriminatory legislation in matters such as land, and housing or in repressive security legislation, or utilising the principles of administrative law to mitigate the worst excesses of apartheid legality. Liebenberg Sandra, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co. Ltd 2010) 6.

See also Klug Heinz, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010) 116.

of alleged discrimination on any of the grounds, the burden of proof is shifted onto those who deny that the prima facie effect of discrimination was not the consequence of their actions.⁴⁶⁵ The constitutional protections are not limited to relations between the state and individuals but are applied to both governmental and private conduct, with the constitution mandating the legislature to enact laws to prevent or prohibit unfair private discrimination.⁴⁶⁶

Fundamental rights and freedoms are included in the bill of rights in chapter 2 of the Constitution of South Africa.⁴⁶⁷ The applicability of socio-economic rights is reinforced by section 8 which mentions the extent to which the rights are applicable and who the subjects to such rights are. Moreover, the state is mandated in terms of section 7(2) to “respect, promote, protect and fulfil” the rights as enshrined in the Constitution.⁴⁶⁸ The bill of rights in this respect applies to all laws and is binding on all branches of the government and organs of the state.⁴⁶⁹ This happens because human rights encompass an overriding importance as a matter of policy and law.⁴⁷⁰ The Constitution of South Africa is henceforth, considered a benchmark for constitutional protection and the judicial enforcement of socio-economic rights.⁴⁷¹ These socio-economic rights have direct bearing on poverty.⁴⁷²

Contrarily, the Constitution of Lesotho is drastically different from that of South Africa. For instance, it categories civil and political rights as fundamental justiciable rights, then socio-economic rights are categorised in a different chapter as principles of state-policy.⁴⁷³ These rights

⁴⁶⁵ Ibid.

⁴⁶⁶ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted to fulfil this constitutional mandate. This Act is a wide-ranging statute that aims to eradicate social and economic inequalities, “especially those that are systematic in nature, which are generated in our history by colonialism, apartheid and patriarchy and which brought pain and suffering to the great majority of our people”. See Klug (n 475) 116.

⁴⁶⁷ The Constitution of the Republic of South Africa Act 108 of 1996.

⁴⁶⁸ The inference here is that the state must not only refrain from interfering with the enjoyment of rights but must also act in ways that protect, enhance and realise the enjoyment of these rights. This may be achieved in a number of ways, for instance, the state through its legislature may enact relevant enabling legislation, it may through the executive and state administration adopt necessary policies and make appropriate administrative decisions. Mubangizi (n 409) 6.

⁴⁶⁹ Bentley Kristina, “Women’s Human Rights & the Feminisation of Poverty in South Africa” (2004) 100 *Review of African Political Economy*, 249. The constitution enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

⁴⁷⁰ Ibid.

⁴⁷¹ Mubangizi (n 409) 2.

⁴⁷² Ibid, 282.

⁴⁷³ Theoha Maiketso Edward, “Realising the Right to Education in Lesotho” (Master of Laws, University of Pretoria, 2011) 15.

are in this respect unenforceable in courts and are only subject to Lesotho's economic capacity and development constraints.⁴⁷⁴

4.2.5 Socio-Economic Rights

Historically, there has been enormous contribution by academic and public interest law practitioners to the bill of rights debate.⁴⁷⁵ Socio-economic rights were initially proposed to be included in the bill of rights as principles of state policy. The argument advanced in this regard was that the inclusion of socio-economic rights as justiciable rights would force the courts to “dictate on budgetary questions to the executive and legislative branches of the government”.⁴⁷⁶ Additionally, socio-economic rights were argued to address complex issues that the courts were institutionally not well equipped to address.⁴⁷⁷ Even so, there was a strong civil society support by academics, NGOs, trade unions, and women organisations for the inclusion of socio-economic as justiciable rights.⁴⁷⁸ These groups collectively campaigned for the inclusion of socio-economic rights in the Constitution of South Africa.

Subsequently, socio-economic rights were included in the bill of rights in the 1996 Constitution, marking the finale of a process of the struggle to recognise socio-economic proportions of human dignity, and equality.⁴⁷⁹ Motivated by the anti-apartheid struggle, socio economic rights were regarded to integrate a holistic bill of rights, which would reflect the need and aspirations of all groups in South Africa, and do away with all the discrimination that was present under the apartheid regime.⁴⁸⁰ It was hoped that with this inclusion, participatory democracy would be enriched, enabling persons marginalised by poverty to challenge both decisions and omissions that

⁴⁷⁴ Ibid.

⁴⁷⁵ Corder Hugh, Kahanovitz Steve and Murphy John, “A Charter for Social Justice: Contribution to the South African Bill of rights Debate” (1992) *South African Law Commission Project*, 18-21. See also Sandra (n 314) 2.

⁴⁷⁶ Liebenberg Sandra, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co. Ltd 2010) 12.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid, 18.

⁴⁷⁹ Sandra (n 476) 21.

⁴⁸⁰ Apartheid represented not only the exclusion of the black population of South Africa, but also an institutionalised system which maintained white dominance and privilege in the political, economic, social and cultural spheres. This was achieved at the expense of the black population who were deprived of access to land, subjected to underdevelopment in economically marginal reserves and homelands’ and systematically discriminated against in their access to a range of social services and resources. Liebenberg (n 476) 2.

have an impact on their socio-economic well-being.⁴⁸¹ Likewise, the inclusion of socio-economic rights as justiciable rights gave an express mandate for adoption of legislation and programs that are aimed at achieving a more equitable distribution of social and economic resources and services to everyone including marginalised communities.⁴⁸²

As previously stated, the debate on enforceability of socio-economic rights is premised on the availability of resources. These rights have important social and economic dimensions as most of them reflect key necessities and access to particular goods and services.⁴⁸³ States and various scholars when discussing international human rights, make various references to resource constraints.⁴⁸⁴ This idea echoes the recognition that the state's obligation to take appropriate measures is evaluated on account of financial resources and/or its ability to engage in international cooperation.⁴⁸⁵

The issue of availability of resources has been cited in most cases as a barrier to the realisation of socio-economic and cultural rights. The Constitutional Court has however rejected the state's argument in this respect and in doing so, agrees with the UN Committee on Economic, Social and Cultural Rights.⁴⁸⁶ The United Nations Committee on Economic, Social and Cultural Rights has warranted that for justification of failure by each member state to meet its obligations due to resource constraints, such a state must be able to demonstrate extensive effort was made to use all available resources to satisfy its pivotal obligations.⁴⁸⁷

The courts adjudicate on socio-economic rights through their inherent authority to interpret legislation and develop the rules of the common law, and lastly by adjudicating over constitutional and other challenges to provide measures that are intended to advance those rights.⁴⁸⁸ Moreover, the Constitution of South Africa envisages enforceability of socio-economic rights. The judiciary

⁴⁸¹ Sandra (n 476) 21.

⁴⁸² Sandra (n 476) 21.

⁴⁸³ Mubangizi (n 409) 118.

⁴⁸⁴ Waris Attiya and Latif Laila Abdul, "Financing the Progressive Realisation of Socio Economic Rights in Kenya" (2015) 8 (1) *University of Nairobi Law Journal*, 3.

⁴⁸⁵ Ibid.

⁴⁸⁶ See General Comment 3, The nature of States party's obligations (Art 2 para 1 of the CESCR) (5th Session, 1990)

⁴⁸⁷ Mubangizi (n 409) 3.

⁴⁸⁸ Brand D, "Introduction to socio-economic rights in the South African constitution" in Brand, D. and Heyns, C. (eds) *Socio-economic Rights in South Africa* (Pretoria University Law Press 2005) 3. See also Mubangizi (n 409) 6.

bears a significant role in the enforcement of these rights by ensuring that they are upheld.⁴⁸⁹ The evolving jurisprudence on socio-economic rights is not only important for future litigation at enforcement of socio-economic rights, but also in shaping the adoption and implementation of policies and legislation by the government in accessing them.⁴⁹⁰ If courts interpret socio-economic rights too narrowly, or impose weak obligations on the government, these socio-economic rights may not be comprehensively protected as other rights in the bill of rights.⁴⁹¹

The constitution of African countries reveals three broad constitutional models that ensure the protection of constitutional rights.⁴⁹² The first model is the direct constitutional model, the second model does not include the protection of socio-economic rights and the third model is referred to as the hybrid model wherein socio-economic rights are categorised under directive principles of state policy.⁴⁹³ South Africa adopts the first model, which ensures the direct protection of constitutional rights, socio-economic rights included. Contrarily, Lesotho, adopts the hybrid model, which classifies socio-economic rights as directives of state policy.

4.2.6 Case Law

A significant number of cases involving socio-economic rights have been brought before the Constitutional Court. However, the framework within which the enforcement of these socio-economic rights is assessed is through four important Constitutional Court decisions.

4.2.6.1 Soobramoney v Minister of Health, KwaZulu-Natal⁴⁹⁴

The *Soobramoney* case was the first socio-economic rights litigation to be adjudicated by the Constitutional Court of South Africa. The issue in this case was whether a public hospital in failing to provide renal dialysis service to a terminally ill man who suffered from diabetes, and cerebro-

⁴⁸⁹ Liebenberg (n 476) 160.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Chirwa D.M and Chenwi L, “The Protection of Economic, Social and Cultural Rights in Africa” in Chirwa, D.M. and Chenwi L (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press, 2016) 8.

⁴⁹³ Mashego Katlego Arnold, “The Full Enforcement of Socio-economic Rights in Africa: A Dream or a Reality?” (2024) 10 (1) *Athens Journal of Law*, 166.

⁴⁹⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* (1998) 1 SA 765 (CC); (1997) (12) BCLR 1696.

vascular disease violated his constitutional right to health.⁴⁹⁵ Soobramoney sought an immediate order directing the public hospital to provide the appellant with dialysis treatment and an interdict to direct the hospital to refrain from refusing his admission to the renal unit.⁴⁹⁶ In making its decision, the Court rejected Soobramoney's assertion that his illness required immediate remedial treatment. It noted that as much as Soobramoney's renal failure would need dialysis several times a week to prolong his life, his illness was an incurable one and the hospital's rational policy for scarce resources had to be considered.⁴⁹⁷ With this, the Constitutional Court held that the hospital did not breach Soobramoney's right to health as enshrined in section 27 (1) of the Constitution and the right to emergency medical treatment as provided for in section 27(3) of the Constitution of South Africa.

