



NATIONAL UNIVERSITY OF LESOTHO

**Striking a Balance between Human Rights Protection and
Maintaining National Security: The Dilemma of Executing
the Constitutional Mandate by National Security Agencies
in a Democratic Society – Lesotho Case Study**

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A Mini-Dissertation Submitted in Partial Fulfilment of the Requirements of the
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SUMMARY

This mini-dissertation explores the complex interplay between the protection of human rights and the imperative of national security within the context of Lesotho's constitutional framework. In a democratic dispensation, it is essential for national security agencies to uphold public safety while simultaneously, required to respect human rights and freedoms. The study delves into the dilemmas faced by the security agencies as they navigate the often conflicting demands of constitutional responsibilities and security imperatives. Through a case study approach, the research examines the historical, legal, and social dimensions of national security practices in Lesotho, highlighting instances where efforts to safeguard citizens have encroached upon human rights.

The analysis draws on use of the qualitative research methodology and a review of legal documents and case law. The findings reveal a persistent tension between the objectives of national security and the commitment to uphold democratic values, with significant consequences for human rights protection and public trust in security institutions. The mini-dissertation concludes with recommendations for policy reforms aimed at fostering greater accountability and transparency among national security agencies while enhancing their capacity to protect human rights in the execution of their constitutional mandates. The research contributes to the broader discourse on national security in a democratic setting, offering insights that are particularly relevant for emerging democracies grappling with similar challenges.

DECLARATION

I **Lebohang Ramakoala**, 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 dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

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DEDICATION

To my beloved son, **Tumelo Ramakoala** whose unwavering support and bright smile have been my greatest motivation throughout this journey, I dedicate this mini-dissertation to you. Your boundless curiosity and strength inspire me every day and I hope to instil in you the values of perseverance and the pursuit of knowledge. You are my greatest achievement, and this work is for you.

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ACRONYMS

LCS	Lesotho Correctional Service
LDF	Lesotho Defence Force
LMPS	Lesotho Mounted Police Service
NSS	National Security Service
MoD	Minister of Defence
IDF	Israel Defence Force
US	United States
SADC	Southern African Development Community
SSR	Security Sector Reform
DCAF	Geneva Centre for Democratic Control of Armed Forces
LLHR	Lesotho Lawyers for Human Rights
EU	European Union
UNSC	United Nations Security Council
NSS	National Security Strategies
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
RIPA	Regulation of Investigatory Powers Act

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CHAPTER ONE

INTRODUCTION – RATIONALE FOR THE STUDY

1.1 Problem Statement

In democratic societies, the imperative of upholding national security often stands at odds with protection of the human rights and fundamental freedoms enshrined in the constitution. This is well articulated in the case of *Maxwell Mancoba Dlamini and Another v Rex*.¹ Basil notes that the law ought to reconcile conflicting interests by securing the most and sacrificing the least.² This research explores the dilemma posed by national security agencies in the execution of their constitutional mandates while simultaneously, needing to comply with the obligation to respect human rights and fundamental freedoms. Specifically, it investigates how case law, such as the *Prime Minister and Others v Machesetsa Mofomobe and Another*,³ *Maseko v Attorney General*⁴ and *Bolofa v DPP* cases⁵ among others, illustrate the challenges and legal constraints that shape the operational scope of Lesotho's national security agencies, namely; Lesotho Defence Force, Lesotho Mounted Police Services, National Security Service and Lesotho Correctional Services. The increasing prevalence of terrorism and security threats from insurgency Famo groups in Lesotho exacerbates this tension, compelling a critical examination of existing legal frameworks and the practical implications for the protection of human rights and fundamental freedoms in the country. The research will also delve into a comparative analysis with Kenya.

1.2 Research Questions

These are the legal questions the research responds to:

- What are the specific challenges faced by national security agencies in balancing their constitutional mandates with the protection of human rights and fundamental freedoms?
- In what ways does Lesotho's existing legal framework address the operational requirements of security agencies while ensuring the protection of human rights and fundamental freedoms, and what gaps can be identified in these frameworks?

¹ [2014] SZSC 09 (29 July 2015).

² Curzon Leslie Basil. *Jurisprudence* (Cavendish, 2001) 164.

³ (C of A (CIV) 51 of 23).

⁴ LAC (1990-1994) 13.

⁵ LAC (1995-1999) 231.

- What role does case law play in shaping the operational requirements of security agencies, and what specific challenges and legal constraints have been identified through court rulings?
- How can security agencies better align their operational practices with the protection of human rights and fundamental freedoms while fulfilling their constitutional responsibilities?

1.3 Objectives of the Study

The objectives of the research are:

- To identify and analyse the specific challenges national security agencies encounter in balancing their constitutional responsibilities with the necessity of upholding human rights and fundamental freedoms.
- To evaluate Lesotho's legal framework that governs the operations of security agencies in determining their effectiveness in addressing operational needs while safeguarding human rights and fundamental freedoms, and hence identify any existing gaps.
- To examine case law that showcases the conflicts between security prerogative and the obligation to protect human rights and fundamental freedoms, and to assess the impact of legal constraints on the operations of security agencies.
- To investigate the practical implications of the human rights and fundamental freedoms framework on security agency operations, with the aim of proposing enforcement measures that ensure the simultaneous attainment of national security objectives and human rights protection.

1.4 Hypothesis

In a democratic society, the effectiveness of security agencies in executing their constitutional mandates is significantly influenced by the extent to which they balance the imperative of maintaining national security with the obligation to uphold human rights and fundamental freedoms. An imbalance may lead to erosion of public trust, human rights violations, and societal unrest.

1.5 Background

In Lesotho, national security forces consist of the Lesotho Defence Force, Lesotho Mounted Police Services, National Security Service and Lesotho Correctional Services.⁶ Each of these agencies has a constitutional mandate enshrined in the Lesotho Constitution of 1993.⁷ The Lesotho Mounted Police Service is responsible for internal security.⁸ The Lesotho Defence Force maintains external security, protects Lesotho's sovereignty and may support the police when the Lesotho Mounted Police Service's Commissioner requests assistance.⁹ The National Security Service is an intelligence service that provides information on possible threats to internal and external security.¹⁰ The Lesotho Defence Force and the National Security Service report to the Minister of Defence, the Lesotho Mounted Police Service to the Minister of Police and Public Safety; and the Lesotho Correctional Service, to the Minister of Justice and Correctional Services. Civilian authorities generally maintain effective control over the security forces.¹¹

Csanyi underscores the fact that "The need to find the right balance between competing rights and competing interests is fundamental in all States."¹² It means that human rights and national security are essential primary issues relating to how national security laws interact with international human rights norms.¹³ In Lesotho, like in many democratic societies, security agencies tend to prioritise national security over human rights, potentially leading to everyday violations such as unlawful arrests and detention,¹⁴ excessive use of force, or surveillance without proper legal oversight.¹⁵

There is a need to determine the legality of security operations, bearing in mind that the development of any country squarely depends on the ability of government to ensure that

⁶ United States Department of State Bureau of Democracy, Human Rights and Labor (2019) "Country Reports on Human Rights Practices: Lesotho".

⁷ The Lesotho Constitution of 1993 Sec 147(2).

⁸ Ibid.

⁹ Lesotho Defence Force Act 1996, Sec 190 (1) which states that the commander may, "at the request of the commissioner of police, authorise any member or unit of the defence force in support of, or to give assistance to the police force, in the discharge of their function under the Police Order 1971 or any law amending or replacing the same." Section 190 (2) also reads that, a member of the Defence Force acting in pursuance to an authorisation under subsection (1) shall have and may exercise all the powers of a police officer of equivalent rank."

¹⁰ United States Department of State Bureau of Democracy, Human Rights and Labor (2019) "Country Reports on Human Rights Practices Lesotho."

¹¹ Ibid.

¹² Csanyi, C. "Terrorism and Human Rights" (2016) *Journal of Eastern-European Criminal Law* 1, 176-179.

¹³ Ibid.

¹⁴ Dirikgil, N. "Addressing the Prevention of Internal Displacement: The Right Not to Be Arbitrarily Displaced" (2023) 24 *Journal of International Migration and Integration* 113–138.

¹⁵ Ibid.

competing interests of national security and human rights are balanced. The *Kituo Cha Sheria and 8 Others v Attorney General* case¹⁶ restated reasonableness and proportionality of government actions while declaring that the directive to close the Dadaab refugee camp was unconstitutional and against the principle of *non-refoulement* under refugee law.¹⁷ This was a landmark Kenyan case¹⁸ and the first forced encampment case¹⁹ involving a Government Directive issued to stop reception and registration of refugees and asylum-seekers in urban areas. The petitioners argued that the directive violated the rights and fundamental freedoms of refugees, as enshrined in the Kenyan Constitution. The rationale for the policy of relocation and encampment by the Kenyan government was the issue of national security. In this case the judiciary tried to balance between the national security and human rights, the court concluded that Government directive was a threat to the petitioner’s fundamental rights and freedoms including the freedom of movement under Article 39 and right to dignity under Article 28 of Kenyan Constitution.

The role of the judiciary in overseeing the actions of security agencies is crucial. In Lesotho, the need to balance and prioritise national security over human rights arises as a result of a number of attacks orchestrated by the Famo gang wars,²⁰ which ultimately escalate into the killing of civilians who have nothing to do with the Famo gangs. The case of the Fobane killings of an entire family and retaliation in Liphakoeng in the Leribe District of Lesotho is illustrative.²¹ There may be issues related to access to justice after the said incidents where victims of human rights abuses by security agencies struggle to hold these entities accountable.²² The independence of the judiciary in Lesotho and its ability to check the powers of national security forces is a significant concern.²³

¹⁶ 19 & 115 of 2013 [2013].

¹⁷ *Ibid.*

¹⁸ Juma, L. “Protection of Rights of Urban Refugees in Kenya: Revisiting *Kituo Cha Sheria v The Attorney General*” (2018) 33 Southern African Public Law 1–2.

¹⁹ Ogg, K. *Protection from Refuge: From Refugee Rights to Migration Management* (Cambridge University Press, 2022) 58.

²⁰ Tšoloane Mohlomi, “Famo gang wars fuel deadly violence in Lesotho that spills into South Africa” *Mail & Guardian* (Johannesburg, 16 September 2024). This is a gang war that involves Famo musicians who are also involved in the illegal mining in South Africa.

²¹ Fobane is a village in Leribe district where five people were murdered at a home on 18 April 2024 in a brutal attack police suspect to be linked to famo gang wars that have rocked the area in recent months. There is also strong speculation that the murders were linked to an earlier incident in Liphakoeng where a Terene ea Mokata-Lirope member was shot dead while two others were injured. Available at: <https://www.diaspora.thepost.co.ls/2024/07/25/police-hunt-for-suspected> (accessed on 11 October 2024).