What is worth noting about the *Soobramoney* case is that a balance was struck between the recognition of socio-economic rights and legislative competence.⁴⁹⁸ Nevertheless, a number of criticisms were made on the judicial reasoning and approach of the court in this case. Several commentators have argued that the precedent set by this case neither made a meaningful contribution to the understanding of socio-economic rights nor did it provide important guidelines for the interpretation of socio-economic rights.⁴⁹⁹

4.2.6.2 Government of the Republic of South Africa v Grootboom⁵⁰⁰

This is a landmark case on the right to housing. A group of adults, including Irene Grootboom were left homeless following an eviction from their informal squatter dwelling. The settlement lacked amongst others, running water, electricity and was filled with sewerage. Because of these conditions, the group moved onto a private property reserved for low cost housing. Whilst under

⁴⁹⁵ Marks Stephen P, *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung 2008) 145.

⁴⁹⁶ Sambo Abdulfatai O. and Abdulkadir B, "Socio-Economic Rights for Sustainable Development in Malaysia: Lessons from Selected African Countries' Constitutions" (2011) 2 (19) *OIDA International Journal of Sustainable Development*, 19.

⁴⁹⁷ Soobramoney (n 505) para 21.

⁴⁹⁸ The court noted in para 29 that it shall not immediately interfere with rational decisions that have been taken in good faith by the political organs and medial authorities whose primary responsibility is to deal with such matters. See also Bazelon Emily, "After the Revolution", *Legal Aff.* 25, 28 (Jan/Feb 2003).

⁴⁹⁹ Ngwena, C and Cook R, "Rights Concerning Health" in Brand D. and Heyns C. (eds) *Socio-Economic Rights in South Africa* (Pretoria University Law Press 2005) 135 and 137.

⁵⁰⁰ *Government of the Republic of South Africa v Grootboom* (2000) (11) BCLR 789/1169 (CC).

the impression that the group was trespassing, the owner of the land obtained an eviction order against them. The situation was made worse when the local government bulldozed the occupant's houses and then buried the wreckage before the date set for eviction. The weather in which the group lost their homes was a cold, windy and rainy western Cape winter. Faced with the harsh circumstances, the group moved to a nearby municipal field and erected "flimsy" temporary structures, which were however, unable to protect them from the heavy rains. They then approached the municipality to request for assistance, which to their dismay, was declined.

The group sought a judicial order directing the government to provide them with temporary shelter, health care and other social services.⁵⁰¹ The court in making its judgement had to determine whether socio-economic rights were justiciable, their importance and observe the nexus between the government meeting the social needs and the people exercising their civil and political rights.⁵⁰² Socio-economic rights were held to be as equally important as all the other human rights since they are collectively included in the bill of rights, and their realisation is key to advancing equalities in the country.⁵⁰³ The Constitutional Court held that the measures employed by the government to provide systematic housing over a period of time were unreasonable, as there had been no provisional plans for temporary shelter of the homeless and destitute people; the Grootboom group could not obtain such housing for years given the housing backlog that was already existing.⁵⁰⁴ The court highlighted that the national housing programme fell short of providing mandatory obligations to the government to provide relief for those in desperate need.⁵⁰⁵ With this, the Court held that the state failed in performing its obligation as provided for in section 26 of the South Africa Constitution and additionally declared the state housing program as inconsistent with section 26 (1) of the Constitution.⁵⁰⁶

⁵⁰¹ Sambo (n 496) 18.

⁵⁰² Kende Mark S, "The South African Constitutional Court's Embrace of Socio-Economic rights: A Comparative Perspective" (2003) 6 (1) *Chapman Law Review*, 142-143.

⁵⁰³ *Ibid*, 143.

⁵⁰⁴ Sambo (n 496) 19. See also Kende (n 513) 144.

⁵⁰⁵ Grootboom (n 500) 66. See also Kende (n 513) 145.

⁵⁰⁶ Sambo (n 496) 18.

The significance of the *Grootboom* case is that it has demonstrated an “administrative law model” of the interpretation of socio-economic rights.⁵⁰⁷ The Court enquired beyond the inclusion of socio-economic rights in the bill of rights, not only forcing compliance with the constitutional provision but also providing a comprehensive framework on what compliance with the law entails.

4.2.6.3 *Van Biljoen v Minister of Correctional Services*⁵⁰⁸

This case involved a number of prisoners who were infected by HIV. The prisoners claimed, inter alia, their right to adequate medical treatment. The right to healthcare enshrined in section 27 of the Constitution of South Africa entitled them to the provision of expensive anti-retroviral medication. The applicants in this case highlighted that the right to adequate medical treatment was guaranteed in the Bill of rights. The appellants argued that the prison authorities could not cite lack of funds and refuse to provide treatment which was medically indicated. The high court was of the view that the cited lack of funds could not be an answer to a prisoner’s constitutional claim to adequate medical treatment. The court ordered the respondents to supply the prisoners with a combination of anti-retroviral medication for as long as the medication continued to be prescribed.⁵⁰⁹

Similarly, in the case of *Minister of Health v Treatment Action Campaign and Others*,⁵¹⁰ when determining the justiciability on the right to health, the court held that the government’s policy and measures to “prevent mother-to-child transmission of HIV at birth” did not comply with sections 27 (1) and (2) of the constitution. The court ordered that the state should freely distribute the required medication.

4.2.6.4 *Khosa v Minister of Social Development*⁵¹¹

This case emphasised that socio-economic rights should be interpreted in the manner that maximises their enjoyment so that the benefits are equally distributed to a number of people.⁵¹² In

⁵⁰⁷ Sunstein Cass R, *Designing Democracy: What Constitutions Do*, (Oxford University Press 2001) 234. See also Mark (n 69) 145.

⁵⁰⁸ *Van Biljoen v Minister of Correctional Services* (1997) (6) BCLR 789 (c).

⁵⁰⁹ Sambo (n 496) 18.

⁵¹⁰ *Minister of health v Treatment Action Campaign and Others* (2002) 5 SA 703 (CC).

⁵¹¹ *Khosa v Minister of Social Development* (2004) ZACC 11 SA 505 (CC).

⁵¹² Allsop Geoffrey, “Socio-Economic Rights” in *Constitutional Law for Students* (2020) 514.

the case, a number of indigenous permanent residents and their children were in terms of the Social Assistance Act,⁵¹³ excluded from accessing social services. The Constitutional Court in this respect, had to determine whether the legislation that excluded permanent residents from accessing social services violated their constitutional rights to social security and their freedom from discrimination. The Constitutional Court in making its judgement, noted that the founding constitutional values of dignity and equality mean that socio-economic rights have to be interpreted in such a way that ensures all person live in conditions consistent with human dignity⁵¹⁴ and also in a way that enables everyone to meaningfully exercise all their civil and political rights.

The above cases are just few out of a vast jurisprudence on the judicial enforcement of socio-economic rights in South African law.⁵¹⁵ In essence, the inclusion of socio-economic rights in the bill of rights has been crucial in promoting development and ensuring human dignity. By guaranteeing access to healthcare and education, individuals are empowered to achieve their full potential and their standards of living are improved. The courts have also delved in progressive interpretation of these rights, emphasising that socio-economic and civil and political rights are mutually dependent. The courts have also ensured the enforcement of these rights even against resource constraints, fostering accountability and inclusivity amidst challenges such as inequalities and poverty.

4.3 Kenya

Kenya is an African country with an average population of 37 million.⁵¹⁶ It gained independence from British colonial rule in 1963.⁵¹⁷ At Independence, Kenya adopted the common law system of governance.⁵¹⁸ Thus, Kenyan courts and the legal system lean more towards the English common law than it did during the British colonial rule.⁵¹⁹ The shift was motivated by the fact that under colonial rule, the common law was primarily reserved for the English and expatriates.⁵²⁰ Soon after

⁵¹³ Social Assistance Act 59 of 1992.

⁵¹⁴ Liebenberg Sandra, "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR*, 1.

⁵¹⁵ Mubangizi (n 409) 6-7.

⁵¹⁶ Owino Jacob Catwright, "The African Charter on Human and People Rights, A Critical Analysis on the Human Rights Record in Kenya" (Bachelor of Law Kampala International University, 2011) 43.

⁵¹⁷ *Ibid.*

⁵¹⁸ Joireman Sandra F, "The Evolution of the Common Law: Legal Development in Kenya and India" (2006) 68 *Political Science Faculty Publications*, 14.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

independence, Kenya became a one-party state (republic).⁵²¹ The multiparty democratic system was subsequently, reintroduced in 1991 and elections were held in December 1992.⁵²²

In 2010, Kenya enacted a new constitution, which among other things, aims at addressing historical injustices by enhancing human rights protections and integrating international law into the Kenyan domestic legal system.⁵²³ The Constitution demonstrates a transformative shift which guarantees a democratic governance structure that promotes inclusivity and accountability to the public.⁵²⁴

4.3.1 Theories of Incorporation

The theories of incorporation refer to different theories that determine whether international law and municipal law are classified as a single conception of law or whether these laws are independent to each other.⁵²⁵ These theories are namely monism and dualism. Monism is a system where international law is directly incorporated into domestic law without any condition for prior enabling legislation.⁵²⁶ The effect of this is that, international law, does not only override domestic law but also determines the content of domestic law.⁵²⁷ The landmark case of *David Ndonga Maina v Zipporah Wambui Matara*⁵²⁸ introduced a change of the legal system of Kenya from dualism to monism.⁵²⁹ In this case, the high court confirmed that in terms of article 2 (6) of the Constitution of Kenya,⁵³⁰ the international conventions that Kenya has ratified become a part of the sources of Kenyan law.⁵³¹ Article 2 (6) the Kenyan Constitution was thus, in line with the Committee on Economic, Social and Cultural Rights General Comment that recommends the “immediate and direct application of binding international instruments in the domestic legal systems to enhance

⁵²¹ Owino (n 516) 24.

⁵²² Ibid.

⁵²³ The Constitution of Kenya 2010, art 2(6).