²² United States Department of State Bureau of Democracy, Human Rights, and Labor, (2022) “Country Reports on Human Rights Practices Lesotho” There were credible reports members of the Lesotho Mounted Police Service and Lesotho Defence Force committed some human rights abuses. Significant human rights issues included credible reports of: unlawful or arbitrary killings; torture or cruel, inhuman, or degrading treatment or punishment by security forces; harsh prison conditions; arbitrary arrest or detention; serious government corruption; lack of investigation of and accountability as reported in the 2022 Country Reports on Human Rights Practices: Lesotho.

²³ *Ibid.*

Measures taken by security agencies in relation to the protection of national security often lead to discrimination against certain groups, particularly marginalised communities.²⁴ Legal issues regarding racial, ethnic, or political profiling may emerge, challenging the fairness and equity in law enforcement practices.²⁵ The use of emergency powers by the state in response to security threats usually lead to the suspension of certain human rights. On the contrary, states may not adopt laws or practices that would make activities for the defence of human rights unlawful.²⁶

The balance between national security and human rights has been influenced by public opinion and the political contexts, including members of opposition parties and civil society organisations like the Lesotho Law Society and the Lesotho Lawyers for Human Rights.²⁷ However, political pressure has led the government to prioritise human rights over national security²⁸ yet, murder rates are sky-rocketing, raising questions about the democratic process, accountability and government responsibility.²⁹ While issues relating to national security are part of the government’s mandate, the government also has a mandate to protect and promote human rights, including the right to personal security, which is encompassed in the realm of human rights protection and maintaining the rule of law in a democratic society.³⁰

Lesotho, being a state party to various international human rights treaties such as the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Elimination of All Forms of Discrimination Against Women, has obligations that may conflict with national security interests and human rights protection. For example, while these treaties emphasise the importance of safeguarding human rights, human dignity, and non-discrimination, certain measures taken for national security, such as detention policies, restrictions on freedoms of expression, or counter-terrorism laws, might infringe upon these rights. Balancing adherence to these international commitments with the imperatives of

²⁴ Lesotho Times, “Letsoela clears the air” *Lesotho Times* (Maseru, August 2024) The Law Society of Lesotho said the Constitution guaranteed every person human rights and the army had no powers to take matters into their own hands “when the courts were there to determine the guiltiness or otherwise of any accused person.” The Lesotho Lawyers for Human Rights (LLHR) petitioned Lt-Gen Letsoela on 7 August 2024, giving him a seven-day ultimatum to rein in Maj Gen Matobakele or face legal consequences.

²⁵ Ibid.

²⁶ United Nations General Assembly, Resolution A/59/401 1 October 2004, paras 49, 51.

²⁷ Lesotho Times, “Letsoela clears the air” *Lesotho Times* (Maseru, August 2024).

²⁸ Lesotho Times, “LDF actions spark outrage, fear across nation” *Lesotho Times* (Maseru, 16 September, 2024)

²⁹ Ibid.

³⁰ Lesotho Constitution of 1993.

national security remains a complex challenge for Lesotho. The legal implications of these international commitments affect domestic laws and policies.³¹ However, international law recognises that certain rights may be limited by proportional and justified national security measures.³²

National security in Lesotho involves classified information, which has led to lack of transparency regarding government actions.³³ The legal challenges regarding the right to information and whistle-blowing protections arise, complicating the public's ability to hold security agencies accountable.³⁴ The increasing use of surveillance and information gathering by security agencies has raised legal concerns about privacy rights and the regulation of such technologies to ensure compliance with human rights standards.³⁵

1.6 Significance of the Study

The significance of this study lies in its exploration of the complex relationship between the protection of human rights and the necessity for national security within the context of Lesotho.³⁶ As a democratic society, Lesotho faces the challenge of ensuring that its security agencies adhere to their constitutional obligations to respect the human rights and fundamental freedoms enshrined in the Constitution while upholding their mandates in effectively addressing security threats.³⁷ The findings and insights from this research are likely to have several important implications.

The study provides critical insights into the current practices of security agencies in Lesotho, highlighting areas where human rights may be compromised. The results are envisaged to inform policymakers in developing strategies that ensure effective protection of human rights without compromising national security. By analysing case studies of human rights violations in the name of security, the research contributes to discussions on reforming the legal

³¹ 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 193-218.

³² International Covenant on Civil and Political Rights, Art. 4. adopted 16 December 1966, United Nations, Treaty Series, Vol 999, 171.

³³ *Prime Minister and Others v Machesetsa Mofomobe and Another* (C of A (CIV) 51 of 23).

³⁴ Josan Meijers, "The Protection of Whistle Blowers: Challenges and Opportunities for Local and Regional Government Governance." (2019) 36 Committee Rapporteur: 1 Netherlands (R, SOC) Resolution 444.

³⁵ Ibid.

³⁶ United States Department of State Bureau of Democracy Human Rights, and Labor (2019) "Country Reports on Human Rights Practices: Lesotho" There were credible reports members of the Lesotho Mounted Police Service and Lesotho Defence Force committed some human rights abuses.

³⁷ Ibid.

framework that governs the operations of security agencies in Lesotho, promoting adherence to both national and international human rights standards.

The research is intended to serve as a valuable resource for civil society organisations and human rights advocates in Lesotho. By shedding light on the dilemmas faced by security agencies, the findings might help in mobilising public opinion and advocacy for greater accountability and transparency in security operations.

The study offers a nuanced perspective on how democratic societies like Lesotho can strike a balance between maintaining national security and protecting human rights. It is envisaged to be a suitable model or framework which other nations facing similar dilemmas may emulate. The research adds to the existing literature on human rights and security studies, particularly within the African context. It provides data and analysis relevant to debates around the interplay between national security and human rights concerns in a democratic society.