⁵²⁴ Mutua M, “Kenya’s Quest for a New Constitution” (2012) 56 (1) *Journal of African Law*, 1-15.

⁵²⁵ LawBhoomi, “Important Theories of Under International Law” (LawBhoomi, 8 June 2021) <https://lawbhoomi.com/importatnt-theories-of-under-international-law/> accessed 18 April 2025.

⁵²⁶ Orago, Nicholas Wasonga “Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution” (LLD University of the Western Cape, South Africa, 2013) 40. See Gibson W.M, “International law and Colombian constitutionalism: A note on monism” (1942) 36 (4) *The American Journal of International Law*, 614. See also Slyz G, “International law in national courts” (1995-1996) 65 *New York Journal of International Law and Politics*, 67.

⁵²⁷ Ibid.

⁵²⁸ *David Ndungo Maina v Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, KEHC 4136 (KLR). See also *David Njoroge Macharia v Republic*, Criminal Appeal No. 497 of 2007, 15

⁵²⁹ Orago (n 526) 39.

⁵³⁰ Constitution of Kenya 2010, art 2 (6).

⁵³¹ Orago (n 526) 39.

the ability of individuals to seek effective, accessible, affordable and timely enforcement of their right in domestic courts and tribunals”.⁵³² The applicability of international law in the Kenyan legal system is observed in terms of articles 2(5) and (6) of the Kenyan Constitution which, integrates customary international law and ratified treaties in the legal system of Kenya.⁵³³

4.3.2 International Law in Kenyan Legal Framework

The government of Kenya has ratified numerous treaties and conventions over the past decades.⁵³⁴ After these treaties are ratified, the state cannot enforce or implement any new legislation related to that treaty until the Parliament enacts relevant laws to give effect to the treat within the domestic legal system.⁵³⁵ In cases where discrepancies exist between treaties and domestic law, reservations are made within the instruments.⁵³⁶ International legal instruments become enforceable in Kenya after they are incorporated into the constitution under Article 2 (6).⁵³⁷ These treaties include the International Covenant on Civil and Political Right,⁵³⁸ the International Covenant on Economic, Social and Cultural Rights,⁵³⁹ the Convention on the Elimination of All Forms of Discrimination against Women,⁵⁴⁰ the Convention on the Rights of the Child,⁵⁴¹ the Convention on the Rights of Persons with Disabilities⁵⁴² the International Labour Organisation Conventions,⁵⁴³ the African

⁵³² CESCR, General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 4 <https://www.unhcr.org/refworld/docid/47a7079d6.html> accessed 11 April 2025. See also Orago (n 526) 39.

⁵³³ Orago (n 526) 34.

⁵³⁴ Elder Brent C, “Right to Inclusive Education for Students with Disabilities in Kenya” (2015) 18 (1) *Journal of International Special Needs Education*, 18-28

⁵³⁵ Ibid.

⁵³⁶ Ibid.

⁵³⁷ Owino (n 516) 28.

⁵³⁸ International Covenant on Civil and Political Rights (adopted on 1 May 1972, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵³⁹ ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, accented to by Kenya on the 1 May 1972.

⁵⁴⁰ CEDAW (adopted 18 December 1979 and entered into force on 3 September 1981, accented to by Kenya on 9 March 1984) 1249 UNTS 13.

⁵⁴¹ CRC (Adopted 20 November 1989. Entry into force 2 September 1990, in accordance with article 49. Ratified by Kenya on the 30 July 1990) See, Orago (n 526) 288.

⁵⁴² CRPD (adopted 24 January 2007, signed by Kenya on 30 March 2007, ratified on 19 May 2008) 2515 UNTS 3.

⁵⁴³ Kenya has ratified 49 ILO Conventions, 43 of which are in force and 6 have been denounced. Some of the Conventions in force include: The Forced Labour Convention, 1930 (No. 29); The Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); and, Worst Forms of Child Labour Convention, 1999 (No. 182).

Charter on Human and Peoples' Rights⁵⁴⁴ and its Protocol on the Rights of Women in Africa,⁵⁴⁵ and, the African Charter on the Rights and Welfare of the Child.⁵⁴⁶ Through the adoption of the 2010 Constitution, the provisions of these international human rights instruments have been incorporated into the Kenyan domestic legal framework in terms of articles 2(5)⁵⁴⁷ and (6)⁵⁴⁸ of the Constitution.

4.3.3 Regional Legal Framework

The African Charter on Human and People's Rights was formed under the auspices of the African Union.⁵⁴⁹ The African Charter on Human People's Rights is the only human rights instrument that incorporates the right to development as a binding legal entitlement.⁵⁵⁰ Other instruments that incorporate the right to development include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁵⁵¹ and the African Youth Charter.⁵⁵² The Protocol affirms women's right to fully enjoy development and obliges member states to ensure that women "have equitable access to resources, nutritious food, and a healthy environment, as well as to eliminate all forms discrimination that hinders women's development".⁵⁵³ Likewise, the African Youth Charter recognises the right of the youth to development, emphasising access to education and participation in economic and social life which is essential for the youth empowerment and the continents' progress.⁵⁵⁴

⁵⁴⁴ ACHPR (adopted 1 June 1981 and entered into force on 21 October 1986, entered into force 23 January 1992). See, Orago (n 526) 289.

⁵⁴⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, ratified by Kenya 6 October 2010) (African Women's Protocol).

⁵⁴⁶ ACRWC (Adopted 1 July 1990 and Ratified by Kenya on 25 July 2000).

⁵⁴⁷ The Constitution of Kenya 2010, art 2(5) provides that "the general rules of international law shall form part of the law of Kenya".

⁵⁴⁸ The Constitution of Kenya 2010, art 2 (6) provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

⁵⁴⁹ Zubeida Abdinasir Sheik, "The legal perspective of human rights and Development in Kenya" (Masters Degree in International studies, at the Institute of Diplomacy and International Studies (IDIS) University of Nairobi, 2020) 51.

⁵⁵⁰ Kanga Serges Alain Djoyou, "The right to development in the African human rights system: The Endorois case" 2011 *De Jure*, 386.

⁵⁵¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (African Women's Protocol), art 19.

⁵⁵² African Youth Charter (adopted 2 July 2006, entered into force on 8 August 2009) art 10. https://au.int/sites/default/files/treaties/7789-treaty-0033-african_youth_Charter_e.pdf/ accessed 18 April 2025.

⁵⁵³ African Women's Protocol (n 551) art 19.

⁵⁵⁴ African Youth Charter (n 552) art 10.

4.3.4 Domestic Legal Framework

In the Constitution of Kenya 2010, the general rules of international law, treaties and conventions that Kenya has ratified are recognised to form part of domestic law in Kenya.⁵⁵⁵ The bill of rights in the Kenyan Constitution sets out numerous fundamental rights and freedoms with caution that it does not exclude other rights and fundamental freedoms which are recognised by law, such as the right to development.⁵⁵⁶ This signifies that the right to development, provided for in the United Nations Declaration on the Right to Development⁵⁵⁷ and the African Charter on Human and People's Rights,⁵⁵⁸ is a fundamental right which recognised and enforceable in the Kenyan law.⁵⁵⁹

Accordingly, the international legal obligations established by the United Nations Declaration on the Right to Development and the African Charter are binding on all persons in Kenya, including the national and county governments.⁵⁶⁰ In contrast, the Constitution of Lesotho 1993, does not explicitly recognise the right to development as an enforceable right. It instead frames Socio-economic rights, which offer a closest mechanism to claiming development related rights, as principles of state policy rather than enforceable rights.⁵⁶¹ This does not only create challenges in the enforcement of the right to development by individuals at the national level but also demonstrates a failure by the state (Lesotho) to honour its international obligations.⁵⁶²

4.3.5 The Right to Development in Kenya

As previously stated, the right to development is enshrined in article 22 of the African Charter on Human and People's Rights.⁵⁶³ The article is considered to be both constitutive and instrumental, requiring the establishment of conditions favourable to development for all peoples.⁵⁶⁴ The

⁵⁵⁵ Munene Anthony Wambugu, "Public Participation and the Right to Development in Kenya", (2019) 7 (1) *ANULJ*, 64 <https://hdl.handle.net/10520/EJC-17f1e66883/> accessed 06 April 2025.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ UN General Assembly resolution 41/128, United Nations Declaration on the Right to Development, UN Doc. A/RES/41/128 (1986).

⁵⁵⁸ African Charter on Human and Peoples' Rights, adopted in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 Rev.5 (1981).

⁵⁵⁹ The Constitution of Kenya 2010. See also Munene (n 555) 65.

⁵⁶⁰ *Ibid.*

⁵⁶¹ Shale (n 110).

⁵⁶² Lesotho ratified the African Charter on Human and People's Rights, which enshrines the right to development as a legally binding right and mandates state parties to promote and protect this right for all people within their territories. See art 22(2) of the African Charter on Human and People's Rights.

⁵⁶³ Kenya ratified the African Charter on Human and Peoples' Rights on the 23rd January 1992.

⁵⁶⁴ Ngang (n 207) 38.

justiciability of the right to development was primarily adjudicated upon in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois case)*.⁵⁶⁵ In this case, after exhausting all local remedies, the Centre for Minority Rights Development, Minority Rights Group International and the Centre on Housing Rights and Evictions brought a case before the African Commission as representatives of the Endorois community.⁵⁶⁶ The Endorois alleged arbitrary eviction from their ancestral land at Lake Bogoria, located in Central Kenya in the 1970s for the land to be used the land they previously occupied to set up a national reserve and other tourist facilities.⁵⁶⁷ The indigenous Endorois community cited the forced eviction to be a violation of their right to freedom of conscience and religion,⁵⁶⁸ their right to property,⁵⁶⁹ their right to culture,⁵⁷⁰ the right to natural resources⁵⁷¹ and their right to development enshrined in the African Charter on Human and Peoples' Rights.⁵⁷²

In this case, public participation was observed to be of central importance as a human right mechanism for the realisation of the right to development.⁵⁷³ The 2010 Kenyan Constitution incorporates public participation by vesting all sovereign power in its people⁵⁷⁴ and declaring participation of the people as a valuable and inherent principle of governance.⁵⁷⁵ With this, the Constitution apparently establishes a different type of governance; a devolved government which gives “voice to the people” in respect of matters of governance, contrary to the pre-2010 centralised

⁵⁶⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 ILHR 3591 (ACHPR 2009).

⁵⁶⁶ Kamga (n 550) 382.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ African Charter on Human and Peoples' Rights, art 8.

⁵⁶⁹ *Ibid.*, art 14.

⁵⁷⁰ *Ibid.*, art 17.

⁵⁷¹ *Ibid.*, art 21.

⁵⁷² *Ibid.*, art 22.

⁵⁷³ Munene (n 555) 77.

⁵⁷⁴ The Constitution of Kenya 2010, art 1(1).

⁵⁷⁵ The Constitution of Kenya 2010, art 10 (2) (a). The High court in the case of *Re Mui Coal Basin Local Community* 2015) eKLR para 88, later affirmed importance of public participation as enshrined by the 2010 Kenyan Constitution by stating: “As our case law has now established, public participation is a national value that is the expression of the sovereignty of the people as articulated in Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence public participation is an established right in Kenya: a justiciable one – indeed one of the cornerstones of our new democracy. Our jurisprudence has firmly established that courts will strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed, it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy on matters of public interest as anathema to our democracy”. See Munene (n 555) 8-79.

system, which alienated people from participating in matters of governance.⁵⁷⁶ With the enactment of the 2010 Constitution, the devolved government was conferred with the obligatory duty to respect public participation as a fundamental mechanism in the promotion of the realisation of the right to development.⁵⁷⁷ Likewise, implementation of the right to development through public participation, is set out in the Constitution, and other domestic legislation. Enforcement of the right to development has however, been left in the hands of African courts and the Kenyan courts,⁵⁷⁸ with each case being decided on its own merits.⁵⁷⁹

Moreover, the fulfilment of human rights, including the right to development requires specific policies and programs, with corresponding resource allocation.⁵⁸⁰ This is crucial so as to establish the feasibility of the right and also, so that the obligations of duty-bearers can be specified.⁵⁸¹ In Kenya, the right to development applies to all individuals without discrimination on the basis of race or gender.⁵⁸² Furthermore, the Kenyan government has taken a duty to ensure that all persons (Kenyans) are included and fully consulted in development initiatives that affect them.⁵⁸³

The significance of the *Endorois* case is that it highlights a significant shift in the jurisprudence on collective rights, mainly the right to development. Contrary to earlier cases like the *Democratic Republic of the Congo v Burundi*⁵⁸⁴ and *Kevin Mgwanga Gumne et al v Cameroon* which also dealt with the right to development,⁵⁸⁵ the *Endorois* case clearly defined who “peoples” who are recognised indigenous communities as forming part of the category. For this reason, the Endorois peoples were recognised as legitimately entitled to effective protection under the African Charter Human People’s Rights. In making its judgement, the African Commission emphasised that the

⁵⁷⁶ Munene (n 555) 78.

⁵⁷⁷ The Constitution of Kenya 2010, art 174. See also y Munene (n 555) 79.

⁵⁷⁸ Munene (n 555) 82.

⁵⁷⁹ Each case is judged on its own merits since there is no certain prescription of what precisely amounts to effective participation. See Munene (n 555) 82.

⁵⁸⁰ Marks Stephen P (ed), *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung 2008) 8.

⁵⁸¹ Ibid.

⁵⁸² Sheik Zubeida Abdinasir, “The Legal Perspective of Human Rights and Development in Kenya” (Master of Laws in International studies, University of Nairobi, 2020) 47.

⁵⁸³ See generally the Holistic Productive Capacities Development Programme.

⁵⁸⁴ *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

⁵⁸⁵ *Kevin Mgwanga Gumne et al v Cameroon Communications*, 266/2003; 26th Annual Activity Report of the African Commission, Annex IV.

state/government has a duty to obtain prior informed consent of indigenous communities in decisions that affect their livelihoods.

Moreover, the *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek case)*⁵⁸⁶ is another significant case on the right to development. This case further reinforced the importance of the right to development in the African human rights jurisprudence. The case concerned the Ogiek community, a historically disadvantaged indigenous community in the Mau forest which was a victim of an eviction and forced relocation by the government of Kenya.⁵⁸⁷ Given the close relationship the Ogiek community had with their ancestral lands, the eviction constituted a substantial violation of their right to cultural, religious, social and economic development and freedom to live in their homeland.⁵⁸⁸ The Ogiek community was deprived of the resources in their territory and consequently, unable to enjoy their shared cultural, economic and social life in their ancestral land (Mau Forest). The eviction encompassed a series of other acts undertaken by the government since the colonial era. The rights alleged to have been breached, included articles 21 and article 22 of the African Charter relating to *inter alia*, the free disposition of wealth and natural resources for the benefit of societies, the right to receive fair compensation, the elimination of foreign forms of exploitation and the right to social and economic development.

Relating to article 21, the African Court noted that “it has already been recognised that the Ogieks have a number of rights to their ancestral land, and that presupposed their right of access to land. The violation came in respect of the eviction that deprived them of the right to enjoy and freely dispose of the abundance of food produced by their ancestral land”.⁵⁸⁹ As concerns article 22, the Court equally noted that, the Ogiek community was continuously evicted from the Mau forest without proper consulted, adversely affecting their “economic, social and cultural development”.⁵⁹⁰ The African Court in this case read the right to participation provided for in article 23 of the United Nations Declaration on the Rights of Indigenous Peoples into article 22 of

⁵⁸⁶ *African Commission on Human and Peoples' Rights v Republic of Kenya* Application No. 006/2012 (26 May 2017).

⁵⁸⁷ Focus Africa, “The forced eviction of the Ogieks indigenous people from their ancestral land in Kenya: The intervention of the African Court on Human and Peoples' Rights” (2017) 17 (2) African Human Rights Law Journal.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Focus Africa (n 598) 7.

⁵⁹⁰ *Ibid.*

the African Charter.⁵⁹¹ Article 23 of the United Nations Declaration on the Rights of Indigenous Peoples safeguards the right of indigenous peoples to actively determine and develop strategies for exercising their right to development. This includes being active in housing and other social and economic programs that affect the communities.⁵⁹² The African Court found that the right to development of the Ogiek community had been violated. The evictions from the Mau forest were carried without the government effectively consulting them in the development of social and economic programs thus, adversely affecting their economic, social and cultural development.⁵⁹³

It is worth noting that the Endorois case did not only set a precedent that mandated protection of the rights of indigenous communities, but also ensured a universal interpretation of the right to development, including its application to indigenous communities. In a nutshell, the above cases have laid the foundational principles upon which the right to development is based. Additionally, the inclusion of a key element to the right to development, namely public participation under article 174 of the Kenyan Constitution in the same human rights language as that in the African Charter efficiently enhances the enforcement of the right at the domestic level. However, progress on the right to development is hindered by the disregard and persistent violation of the law that guarantees sovereign natural resources ownership rights to the people of Africa and the denial of the right to equal enjoyment of the common heritage.⁵⁹⁴

4.4 Conclusion

The constitutional recognition and justiciability of socio-economic rights have successfully been linked to socio-economic and cultural development. Their inclusion in the bill of rights in the South African Constitution has enabled the development of a vast jurisprudence on how these rights address inequalities and poverty. In interpreting these rights, the courts have progressively devised obligatory mechanisms that oblige governments to enforce the rights and consequently, ensure realisation of the right to development. This includes obliging governments to take reasonable and progressive steps towards the realisation of these rights and balancing the immediate needs and long-term sustainability engendered by the rights. Additionally, in adjudicating on the right to

⁵⁹¹ Munene (n 555) 76.

⁵⁹² Ibid.

⁵⁹³ *Ogiek* case (n 597) para 210.

⁵⁹⁴ Ngang (n 207) 29.

development, the courts have also reinforced the interdependence of socio-economic rights with civil and political rights. This approach promotes human dignity⁵⁹⁵ and transformative constitutionalism.⁵⁹⁶

Regarding the right to development, the *Endorois* and *Ogiek Community* cases have established precedent on the interpretation of the right to development enshrined in the African Charter among other instruments. Since Kenya has adopted the African Charter into its national legislation, the rights of indigenous persons were accordingly protected. Both cases highlight the important principles of participation, inclusion and informed consent of the indigenous communities in development projects that affect their livelihoods. The forced evictions of the Endorois community from the Lake Bogoria area and the Ogiek Community from the Mau Forest violated their rights to land, natural resource ownership, property, culture and socio-economic development. The judgements in both cases emphasise the need for equitable treatment of all persons and recourse to a participatory framework for equitable benefit of all persons in development initiatives.

Finally, it can be drawn from the above that the Lesotho Constitution is in dire need of enforceable socio-economic rights. Socio-economic rights first have to be recognised in the Lesotho Constitution as justiciable and legally enforceable rights. What should then follow is the enforcement mechanism necessary for reinforcing their realisation. Adopting this approach will not only advance socio-economic development in Lesotho but also serve as a guide to policy makers, with the courts being able to intervene in instances where policies are not satisfactorily implemented. Also, the right to development may be reinforced by including the principles of informed consent and public participation into the Lesotho domestic legislation to facilitate inclusion of all Basotho in the decision-making processes regarding development initiatives that affect their livelihoods. The Constitution will in this respect, demonstrate a commitment to sustain the socio-economic development landscape in Lesotho.

⁵⁹⁵ Klare K, "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal on Human Rights*, 188. See also Van der Walt "A South African Reading of Frank Michelman's Theory of Social Justice" (2004) 19 *SA Public Law*, 255.

⁵⁹⁶ Liebenberg Sandra, "South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool to Challenging Poverty?" (2002) 2 *Law, Democracy & Development*, 159.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The critical issue in this study has been to determine how human rights violations affect development in Lesotho. In order to achieve this, chapter one has dealt with the general overview of the entire dissertation. It provides the background of the study, problem statement, relevance of study, objectives and research questions. The background determined the intricate nexus between human rights and development, critically analysing whether existing laws and policies are effective in addressing human rights violations to promote sustainable development goals. This chapter has highlighted that aspects such as customary laws, non justiciability of socio-economic rights are major catalysts to human rights violations which affect development outcomes. This study has further highlighted that despite Lesotho's ratification of numerous treaty instruments, the enforceability of these international instruments in national law remains subject to domestication. This has adversely affected the impact of these instruments in protecting human rights and promoting development. By examining these dynamics, the study demonstrates the effect of human rights violations on development intended to inform new reforms that address human rights violations and integrate human rights into development frameworks for inclusive development of the nation as a whole.