International relations and reputation can be strengthened. That is, in understanding how Lesotho addresses this dilemma can have broader implications for its international relations, particularly in fostering partnerships with countries and organisations that prioritise human rights. This study can help position Lesotho as a nation committed to balancing security with the rule of law and individual human rights and freedoms.

The findings highlight gaps in the current understanding of the issue, paving the way for further research into specific areas such as the impact of security policies on marginalised communities or the role of international organisations in supporting human rights in Lesotho. The study is significant not only within the specific context of Lesotho but also in contributing to the global discourse on how democracies can simultaneously safeguard national security and human rights.

1.7 Literature Review

The intersection of human rights and national security is a complex and often contentious issue.³⁸ This literature review examines existing research related to the topic at hand, focusing

³⁸ Burke-White W.W. "Human Rights and National Security: The Strategic Correlation" (2004) 960 All Faculty Scholarship. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/960 (accessed on 6 Nov 2024).

on how these agencies navigate the dilemma of enforcing national security while upholding human rights.

The theoretical underpinning of the research is rooted in the social contract theory, which posits that a government's legitimacy stems from its ability to protect its citizens. Although not contemporary, authors like Thomas Hobbes³⁹ and John Locke⁴⁰ suggest that individuals relinquish certain freedoms to gain protection and security from their governments.⁴¹ However, contemporary debates have emerged about where to draw the line between necessary security measures and the preservation of fundamental human rights.

The literature review provides a comprehensive perspective with regard to necessary shifts in the law so as to meet contemporary legal needs, especially with regard to issues of violation of human rights while the intention is to protect them. Various regions in recent years have been in the process of updating their terrorism legislation,⁴² with some adopting contentious measures like administrative bans on the movement of suspected Jihadists in and out of the country.⁴³ Researchers like Feinberg, Niada-Avshalom, and Toebes, have highlighted the ongoing controversy surrounding data surveillance.⁴⁴ Their work, which aligns with international human rights instruments and obligations, has reignited the long standing debate between national security and human rights.

Balancing the two imperatives is the conventional method for incorporating both interests in democratic societies. The emphasis on the conflict prevalent in counter-terrorism frequently forces a choice between values that ought to collectively serve as the standard for counter-terrorism measures.⁴⁵ Terrorist sanctions serves as a specific example of the interplay between security measures and the protection of human rights, when looking at the *Kadi* case involving issues of human rights and the legality of sanctions imposed by the European Union based on

³⁹ Thomas Hobbes, *Leviathan* (Penguin Books, 1651).

⁴⁰ John Locke, *Two Treatises of Government* (Awnsham Churchill, 1689).

⁴¹ Ibid.

⁴² Combs C, *Terrorism in the Twenty-First Century* (Routledge, 2022).

⁴³ Feinberg M, et al, "National security and public health: Exceptions to human rights" (2015) *The International Journal of Human Rights* 19, 383–387.

⁴⁴ Ibid.

⁴⁵ Ibid.

United Nations Security Council resolutions were addressed.⁴⁶ The court ruled that the rights of individuals must be respected, even in the context of international security measures.⁴⁷

Excessive security measures can lead to human rights violations, particularly in democratic contexts.⁴⁸ States often justify draconian measures in the name of national security, which can undermine public trust and the rule of law. This notion is supported by Jonathan Hafetz, who examined the United States national security considerations post-9/11 through the framework of transitional justice in which he highlights the tension between national security measures and the protection of human rights.⁴⁹ After the September 11th attack, the United States government implemented a series of security measures aimed at preventing further terrorist attacks, which included heightened surveillance, detention of suspects without charges, and the use of military force against perceived threats.

As noted above, states like United States and Israel posit that a security-centric approach is necessary to protect citizens from threats, both internally and externally, as President Bush made it clear that “defending our Nation against its enemies is the first and fundamental commitment of the Federal Government.”⁵⁰ Israel shares the same sentiments as illustrated in its justification of its policy regarding the security-centric stance it took in the *Public Committee Against Torture in Israel v Government of Israel* case.⁵¹ The petitioners contested the legality of the methods used by the Israel Defence Forces during interrogations of suspected terrorists, particularly practices that were deemed to involve torture, cruel, inhuman and degrading treatment. The primary legal questions concerned the balance between national security interests and the protection of human rights. The court was tasked with determining whether the method of interrogation violated both Israeli law and international legal standards regarding the treatment of detainees. The Israeli Supreme Court issued a landmark ruling, determining that certain interrogation methods employed by the Israeli Defence Force were indeed contrary to the values enshrined in the Israeli legal system.⁵² The Court held that even in situations where national security is at stake, the state must respect fundamental human rights,

⁴⁶ *P, Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 3 September 2008 (European Court of Justice).

⁴⁷ *Ibid.*

⁴⁸ Frank, L.P. “Review of Human Rights and the South African Legal Order” (1980) *Universal Human Rights* 2. 95–97.

⁴⁹ Hafetz, J. “Resisting Accountability: Transitional Justice in the Post-9/11 United States,” (2015) *International Journal of Human Rights*, 19, 429–446.

⁵⁰ President of the United States of America, *National Security Strategy of the United States* (September 2002). Available at: <https://2009-2017.state.gov/documents/organization/63562.pdf> (accessed on 11 September 2001).

⁵¹ H CJ 769/02.