Chapter two deals with the general legal framework on human rights and development in Lesotho. It notes that Lesotho is a state party to a number of international human rights instruments. This normative approach was used to emphasise the significance of international human rights standards in promoting development and how adherence to international law has helped develop domestic law and the overall jurisprudence on the human rights-development nexus. Also, the chapter underscores the implications of strictly adhering to the monist-dualist dichotomy, demonstrating that Lesotho has through its ratification of international human rights treaties, effectively established binding commitments and is inclined to align its domestic laws and policies to these instruments.

The next chapter deals with human rights violations in Lesotho. Central to this study, is the complex interplay between cultural, social, economic and political factors that perpetuate human rights violations and abuses in Lesotho. Human rights violations such as police torture and brutality remain widespread, resulting in increased civil compensation claims against the government, which constitutes a significant burden on public resources. Also, customary law norms are recognised as justifiable limitations to the right of freedom from discrimination. This results in the exclusion of women from social, economic and political life. For instance, customary land laws largely favour married men to the exclusion of women and unmarried men, entrenching inequalities. Women are also often excluded from cultural inheritance practices and from succession to chieftainship. Socio-economic rights are classified as non-justiciable principles of state policy, which renders them unenforceable. This leaves individuals without judicial recourse to socio-economic rights thereby, undermining efforts to address poverty and inequalities, and hence, adversely affect development. Cumulatively, human rights violations and their underlying contributing factors creates a cyclical effect that undermines the human rights framework and impedes development in Lesotho.

Chapter four provides a comparative perspective between Lesotho as compared to South Africa and Kenya. With this comparison, the effects of human rights violations on development with respect to applicable legal frameworks that can mitigate these effects have been established. For instance, South Africa has constitutionally enshrined socio-economic rights as justiciable rights, which has enabled the state to address systematic inequalities and poverty, which are significant barriers to development. Similarly, Kenya has reinforced the right to development in its domestic legislation to enhance its recognition and enforcement. The absence or weak enforcement of these mechanisms as has been observed in Lesotho, exposes the population to a plethora of human rights violations, which ultimately causes stagnation in socio-economic development. The South African and Kenyan experiences provide instructive lessons for Lesotho, indicating that embedding socio-economic rights and recognising the right to development in domestic legislation constitutes effective approaches in combating human rights violations and in promoting development. In essence, the comparative perspective in chapter four highlights the role of enforceable human rights frameworks in addressing violations that constitute obstacles to development.

5.2 Recommendations

5.2.1 Theories of Incorporation

It is recommended for Lesotho to move beyond the dualist-monist dichotomy. These theories have been noted by Oppong to focus more on the source of human rights rather than the content of such rights.⁵⁹⁷ That is, they only focus on whether such human right emanates from a national or international source, prompting violation of human rights with impunity as individuals will have no recourse in the national courts when it is established that a treaty instrument has not been domesticated. Lesotho may adopt a similar approach like South Africa wherein, it has in terms of section 39 (1) (b) of the Constitution provided for consideration of international law in the interpretation of the rights enshrined in the bill of rights. Having the same provision in the Lesotho Constitution on the extent of applicability of international law shall be helpful in defeating challenges that courts have been faced with over the years, consequently, ensuring that effective redress is provided to complainants and human rights violations are reduced.

Likewise, Lesotho may domesticate all international treaties it has ratified so that they become part of its municipal law and thus, enable enforceability by the courts. Without this a nuanced strategy, the courts may refuse to apply international law simply because the treaties have not been incorporated into national legislation, leading to ineffective remedies. This general limitation was clearly articulated in the case of *Basotho National Party and Another v Government of Lesotho and Others*, where the Constitutional Court held that “courts can neither take over the constitutional powers invested in the executive and the legislature nor can they indirectly require the executive to assume a supervisory function over the law-making activities of the executive and the legislature”.⁵⁹⁸ That is to say, the courts are generally limited to their judicial functions and cannot interfere with other branches of government.

5.2.2 Right to Development

It is recommended that Lesotho should adopt a right to development governance model which shall compel the government of Lesotho to inter alia, constitutionalise the right to development

⁵⁹⁷ Oppong, R.F. “Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa” (2006) 30 *Fordham International Law Journal*, 3.

⁵⁹⁸ See 2.8.2 *Basotho National Party and Another v Government of Lesotho and Others* chapter two.

and also adopt a comprehensive policy instrument that outlines its strategies as a model for development in the country, to create financing for development by leveraging the country's natural resources and establish functional oversight mechanisms in monitoring the progressive implementation of the right to development.⁵⁹⁹ This approach will, as Ngang has proposed, ensure equitable distribution of resources for the attainment of sustainable development goals.⁶⁰⁰

Alternatively, Lesotho may adopt the Kenyan approach to the right to development by including the key elements of the right to development mainly, public participation in the constitution. Public participation shall ensure that all persons and communities in Lesotho, which are intended beneficiaries of the right to development, are effectively consulted on policy issues that affect their livelihood. The state is already obligated in terms of article 22 (2) of the African Charter on Human and People's Right to create an enabling environment for the realisation of the right to development. However, without national legislation reinforcing this right, the people are not able to hold the government accountable for the failure to realise the right to development.

5.2.3 Socio-Economic Rights

The Constitution of Lesotho needs to be amended to enshrine social, economic and cultural rights as judicially enforceable rights. The constitution of Lesotho may adopt the South African holistic integration of all rights in the bill of rights. The categorisation will enable the recognition of all rights as universal, indivisible, and interdependent. Further legislation may include the enactment of acts that domesticate the socio-economic rights provisions contained in the international and regional instruments that Lesotho has ratified. Presently, existing legislation do not consider socio-economic right as enforceable rights. For instance, the Health Order does not consider access to healthcare as a human right.⁶⁰¹ Legislation shall pave way for the realisation of socio economic rights as Van Bueren has highlighted that this realisation shall not only oblige the state to ensure progressive realisation of these rights but also reinforce litigation as a means to assisting the

⁵⁹⁹ Ngang Carol Chi and others, "Right to Development Governance: A Policy Proposition for the Kingdom of Lesotho" (2023) 15 (3) *African Journal of Legal Studies*, 421.

⁶⁰⁰ Ibid.

⁶⁰¹ See 3.2.3 Socio-economic rights chapter three.

government in executing its constitutional obligations.⁶⁰² It means that persons who are entitled to these rights would legitimately be able to resort to litigation for their enforcement.

After successful inclusion of socio-economic rights as justiciable rights, it is advised that there should be establishment of a Human Rights Commission as provided for by section 133A of the Constitution (as amended).⁶⁰³ This commission will inter alia monitor compliance with international instruments that enshrine social, economic and cultural rights, conduct research to develop policies and advocacy on social, economic and cultural rights and also ensure partnerships with United Nations agencies such as the UN Committee on Economic, Social and cultural rights, the government, other local human rights institutions and the overall civil society to ensure joint promotion of these rights.

Finally, there is recommendation for Lesotho to comply with the submission of periodic reports in line with the mandatory obligation under the International Covenant on Economic, Social and Cultural Rights to report on the progress of social, economic and cultural rights.⁶⁰⁴ This mechanism will facilitate the successful implementation of social, economic and cultural rights as there will be checks and balances. In this way, failure to comply with the said submissions undermines transparency and accountability mechanisms of a state party, consequently creating international criticism and reputational damage which may lead to the country being exclusively regarded as having poor human rights practices.

5.2.4 Customary Law

It is recommended that international human rights instruments that prohibit discriminatory practices against women be incorporated into the Lesotho Constitution. Also, the reservations that Lesotho has made in international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination and the International Covenant on Civil and Political Rights, have to be revised, so that discriminatory practices perpetuated by customs and traditional

⁶⁰² Van Bueren G, “Alleviating poverty through the Constitutional Court” (1999) 15 *South African Journal on Human Rights*, 52-74.

⁶⁰³ Section 133A of the Sixth Amendment to the Constitution Act, 2011.

⁶⁰⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 16.

practices are eradicated. For instance, with the Convention on the Elimination of All Forms of Discrimination Against Women, Lesotho made a reservation on article 2 to the effect that it shall not undertake any legislative measures under the Convention that shall be inconsistent with its national legislation. The reservation means that laws that are customarily preserved such as those relating to succession are shielded against any subsequent legislation that may contradict this law. It is therefore, as Kenneth Acheampong has highlighted, that reservations entrench (perpetuate) rather than eliminate all forms of discrimination against women in terms of customary law.⁶⁰⁵

The Constitution of Lesotho recognises customary law in section 18(4)(c) as a justifiable limitation of the right to freedom from discrimination. This provision presents a number of challenges such as gender inequalities, which perpetuates human rights abuses and violations. For instance, women are excluded from owning land under customary law. In this way, women are intentionally made to depend on men and their ability to participate in development processes is instead strictly limited. Similarly, unmarried men are also excluded from customary land tenure practices, limiting their ability to contribute and equitably benefit from development processes. Consequently, it is recommended that section 18 (4) (c) of the Constitution of Lesotho be repealed so that systematic inequalities prompted by unfair customary practices come to an end.

Moreover, it is recommended that the Constitutional Court of Lesotho be allowed to adopt the South African experience where the courts are in terms of section 39(2) of the South African Constitution, vested with the mandate to interpret and develop customary law to promote the spirit, purport and object of the bill of rights. This approach has promoted development of customary law with notable cases like *Bhe and others v Khayelitsha Magistrate* which dealt with the pursuit of male primogeniture and succession to chieftainship.⁶⁰⁶ The court noted that 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, 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 areas⁶⁰⁷ reinforcing that antiquated

⁶⁰⁵ Acheampong Kenneth, “The ramifications of Lesotho’s ratification of the Convention on the Elimination of all Forms of Discrimination against Women” (1993) 9 *Lesotho Law Journal: A Journal of Law and Development*, 79.

⁶⁰⁶ See 3.4.2.1 chapter three.