⁵² *Ibid.*

including prohibition against torture, acknowledging the need for a robust national security strategy, which Solon Solomon suggests, should not come at the expense of human rights.⁵³

The Constitution of Lesotho provides a framework for human rights protection in the bill of rights in Chapter 2 while also delineating the powers of security agencies⁵⁴ in their respective Acts. The Lesotho Defence Force for instance, is governed by the Defence Force Act.⁵⁵ Its role comprises of assistance in the protection of life, health, and property, provision and maintenance of essential services, upholding law and order in support of the police as directed by the government, support to state departments as directed by the government, submission to international responsibilities such as peacekeeping support processes and regional military assistance.⁵⁶

The Lesotho Mounted Police Service is also governed by the Lesotho Mounted Police Service Act which provides that the Lesotho Mounted Police Service shall be an efficient and effective police service for Lesotho.⁵⁷ The National Security Service is governed by the National Security Service Act of 1998, which provides that it shall be responsible for the protection of national security.⁵⁸ The Command of the National Security Service is vested in the Director-General responsible for the management and discipline of the National Security Service.⁵⁹

The Lesotho Correctional Services is also governed under the Lesotho Correctional Service Act of 2016,⁶⁰ which replaced the Basutoland Prisons Proclamation of 1957.⁶¹ The main duties of the Act include ensuring the security and safe custody of all inmates detained in custody in prison or correctional facility. The Lesotho Correctional Service ensures that the treatment and discipline of inmates is in accordance with the provisions of the Lesotho Correctional Service Act.⁶²

⁵³ Solomon, S. *Dispute Settlement – The Justifiability of International Disputes* (Publisher Wolf Legal Publishers, 2009)

⁵⁴ Constitution of Lesotho of 1993.

⁵⁵ Lesotho Defence Force Act 1996.

⁵⁶ *Ibid* Sec 5(a) (c).

⁵⁷ Police Service Act 1998.

⁵⁸ National Security Service Act 1998.

⁵⁹ *Ibid*.

⁶⁰ The Lesotho Correctional Service Act 2016 Sec 34(a).

⁶¹ Severson, S.J. "Social Control and Incarceration in Lesotho: A History of Strategies, 1850-1970" (Doctoral Dissertation, Yale University, 2021).

⁶² *Ibid*.

In light of these, while the Lesotho Constitution espouses the protection of human rights and fundamental freedoms, national security agencies often face pressure to prioritise national security, leading to potential conflicts in operational practice. Murray Christina, asserts that constitutions typically outline specific procedures and principles for declaring states of emergency when a nation confronts extraordinary situations that pose a threat to life and security, such as significant natural disasters, health emergencies, invasions, or armed conflicts.⁶³ Such circumstances may warrant extraordinary measures that restrict human rights.⁶⁴ Any limitations or derogations must adhere to a stringent constitutional process and be interpreted narrowly to prevent abuse.⁶⁵

Furthermore, reports have shown that security agencies in Lesotho operate within a complicated environment of political instability and socio-economic challenges, brought about by the recurring internal political crisis, feeble democratic bodies and practices, and parochial security institutions.⁶⁶ Because of persistent instability, Lesotho has faced extreme systems of governance ranging from military rule to constitutional democracy, which exacerbated the tensions between national security and human rights protection.⁶⁷ This supports the argument that socio-economic challenges and security operations during times of crisis often overlook constitutional mandates, leading to human rights violations.

Studies from various democratic societies illustrate the complexities involved in striking a balance. For instance, research by Kristina Mani, highlights instances in Argentina where national security policies led to the suppression of dissent and severe human rights violations during the military dictatorship.⁶⁸ Lessons drawn from such cases can inform the practices of security agencies in Lesotho where it is crucial to understand how historical grievances and political dynamics have influenced the actions of security personnel.

⁶³ Murray, C. *Protecting Human Rights in Constitutions* (United Nations Development Program, 2023).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Transformation Index, "BTI 2022 Lesotho Country Report". Available at: <https://www.bti-project.org/reports/country-report-LSO-2022.html> (accessed on 19 October 2024).

⁶⁷ Makoa, F. K. "Electoral reform and political stability in Lesotho" (2004) *African Journal on conflict resolution*, 4(2), 79-85.

⁶⁸ Mani, K. "The Argentine Military in Democracy: Moving Beyond Issues of Civilian Control to a Citizen Soldier Paradigm" (2015) CMI Working Paper.

As previously mentioned, because of the recurrent internal political instability, feeble democratic bodies and practices, and parochial security institutions,⁶⁹ security agencies often operate with an ambiguous mandate that result in arbitrary decision-making and abuse of power. This study advocates for clearer guidelines and accountability mechanisms in protecting human rights while ensuring effective national security. This literature review underscores the necessity for a careful consideration of the historical context, the constitutional mandate and international best practices.

1.8 Research Methodology

The study was conducted using a qualitative research method.⁷⁰ To investigate the balance between human rights protection and maintaining national security, the dilemma of execution of constitutional mandate by security agencies in a democratic society and therefore, relevant case law was importantly also examined.

As aforementioned, although the writer's research approach was grounded in qualitative methodology,⁷¹ the doctrinal legal research approach was also employed on account of its pertinence in achieving the objectives of the study. The doctrinal legal research involved: (i) systematic analysis of statutory provisions and legal principles involved therein, or derived therefrom, and (ii) logical and rational ordering of the legal propositions and principles.⁷² Emphasis was placed on the rules of substantive law, doctrines, concepts and judicial pronouncements relevant to the subject matter.

1.9 Chapter Outline

The dissertation is composed of five chapters:

The first chapter serves as the introduction and deals with the general overview of the research topic, which basically explains the parameters of the subject under investigation. It introduces the research problem, the research questions, the objectives of the study, hypothesis,

⁶⁹ Transformation Index, The Lesotho Country Report (2022). Available at: <https://www.bti-project.org/reports/country-report-LSO-2022.html> (accessed on 19 October 2024).

⁷⁰ Mohajan H.K. "Qualitative research methodology in social sciences and related studies" (2018) *Journal of Economic Development, Environment and People* 7, 1-2. Qualitative research is inductive in nature, it is a method of research that explores meanings and insights in a given situation. It comprises of different methods which includes, logic, discourse analysis, case study, comparative method, historical research and others.

⁷¹ Hutchinson, T. and Duncan, N. "Defining and Describing What We Do: Doctrinal Legal Research" (2012) *17 Deakin Law Review* 83.

⁷² *Ibid.*

significance of the study, literature review and the methodology used in conducting the research.

Chapter two outlines the definition of national security and explores its various components. It identifies and analyses the specific challenges faced by national security agencies as they strive to balance their constitutional duties with the imperative of protecting human rights and fundamental freedoms.

Chapter three examines relevant case law that illustrates the tensions between the national security mandate and human rights protection, while assessing the influence of legal constraints on the functioning of security agencies. The chapter also evaluates the legal framework in Lesotho that regulates the operations of national security agencies, assessing their effectiveness in meeting operational requirements while also protecting human rights and fundamental freedoms. It identifies existing gaps within the framework. Furthermore, the investigation explores the practical implications of the human rights frameworks on the functioning of security agencies, with the goal of proposing improvements that can effectively balance national security objectives with the safeguarding of human rights.

Chapter four critically discusses the extent to which the government can go in protecting its citizens. The chapter determines the various factors the government ought to take into consideration in dealing with issues of security and human rights. The chapter also provides a comparative analysis between Lesotho and Kenya in determining how they have dealt with terrorism and insurgency groups in recent years and also responds to recommendations that have been expounded by legal scholars on the issue.

Chapter five provides a summary of the entire mini-dissertation, focusing on key points or issues. It highlights the principal findings, conclusion and recommendations.

CHAPTER TWO

UNDERSTANDING LESOTHO'S LEGAL FRAMEWORK ON NATIONAL SECURITY

2.1 Introduction

In an increasingly complex global landscape, the concept of national security has evolved beyond traditional military concerns to encompass a broader spectrum of factors that ensure the safety and stability of a nation.⁷³ This chapter defines and provides an understanding of national security that elucidates its key components and the intricate legal framework that governs it, particularly within the context of Lesotho. The chapter examines the multifaceted nature of national security, which includes not only defence against external threats but also the protection of political, economic, and social stability. The legal framework surrounding national security in Lesotho serves as a critical foundation for the operations of security agencies tasked with safeguarding the nation's interests. However, the pursuit of national security often presents significant challenges, particularly in the delicate balance between maintaining public order and upholding human rights. As national security agencies navigate this landscape, they must confront dilemmas that test the limits of legal protections and ethical considerations.

2.2 Understanding National Security

National security refers to the protection and preservation of a state's sovereignty, territorial integrity, and ensuring the well-being of its citizens.⁷⁴ It encompasses a wide range of activities and policies designed to guard against internal and external threats that could destabilise the state or compromise its core values hence, governments organise their security policies into National Security Strategies.⁷⁵ The concept of national security goes beyond military defence and includes economic stability, political integrity, social cohesion, and public safety.⁷⁶

National security is a dynamic and a multifaceted concept. Ciekowski notes that processes occurring in Europe and globally especially, in recent years, are resulting in social, political and military transformation that make the consequences difficult to predict, unlike it was the

⁷³ Donald, S.M. *National Security* (Routledge, 2019).

⁷⁴ Harold, B, "Thinking about National Security: Defense and Foreign Policy in a Dangerous World" (1983) United States National Security in reference handbook contemporary world issues.

⁷⁵ United States President. *National Security Strategy of the United States*. White House, 1987.

⁷⁶ Harold, B, "Thinking about National Security: Defense and Foreign Policy in a Dangerous World" (1983) United States National Security in reference handbook on contemporary world issues.

case in the past.⁷⁷ National security refers to the measures taken by a state to ensure its survival, sovereignty, and integrity against threats.⁷⁸ It encompasses the protection of citizens, infrastructure, and institutions from various forms of harm, including terrorism, crime, and internal conflicts. The concept of national security has changed over the years. It has evolved from a focus on military defence against external threats, known as traditional security, to a broader concept termed comprehensive national security.⁷⁹ This inclusive approach addresses both internal and external issues affecting the state and society to ensure their overall safety and well-being. In Lesotho, national security is not viewed solely through the lens of physical protection but also through the prism of human security, which implies the protection of human rights and fundamental freedoms.⁸⁰ It encompasses the protection of individuals from both violent and nonviolent threats. It is a condition defined by freedom from pervasive threats to people's rights, their safety or even their lives.

2.3 Components of National Security

Military security is designed to protect the nation state against other nation-states.⁸¹ Economic security is meant to ensure a stable and sustainable economic system to withstand external shocks, maintain employment levels, and support the overall welfare of citizens. In Canada, threats to the country's overall economic security are considered economic espionage, which is illegal, clandestine or coercive activity by a foreign government in order to gain unauthorised access to economic intelligence, such as proprietary information or technology, for economic advantage.⁸²

Political security is intended to maintain a stable government that is responsive to the needs and rights of its citizens, ensuring legitimacy, and preventing tyranny or autocratic rule.⁸³ In addition, political security refers to a condition in which a country's political structure, order, and ideologies are safeguarded from threats, bias, subversion and destruction. It is a fundamental aspect of national security and serves as its foundation.⁸⁴

⁷⁷ Ciekankowski, Z., Nowicka, J. and H. Wyrębek *Bezpieczeństwo państwa w obliczu współczesnych zagrożeń* (Pracownia Wydawnicza Wydziału Humanistycznego Uniwersytetu Przyrodniczo-Humanistycznego, 2016).