⁶⁰⁷ See 3.4.2.1 chapter three.

traditions and customs are no longer practical. Lesotho is therefore, advised to follow the same approach.

Alternatively, a body or *ad hoc* committee responsible for developing customary laws may be established. This committee may consist of a substantial number of women and other stakeholders to ensure adequate representation of all persons. Once this facilitating body has been created, customary law practices will have to be evaluated against the range of fundamental human rights and freedoms enshrined in the Constitution of Lesotho. This will ensure that any inconsistency that may result between the Constitution and customary law result in the Constitution taking lead. Finally, it is recommended that Parliament should not be vested with the simultaneous duty to develop both customary and civil law. Parliament is recommended to only focus on developing only civil law. In this way, it is proposed that section 154 of the Constitution of Lesotho, which provides for development of customary law by an act of Parliament be amended to relieve the Parliament of such obligation. Customary law consists of complex, evolving and often times unwritten practices that are not always captured in statutes. As a result, the complexity of customary law uniformly weakens the effectiveness of the Parliament, as a civil law institution to modify and develop customary law.

BIBLIOGRAPHY

Books/Chapters in Books

- Allsop G, “Socio-Economic Rights” in *Constitutional Law for Students* (2020).
- Alston P and Robison M (trs), *Human Rights and Development: Toward Mutual Reinforcement*, (Oxford University Press 2005).
- Asika R and Ngang C.C, “The right to development: An African feminist view” in Ngang Carol C and others (ed), *Perspectives on the right to development* (Pretoria University Law Press 2018).
- Askin K.D and Koenig D.M, *Women and International Human Rights Law* (Transnational Publishers 2001).
- Bingham T, *The Rule of Law* (Allen Lane 2010).
- Brand D, “Introduction to socio-economic rights in the South African constitution” in Brand D and Heyns C (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press 2005).
- Burgers J.H and Danelius H, “The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment” (Martinus Nijhoff Publishers 1988).
- Chirwa D.M and Chenwi L, “The Protection of Economic, Social and Cultural Rights in Africa” in Chirwa D.M and Chenwi L (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press, 2016).
- Cook R, “State Responsibility under CEDAW” in Cook, R. (ed) *Human Rights of Women: National and International Perspective* (1994).
- Dugard J, *International Law: A South African Perspective* (Juta & Co Ltd 1994).
- Heidenheimer A.J, Johnston M and Levine V.T (trs), *Terms, Concepts, and Definitions: An Introduction in Political Corruption: A handbook*, (New Brunswick Transaction Publishers 1989).
- Heyns C and Tvernier P, “Lesotho” in *International Human Rights Law in Africa*, (Kluwer Law International 2001) 1203-1225.
- Janusz S, *Human Rights Concept and Standards* (UNESCO Publishing 2000).

Jones P & Stokke K (eds), *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (Martinus Nijhoff Publishers 2005).

Kapindu R.E, “*The Role of International Law in the Enforcement of Socio-economic Rights in South Africa*” (Community Law Centre University of the Western Cape 2009).

Kisaakye E, “Women, culture and human rights: Female genital mutilation, polygamy and bride price” in Benedek W, *Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002).

Klug H, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010).

Lambsdroff G, “Background Paper to the Corruption Perceptions Index” (Transparency International and Gottingen University 2000).

Letete E.M, “Tackling Corruption in Commonwealth Africa: Case studies of Botswana, Lesotho, Mauritius, Rwanda and Seychelles” in Korateng R (ed) *Commonwealth Secretariat* 2018).

Liebenberg S, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co. Ltd 2010).

Makubuya A.N, “Armed forces in Uganda: Human Rights Issues” in Benedek W et al *Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002).

Maqutu W.C.M, *Contemporary Constitutional History of Lesotho* (Mazenod Institute, 1990).

Marks Stephen P (ed), *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung 2008).

Mayrhofer M and Others, “Factors Which Enable or Hinder the Protection of Human Rights” in Lassen E.M (ed) *Fostering Human Rights among European Policies* (Danish Institution for Human Rights 2012).

Munyai A and Agbor AA, “The impact of corruption on the right to development in Africa” in Ngang C.C et al (ed), *Perspectives on the right to development* (Pretoria University Law Press 2018).

Ngwena C and Cook R, “Rights Concerning Health” in Brand D and Heyns C (eds) *Rehman, Javid International Human Rights Law* (Pearson Education Limited 2003).

Payne G, *Urban Land Tenure and Property Rights in Developing Countries: A review of the literature* (Intermediate Technology Publications 1997).

Saha T, *Constitution of Lesotho: A text of Comparative Research Study* (R. Combray & Co. Private Ltd 2010).

Shale I, “The impact of the Maputo Protocol in Lesotho” in Thabane T & Shale I (eds) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria University Law Press 2012).

Spaak T, *Basic Concepts of Public International Law: Monism and Dualism* (Marko Novakovic ed 2013).

Strydom H (ed), *International Law* (Oxford University Press 2016).

Sunstein R, *Designing Democracy: What Constitutions Do*, (Oxford University Press 2001).

Thabane K, “Land Tenure, Housing Rights and Gender in Lesotho” in Benschop, M.L. (ed) *Law Tenure and Gender Review Series: Southern Africa* (UN-HABITAT 2005).

Todaro M, *Economic Development in the World* (London Longman 1977).

Viljoen J, *International Human Rights Law in Africa* (Oxford University Press 2011).

World Bank Group, *An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa* (University of Cape Town Press 2018).

Journal Articles

Acheampong K, “The ramifications of Lesotho’s ratification of the Convention on the Elimination of all Forms of Discrimination against Women” (1993) 9 *Lesotho Law Journal: A Journal of Law and Development*.

Barber S “Fallacies of negative constitutionalism” (2006) 75 *Fordham Law Review*.

Bellina S and others, “The Legitimacy of the State in Fragile Situations, (2009) Organisation for Economic Cooperation and Development DAC: Development and aid committee” (2009) 17 *HALSHS*.

Bentley K “Women’s Human Rights & the Feminisation of Poverty in South Africa” (2004) 100 *Review of African Political Economy*.

Blume L and Voigt S, “The Economic Effects of Human Rights” (2007) 60 *Kyklos*.

Bunch C, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights” (1990) 12 (4) *Human Rights Quarterly*.

Christiansen E, “Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court” (2007) 48 (2) *Columbia Human Rights Law Review*.

Corder H, Kahanovitz S and Murphy J, “A Charter for Social Justice: Contribution to the South African Bill of rights Debate” (1992) *South African Law Commission Project*.

Coyle J.K, “Incorporative statutes and the borrowed treaty rule” (2010) 50 *Virginia Journal of International Law*.

Darrow M and Amparo T, “Power, Capture and Conflict: A call for Human Rights Accountability in Development Cooperation” (2005) 27 *Human Rights Quarterly*.

Duflo E, “Women empowerment and economic development” (2012) 50 (4) *Journal of Economic Literature*.

Dugard J, “International law and the South African Constitution” (1997) 1 *European Journal of International Law*.

Fabosi S.C, “The Protection of Human Rights in South Africa: Unpacking the Duty of State to Realise the Right to Development” (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)*.

Focus A, “The forced eviction of the Ogieks indigenous people from their ancestral land in Kenya: The intervention of the African Court on Human and Peoples’ Rights” (2017) 17 (2) *African Human Rights Law Journal*.

Gibson W.M, “International law and Colombian constitutionalism: A note on monism” (1942) 36 (4) *The American Journal of International Law*.

Gowar C, “The status of International Treaties in the South African Domestic Legal System: Small steps towards harmony in light of Glenister?” (2011) 36 *SAYIL*.

Guercke L, “State Responsibility for a Failure to Prevent Violations of the Right to Life by Organised Criminal Groups: Disappearances in Mexico” (2021) 21 *Human Rights Law Review*.

Holmberg S. and Rothstein B, “Dying of Corruption” (2011) 6 *Health Economic and Policy Law*.

Joireman S, “The Evolution of the Common Law: Legal Development in Kenya and India” (2006) 68 *Political Science Faculty Publications*.

Jonas S, “Regional Consultation on the Practical of the Right to Development: Identifying and Promoting Good Practices” (2010) 2 *South African Human Rights Commission*.

Justine L, “Lesotho” (2013) *Media Law and Handbook for Southern Africa*.

Kamga S, “The right to development in the African human rights system: The Endorois case” 2011 *De Jure*.

Keping Y, “Governance and good governance: A new framework for political analysis” (2018) 11 *Fudan Journal of the Humanities and Social Sciences*.

Killen M and others, “Developmental Perspectives on Social Inequalities and Human Rights” (2022) 66 (4-5) *Human Development Journal*.

Klare, K, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights*.

Liebenberg S, “South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool to Challenging Poverty?” (2002) 2 *Law, Democracy & Development*.

Liebenberg S, “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 *SAJHR*.

Mamashela M.P, “The significance of the Convention on the Elimination of All Forms of Discrimination Against Women for a Mosotho Woman” (1993) 5 *ASIL Proc*.

Mantzaris E.A, “Corruption as a Violation of Basic Human Rights in South Africa and Russia” (2017) 9 (8) *African Journal of Public Affairs*.

Marite K.M, “Women’s Rights and Participation: Including women’s access to land and inheritance, and the role of lobbying and grassroots organizations in Lesotho” (2005) United Nations Division for the Advancement of Women, 6 <https://un.org> accessed 26 February 2025.

Mark S, “The South African Constitutional Court’s Embrace of Socio-Economic rights: A Comparative Perspective” (2003) 6 (1) *Chapman Law Review*.

Marslev K and Hans-Otto S, “The economy of human rights: Exploring potential linkages between human rights and development” (2016) 2 *Darnish Institute for Human Rights*.

Mashego K.A, “The Full Enforcement of Socio-economic Rights in Africa: A Dream or a Reality?” (2024) 10 (1) *Athens Journal of Law*.

Maqutu W.C.M & Sanders A.J.G.M, “The International conflict of laws in Lesotho” (1987) 20 (3) *The Comparative and International Journal of South Africa*.

Mensah J, “Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Rights Action: Literature Review” (2019) *Cogent Social Sciences*.