⁷⁸ Ibid.

⁷⁹ Khan, E.M. "Comprehensive National Security: Contemporary Discourse" (2022) Margalla Papers 26, 1-17.

⁸⁰ Dzimba J. and Matoane M. "Stock Theft and Human Security: Case Study of Lesotho." (2005) 85 Institute for Security Studies Monographs, 113.

⁸¹ Jablonsky, D. *US National Security Beyond the Cold War* (Strategic Studies Institute, US Army War College, 1997).

⁸² Umar, I., Shafiq, Z. and Qian, Z. "The ad Wars: Retrospective Measurement and Analysis of Anti-Adblock Filter Lists" (2017) In *Proceedings of the Internet Measurement Conference*. 171-183.

⁸³ Alan, C. *Contemporary Security Studies* (Oxford university Press, 2022) 111.

⁸⁴ Amos, J. et al, *American National Security* (Johns Hopkins University Press, 2009).

Societal security envisages the protection of the social fabric and identity of the population, addressing issues such as ethnic tensions, cultural preservation, and social cohesion. Ole defines societal security as the capacity of a society to maintain its fundamental identity and cohesiveness in the face of evolving circumstances and potential or ongoing threats.⁸⁵ It encompasses the various social, cultural, and political dimensions that contribute to the stability and continuity of a community or nation.⁸⁶

As societies encounter shifts in globalisation, economic changes, demographic shifts, technological advancements, and environmental challenges they must adapt while safeguarding their core values and social frameworks.⁸⁷ Societal security involves not only protection against external threats like conflicts, terrorism, or natural disasters but also addressing internal pressures that can undermine social cohesion, such as inequality, discrimination, and cultural fragmentation.⁸⁸

Moreover, the assurance of societal security calls for proactive measures to strengthen social bonds, promote mutual understanding among diverse groups, and foster resilience.⁸⁹ This can be achieved through policies that encourage participation, support integration, and enhance communication within society.⁹⁰ Ultimately, a secure society is one that is capable of evolving in the face of challenges while preserving the essence of its collective identity and ensuring a sense of belonging and continuity for its members.⁹¹

Environmental security addresses issues that arise from environmental degradation and climate change, which can lead to resource scarcity and conflict.⁹² Environmental security entails a broad range of issues including the consequences of climate change such as natural disasters, droughts, sea level rise, resource conflicts, threats to sustainability and livelihoods, the degradation of land, water, and air as well as concerns regarding public health.⁹³ For example, climate change can be viewed as a threat to environmental security such as when human

⁸⁵ Wæver, O. *Identity, Migration, and the New Security Agenda in Europe* (London Pinter, 1993).

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Dalby, S. *Environmental Security*. (Vol. 20. University of Minnesota Press, 2002).

⁹³ Ibid.

activity impacts carbon dioxide emissions, impacting regional and global climatic and environmental changes and thus, changes in agricultural outputs. This can lead to food shortages which may then, cause political debates, ethnic tensions, and civil unrests.⁹⁴

Cybersecurity is concerned with protecting information systems and critical infrastructure from cyber threats, espionage, and sabotage.⁹⁵ Cybersecurity is the practice of protecting systems, networks, and programs from digital attacks.⁹⁶ These cyberattacks are usually aimed at accessing, changing, or destroying sensitive information; extorting money from users through ransomware or interrupting normal business processes.⁹⁷ It necessitates the protection of computer software, systems and networks from threats that can lead to unauthorised information disclosure, theft or damage to hardware, software or data, as well as from the disruption or misdirection of the services they provide.⁹⁸

Human security means ensuring the safety and dignity of individuals, focusing on well-being, access to essential services, and protection from violence. The United Nations notes that “human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people.”⁹⁹ It calls for people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people.¹⁰⁰

2.4 National Security Legal Framework in Lesotho

Lesotho’s legal framework regarding national security is constructed through a combination of various laws, statutes, and acts that collectively establish the core principles and guidelines for the protection and preservation of the nation’s sovereignty.¹⁰¹ This framework outlines the fundamental roles and responsibilities assigned to different security agencies, including the

⁹⁴ Chalecki, E.L. “Environmental Security: A Case Study of Climate Change” (2002) Pacific Institute for Studies in Development, Environment, and Security.

⁹⁵ Schatz, S. et al, “Towards a More Representative Definition of Cyber Security.” (2017) 8 Journal of Digital Forensics, Security and Law 12(2).

⁹⁶ Ibid.

⁹⁷ Kaplan, J.M. et al, *Beyond Cybersecurity: Protecting Your Digital Business* (John Wiley & Sons, 2015) see also <https://www.cisco.com/site/us/en/learn/topics/security/what-is-cybersecurity.html>.

⁹⁸ Ibid.

⁹⁹ Lopes, J.V. “Multilateralism in the Field of Security: The Global Role of the United Nations High Commissioner for Refugees.” UN noted in General Assembly Resolution 66/290.

¹⁰⁰ Ibid.