Motaung M and others, “The Environmental and Health Implications of Waste Disposal Sites in The Lesotho Lowlands” (2024) 6 (2) *Innovation Journal of Social Sciences and Economic Review*.

Mubangizi J.C and Mubangizi B.C “Poverty, human rights law and socio-economic realities in South Africa” (2005) 22 (2) *Development Southern Africa*.

Mubangizi JC, “The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation” (2006) 1 *African Journal of Legal Studies*.

Munene A.W, “Public Participation and the Right to Development in Kenya”, (2019) 7 (1) *ANULJ*.

Mutua M, “Kenya’s Quest for a New Constitution” (2012) 56 (1) *Journal of African Law*.

Ngang C.C, “Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order” (2019) 35 (1) *South African Journal on Human Rights*.

Ngang C.C and others, “Land Entitlement and the Right to Development in Lesotho” (2023) 53 (1) *Africa Insight*.

Ngang C.C and others, “Right to Development Governance: A Policy Proposition for the Kingdom of Lesotho” (2023) 15 (3) *African Journal of Legal Studies*.

Ngang C.C, “Right to Development in Africa and the Common Heritage” (2020) 45(1) *Journal for Juridical Science*.

Nicholas A and Cooray A “Human Rights Violations Affect Poverty and Income Distribution?” (2020) 161 *International Economics*.

Nsibirwa M.S, “A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women” (2001) 1(1) *African Human Rights Law Journal*.

Nwogbo D.C and Eze M, “Human rights violations in Nigeria and implication for national development” (2021) 57 (2) *Journal of the Management Sciences*.

Nyane H “Bicameralism in Lesotho: A Review of the Powers and Composition of the Second Chamber” (2019) 23 *Law, Democracy & Development*.

Nyane H, “The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life” (2022) 22 *African Human Rights Law Journal*.

O’Connell D.P, “The relationship between international law and municipal law” (1960) 4 *Georgetown Law Journal*.

Obayelu A.E “Effects of Corruption on Economic Growth and Development: Lessons from Nigeria” (2007) 21 <https://afdb.org> accessed 16 February 2025.

Oppong R.F, “Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa” (2006) 30 *Fordham International Law Journal*.

Peters A, “Human Rights and Corruption: Problems and Potential of Individualizing a systemic Problem” (2024) 22 (2) *International Journal of Constitutional Law*.

Pherudi M, "Political instability in Lesotho: Causes and Possible Remedies" (2022) 34 *Botswana Journal of African Studies*.

Ramkissoon Y, "The Importance of Realising Economic and Social Rights in Alleviating Poverty and Ensuring Transformation: Reflections on the functions of South African Human Rights Commission" (2016) 17 (1) *ESR Review*.

Robert E, "Pariah States and Nuclear Proliferation" (1981) 35 (1) *International Organisation* 135.

Rose C, "The Limitations of a Human Rights Approach to Corruption" (2015) *International & Comparative Law Quarterly*.

Sambo A.O and Abdulkadir B, "Socio-Economic Rights for Sustainable Development in Malaysia: Lessons from Selected African Countries' Constitutions" (2011) 2 (19) *OIDA International Journal of Sustainable Development*.

Scott C, "The interdependence and permeability of human right norms: Towards a partial fusion of the International Covenants on Human Rights" (1989) 27 *OHLJ*.

Sfeir-Younis A, "Violation of Human Rights is a Threat to Human Security" (2004) *Conflict, Security & Development*.

Shale I, "Country Report: Lesotho" (2015) 3 *African Disability Rights Yearbook*, 188.

Shale I, "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*.

Shale I, "The Law and Legal Research in Lesotho" (2019) 19 *Legal Information Management*.

Shelton D, "Legitimate and necessary: Adjudicating human rights violations related to activities causing environmental harm or risk" (2015) 6 (2) *Journal of Human Rights and the Environment*.

Siddiqua A and others "An overview of the environmental pollution and health effects associated with waste landfilling and open dumping" (2022) 29 *Environmental Science and Pollution Research*.

Silva C.B, "Harmonizing (Anti)Corruption: The Socio-Legal values of a Human Rights-based Approach to Corruption" (2019) 5 *Kyiv-Mohyla Law and Politics Journal*.

Slyz G, "International law in national courts" (1995-1996) 65 *New York Journal of International Law and Politics*.

- Stiftung K.A, “The Constitution of Lesotho: Constitutional Supremacy and Human Rights” (2021) 2 *Media Law Handbook*.
- Subedi S.P, “Declaration on the Right to development” (2021) United Nations Audiovisual Library of International Law, 4 <<https://legal.un.org/avl>> accessed 05 February 2025.
- Toeba T, “Corruption in Public Procurement in Lesotho” (2017) *Law and Development Conference*.
- Van Bueren G “Alleviating poverty through the Constitutional Court” (1999) 15 *South African Journal on Human Rights*.
- Walt V “A South African Reading of Frank Michelman’s Theory of Social Justice” (2004) 19 *SA Public Law*.
- Wangrawa S, “Women’s rights in Africa-Progress. Problems! Prospects?” (2021) *Euro Asian Law Congress*.
- Waris A and Latif A, “Financing the Progressive Realisation of Socio Economic Rights in Kenya” (2015) 8 (1) *University of Nairobi Law Journal*.
- Yusuf C and Fessha T, “Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania” (2013) 13 *African Human Rights Law Journal*.

Thesis or Dissertations

- Clay A, “Government, Public Service, and International Studies” (University of Central Arkansas, 2024).
- Koetlisi M, “Female genital mutilation in Lesotho: A cultural hazard to women’s right to health and Dignity” (LLM thesis, National University of Lesotho, 2024).
- Konese T.S, “Factors Influencing Human Rights Violations and their Effects on Development in Africa” (Masters Public Management and Governance University of Johannesburg, 2012).
- Lehobo L.M, “Good Governance in Lesotho: An analysis of the relationship between the rule of law and control of corruption” (Masters of Governance and Political Transformation, University of the Free State, 2017).
- Lipholo T, “Towards the Justiciability of Socio-economic Rights in the Legal System of Lesotho” (LLM thesis, National University of Lesotho 2022).

Mapeshoane M.J, “A Critical Analysis into the Land Tenure System in Lesotho and its Implication on Foreign Investment” (Master of Laws, North-West University 2020).

McPherson P, “Economic Cost of Gender Based Violence against Women and Girls in Lesotho: A Critical Analysis of Lesotho’s Dual Legal System” (LLM thesis, National University of Lesotho, 2023).

Ngang C.C, “Socio-economic Rights Litigation: A Potential Strategy in the Struggle for Social Justice in South Africa” (LLM thesis, University of Pretoria, 2013).

Orago N.W, “Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution” (LLD University of the Western Cape, South Africa, 2013).

Owino J.C, “The African Charter on Human and People Rights, A Critical Analysis on the Human Rights Record in Kenya” (Bachelor of Law Kampala International University, 2011).

Shale I, “Domestic Implementation of International Human Rights Standards Against Torture in Lesotho” (LLD thesis, University of the Witwatersrand, 2017).

Sheik Z.A, “The Legal Perspective of Human Rights and Development in Kenya” (Master of Laws in International studies, University of Nairobi 2020).

Strinka S.M, “The Human Rights-Based Approach to Development: A Theory of Change” (Master of Arts, College of Arts and Sciences of Ohio University, 2020).

Theoha M.E, “Realising the Right to Education in Lesotho” (Master of Laws, University of Pretoria, 2011).

Zubeida A.S, “The legal perspective of human rights and Development in Kenya” (Masters Degree in International studies, at the Institute of Diplomacy and International Studies (IDIS) University of Nairobi, 2020).

Legislation

Alpine Convention 1991.

Anti-trafficking in Persons Act 2011.

Chieftainship Act of 1968.

Constitution of Kenya 2010.

Criminal Procedure and Evidence Act 1981, s 297.

Human Rights Commission Act No. 2 of 2016.

Income Tax (as amended) Act No.10 of 1993.
Legal Capacity of Married Persons Act No. 9 of 2006.
Lesotho Defence Force Act 4, 1996.
Marriage Act 1974.
Money Laundering and Proceeds of Crime Act No. 4 of 2008.
Persons with Disability Equity Act No. 2 of 2021.
Prevention of Corruption and Economic Offences Act No. 5 of 1999.
Sixth Amendment to the Constitution of Lesotho Act, 2011.
Social Assistance Act 59 of 1992.
The Constitution of Lesotho 1993.
The Constitution of the Republic of South Africa Act 108 of 1996.
The Laws of Lerotholi, 1903.
The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Cases

African Commission on Human and Peoples' Rights v Republic of Kenya application no. 006/2012 (26 May 2017).

Basotho National Party V Government of Lesotho (2005) 11 BCLR 1169 (LesH).

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).

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm 276/2003 ILHR 3591 (ACHPR 2009).

Commissioner of Police and the Attorney General v Neo Rantjanyana (2011) LSCA 42.

David Ndungo Maina v Zipporah Wambui Mathara, Bankruptcy Cause 19 of 2010, KEHC 4136 (KLR).

David Njoroge Macharia v Republic, Criminal Appeal No. 497 of 2007.

Democratic Republic of the Congo v Burundi, Rwanda, and Uganda Annex IV, 20th Annual Activity Report of the African Commission.

Director of Public Prosecutions v Mohollo Tsoenyane & Others CR/299/99 (High Court of Lesotho) unreported 25 February 2000.

Fuma v Commander LDF Cons Case 08/2011 [2013] LSHC 68.

Glenister v President of the Republic of South Africa 2011 3 SA 347 (CC).

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC) 44.

Joe Molefi v Legal Advisor & Others [1970] 3 ALL ER 724.

Kevin Mgwanga Gumne et al v Cameroon Communications, 266/2003; 26th Annual Activity Report of the African Commission, Annex IV.

Khathang Tema Baitsokoli & Another v Maseru City Council (CONST/C/1/2004) LSHC 25.

Khosa v Minister of Social Development (2004) ZACC 11 SA 505 (CC).

Law Society of Lesotho v Right Honourable Prime Minister C of A (CIV) No. 5/1985 court of Appeal Judgement.

Leboela v Mapetla C of A (CIV) 44/2011 [2012] LSCA 2.

Lesotho Medical Association V Minister of Health CC 19/2019.

Makhasane v Commissioner of Police & Others CIV/T/401/2006 [2011] LSHC 20.

Maseela v Minister of Home Affairs and others (CIV/APN/380/95) [1997] LSHC 79.

Minister of health v Treatment Action Campaign and others (2002) 5 SA 703 (CC).

Ministry of education v Thuto Ntsekhe PST 3/2015.

Molefi Tsepe v IEC & Others (2005) LSHC 96.

Morie Motiane v Officer Commanding Mabote Police & Others CIV/T/507/2007.

Port Elizabeth Municipality V Various Occupiers 2004 (12) BCLR 1268 (CC).

Re Mui Coal Basin Local Community 2015) Eklr.

Sello v Commissioner of Police and Others CIV/APN /10/1980.

Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others C of A (CIV) 29/2013 [2014] LSCA.

Soobramoney v Minister of Health, KwaZulu-Natal (1998) 1 SA 765 (CC); (1997) (12) BCLR 1696.

Taole v Sehloho and others (2012) LSHC 68.

Van Biljoin v Minister of Correctional Services (1997) (6) BCLR 789 (c).

Command Papers and Commission Reports

Compilation of UN info for the second cycle of the Universal Periodic Review (UPR) mechanism Lesotho (2013).

European Commission for Democracy, Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts (adopted by the Venice Commission at its 100th plenary session, Rome 10-11 October 2014).

Government of Lesotho, “National Strategic Development Plan II, 2018/19–2022/23: In Pursuit of Economic and Institutional Transformation for Private Sector-led Jobs and Inclusive Growth” (Lesotho Government 2018).

Lesotho Human Rights Report, 2021.

Ministry of Education Feasibility Study 1993.

National Strategic Development Plan (NSPD II).

Organisation for Economic Co-operation and Development and the Development Assistance Committee, “Action-Oriented Policy Paper on Human Rights and Development” (OECD Publishing, 2007).

The Kingdom of Lesotho Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, 2018.

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

United Nations Conference on Trade and Development, *Investment Policy Review Lesotho* (United Nations Publication 2003).

United Nations Development Programme (2022). Integrated waste management strategy for Lesotho. United Nations Development Programme, Lesotho.

Conference Papers

ICESCR Committee, General Comment 9 “The domestic application of the Covenant” 8 December 1998, UN Doc E/C.12/1998/28 (ICESCR Committee GC 9).

Joint Stakeholders Report for the United Nations Universal Periodic Review, The Death Penalty, 49 session of the Working Group on the Universal Periodic Review April-May 2025, submitted 11 October 2025.

Treaties and Other International Instruments

Abolition of Forced Labour Convention, 1957 (No. 105).

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

African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi Kenya on 28 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217.

African Charter on Human and Peoples' Rights, adopted in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 Rev.5 (1981).

African Youth Charter (adopted 2 July 2006, entered into force on 8 August 2009).

Charter of the Organisation of African Unity, 23 May 1963, International Legal Materials, Vol. 2, 1963, 776.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

Convention Against Torture, and other Cruel Inhumane Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

Convention concerning forced or Compulsory labour 1930 (adopted 28 June 1930, entered into force 1 May 1932) CO29.

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

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

Convention on the Elimination of All Forms of Racial Discrimination (Adopted 21 December 1965, entered into force on 4 January 1969) 660 UNTS 1.

Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force on 13 December 1977) 989 UNTS 175.

Convention on the Rights of Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

CRPD (Adopted 24 January 2007, Signed by Kenya on 30 March 2007 and Ratified on 19 May 2008) 2515 UNTS 3.

Declaration on the Right to Development (adopted 4 December 1986 UNGA Res41/128).

Declaration on the Right to Development, (adopted 4 December 1986) UN 41/128, preamble.

African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi Kenya on 28 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Equal Remuneration Convention, 1951 (No. 100).

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

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

Minimum Age Convention, 1973 (No. 138).

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).

Right to Organise and Collective Bargaining Convention of 1949 (adopted 1 July 1949, entered into force 18 February 1951) CO98.

The Forced Labour Convention, 1930 (No. 29).

The Freedom of Association and the Right to Organise Convention of 1948 (adopted 9 July 1948, entered into force 4 July 1950) CO87.

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

UN General Assembly resolution 41/128, United Nations Declaration on the Right to Development, UN Doc. A/RES/41/128 (1986).

United Nations General Assembly, Declaration on the Right to Development (adopted 4 December 1986) A/RES/41/128, art 2. United Nations, 1986.

United Nations Refugee Convention (adopted 28 July 1951, entered into force 22 April 1954) 2545 UNTS 149.

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

Universal Declaration of Human Rights, art 15 (adopted 10 December 1948).

Vienna Convention on the Law of Treaties of 1969.

Worst Forms of Child Labour Convention, 1999 (No. 182).

Internet Sources

- Advisory Council on International Affairs, Sustainable Development Goals and Human Rights: An indivisible Bond, (2019) Advisory Report No. 110, The Hague
<https://asser.nl/media/5625/advisory-report-110.pdf&ved> accessed 11 January 2025.
- Amnesty International “Turn a new chapter: A human rights agenda for the new Lesotho government” (2022) www.amnesty.org/en/latest/news/2022/09/lesotho-authorities-must-tackle-police-brutality accessed 13 March 2025.
- Amnesty International Report, “The state of the world’s human rights” 2022/23, 234
www.amnesty.org accessed 13 March 2023.
- Bazelon Emily, “After the Revolution”, *Legal Affair* 25, 28 (Jan/Feb 2003).
- British Columbia, “What is Economic Development?” (2024) www.gov.bc.ca accessed 14 March 2025.
- Centre for Civil and Political Rights, “The International Covenant on Civil and Political Rights (ICCPR) and the Human Rights Committee” A Guide for Civil Society Engagement, 5
https://ccprcentre.org/files/media/DGITAL_VF_F_5_the_International_Covenant_on_Civil_and_Political_Rights_V3.pdf accessed 21 January 2025.
- Cornell Center on the Death Penalty Worldwide, “Kingdom of Lesotho” 2014,
<https://deathpenaltyworldwide.org/database/#/results/country?id=91fn-19380-U21J55V590280> accessed 21 January 2025.
- De Satge Rick and Johnson Sean, “Lesotho-Context and Land Governance” (2021)
<https://landportal.org> accessed 11 March 2025.
- Demerit, Jacqueline H. R, “The Strategic Use of State Repression and Political Violence” (2016)
Oxford Research Encyclopedias
<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-32> accessed 09 January 2025.
- Diversity and Marginalised Communities, “Planning for a Diverse and Equitable Future”
<https://actec.org/plannning-for-a-diverse-and-equitable-future/marginalised-communities>
accessed 09 January 2025.
- Dube Buhle Angelo, “The Law and Legal Research in Lesotho” (Globalex, 2010)
<https://nyulawglobal.org/globalex/lesotho> accessed 16 December 2024.

Floyd David, “10 Common Effects of Inflation” (2024) *Investopedia*
<<https://investopedia.com/articles/insights/122016/9-common-effects-inflation.asp>>
accessed 09 January 2025.

Frederick Kakwata, “Perspective Chapter: Determinative Factors for Bridging Social Inequality Gaps: A South African Perspective Sustainable Development” (2024)
<https://intechopen.com/chapters/1178692> accessed 10 January 2025.

Freedom in the World 2024 <https://freedomhouse.org> accessed 11 December 2024.

Garcia David Bondia, “Human Rights and Political Repression around the World” (2021)
<https://revistaidees.cat/en/sobre-idees> accessed 13 December 2024.

International Monetary Fund, IMF Conditionality (2023)
<https://imf.org/en/About/Factsheets/Sheets/2023/IMF-Conditionality> accessed 10 January 2025.

Lankford, McInerney and others, “Human Rights Indicators in Development: An introduction” (2010) World Bank Study <https://openknowledge.org> accessed 12 March 2025.

LawBhoomi, “Important Theories of Under International Law” (LawBhoomi, 8 June 2021)
<https://lawbhoomi.com/importatnt-theories-of-under-international-law/> accessed 18 April 2025.

Mutua M.W, “The African Human Rights System: A Critical Evaluation” (2000)
<https://hdr.undp.org/system/files/documents/mutua.pdf> accessed 04 February 2025.

Nordic Trust Fund, Human Rights and Economics: Tensions and Positive Relations (2012) The World Bank
<https://documents1.worldbank.org/curated/en/568971607704442026/pdf/Human-Rights-and-Economics-Tensions-and-Positive-Relationships.pdf> accessed 09 January 2025.

OHCHR, “Development and human rights” <https://ohchr.org/en/development/development-and-human-rights?utm> accessed 13 March 2025.

OHCHR, “The negative impact of corruption on the enjoyment of human rights” (2015)
www.ohchr.org/sites/default/files/documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf accessed 11 March 2025.

Ontario Human Rights Commission, “Human Rights and economic and social rights”
<https://ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-cultural-and-economic-rights-under-international-law> accessed 25 January 2025.

Peerenboom Randall, “Human Rights and Rule of Law: What is the relationship?” (2004)
Research Paper No. 05-31, 5 <http://ssrn.com/abstract=816024> accessed 21 February 2025.

Political development <https://oxfordreference.com> accessed 13 March 2025.

Shale I, “The impact of the Maputo Protocol in Lesotho” (2012).
https://www.pupl.up.ac.za/images/edocman/edited-collections/impact_of-maputo-protocol/Lesotho-IMP.pdf accessed 02 September 2024.

Spradley James, “What is culture?” <https://sphweb.bumc.edu/otlt/mph-modules/PH/CulturalAwareness/CulturalAwareness2.html> accessed 31 August 2024.

United Nations Human Rights Treaty Bodies
<https://ohchr.org/layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=97> accessed 21 January 2025.

United Nations Human Rights, (2023) <https://ohchr.org/en/news/2023/07/dialogue-lesotho-experts-human-rights-committee-commend-measures-combact-domestic-and?> accessed 13 December 2024.

United Nations office of the High Commissioner, “Development and Human Rights” (2006)
<https://ohchr.org/sites/default/files/Documents/Publications/FAQen.pdf> accessed 12 March 2025.