¹⁰¹ Letsie, T.W. “Demilitarising the Mountain Kingdom: An Action Research Project in Lesotho” (Phd Dissertation, 2018).

police, the military, and the intelligence services, as they work to maintain peace and stability within the country.¹⁰²

Moreover, the legal provisions emphasise the necessity of balancing national security interests with the protection of individual human rights and freedoms.¹⁰³ This balance is critical in ensuring that measures taken to secure the nation do not infringe on the rights of its citizens.¹⁰⁴ The legislation includes, but is not limited to, the acts of espionage, terrorism laws, regulations governing surveillance and law enforcement operations.¹⁰⁵

In addition to defining the structural setup of security agencies,¹⁰⁶ these laws provide guidelines for accountability, oversight, and compliance with international human rights standards. By establishing clear legal parameters for each agency, Lesotho aims to foster a transparent and responsible security environment that not only prioritises the safety of its citizens but also upholds their dignity and rights.¹⁰⁷ Below is an overview of the main components that make up the Lesotho legal framework.

2.4.1 Lesotho Constitution

As previously mentioned, these agencies operate in a constitutional framework, which ideally ensures the protection of human rights and fundamental freedoms. The Constitution of Lesotho, adopted in 1993,¹⁰⁸ as the supreme law of the land, outlines the fundamental rights and freedoms of individuals, which are essential when discussing national security. The Constitution, lays down human rights and fundamental freedoms. Some key provisions relevant to this discussion, include the right to life provided for in Section 5.¹⁰⁹ Realisation of this right entails that security operations must avoid unnecessary harm to life. It also provides for the right to freedom of expression in Section 14,¹¹⁰ obligating security agencies to respect and protect the freedom of speech of citizens, even during national security operations. However, some of these rights sometimes can be limited in the interest of national security, but

¹⁰² Ibid.

¹⁰³ Akanji, A. "Balancing Individual Rights v National Security: A Critical Analysis." (14 December 2024).

¹⁰⁴ Ibid.

¹⁰⁵ Mohau, M. "National Security Policy as a Framework for Stability" (PhD Dissertation, National University of Lesotho, 2022).

¹⁰⁶ Setshedi, L. "Military Intervention and its Impact on Governance, Peace and Security in the Kingdom of Lesotho." (2023): 203-215 *Global Change, Peace & Security* 35, No. 2.

¹⁰⁷ Ibid.

¹⁰⁸ Constitution of Lesotho, 1993.

¹⁰⁹ Ibid Sec 5(1).

¹¹⁰ Ibid.

any restrictions must be lawful and justifiable in a democratic society.¹¹¹ The Constitution provides for the declaration of a state of emergency, which can enhance the powers of the state in matters of national security.¹¹² Such powers must align with constitutional provisions to prevent abuse.¹¹³

2.4.2 Lesotho Defence Force (LDF)

The Lesotho Defence Force Act governs the establishment and operation of the Lesotho Defence Force, which is responsible for defending the nation against external threats and ensuring national sovereignty.¹¹⁴ It is established by the Constitution.¹¹⁵ The Act defines the roles, structure, and command of the Lesotho Defence Force, emphasizing its operational independence, while also subjecting it to civilian authority.¹¹⁶ The Constitution states that the Prime Minister is Commander-in-Chief and governs the operational use of the Lesotho Defence Force.¹¹⁷ The Lesotho Defence Force Act outlines the conditions under which the armed forces may be deployed, ensuring that military actions are within the bounds of the law and respect human rights standards.¹¹⁸ When discharging its constitutional duties, the Lesotho Defence Force is obligated to stand by values and standards, including respect for others, courage, cohesion¹¹⁹ integrity, commitment and loyalty.¹²⁰

2.4.3 Lesotho Mounted Police Service (LMPS)

The Lesotho Mounted Police Service is established by the Lesotho Constitution¹²¹ and regulated by the Lesotho Mounted Police Service Act, which outlines that the Lesotho Mounted Police Service is responsible for maintaining law and order within the country.¹²² This Act delineates the powers and duties of the police, including the enforcement of laws and maintenance of public safety. The Lesotho Mounted Police Service also plays a critical role in national policing, particularly in addressing internal threats, crime, and civil unrest. Procedures for arrest and detention, as well as community engagement, are crucial for maintaining public

¹¹¹ Salau, O.A. "Right of Access to Information and its Limitation by National Security in Nigeria: Mutually Inclusive or Exclusive" (Doctoral Dissertation, University of Cape Town, 2017).

¹¹² Constitution of Lesotho, 1993 Sec 23.

¹¹³ Nyane, H. "Emergency Powers and Human Rights Derogations under the Constitution of Lesotho" (2023) 26 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1-30.

¹¹⁴ Lesotho Defence Force Act 1996, Sec 190 (1).

¹¹⁵ The Lesotho Constitution of 1993 Sec, 146.

¹¹⁶ Ibid.

¹¹⁷ The Lesotho Constitution (n 7) Sec 145 (1).

¹¹⁸ Lesotho Defence Force Act 1996.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ The Lesotho Constitution of 1993 Sec 147(2).

¹²² Lesotho Mounted Police Services Act 1998.

trust. The authority of the Lesotho Mounted Police Service is conferred in the Commissioner of Police and subjected to the authority of the Minister, the Commissioner is in charge of the discipline and administration of the Police Service.

2.4.4. National Security Service (NSS)

The Lesotho Constitution establishes the National Security Service, responsible for the protection of national security.¹²³ The National Security Service Act highlights the command of the National Security Service is vested in the Director-General who is responsible for its management and discipline. The Act outlines the function of the National Security Service and how those functions are to be performed in consideration of human rights.¹²⁴

Operations that involve surveillance or intelligence-gathering must adhere to constitutional protection against unreasonable searches and invasions of privacy. The right to privacy is a fundamental human right recognised internationally and enshrined in various national constitutions, including in Section 11 of the Constitution of Lesotho. It safeguards individuals against arbitrary interference with their personal lives, autonomy, and private affairs. The Constitution of Lesotho explicitly outlines the importance of privacy, stating that every individual has the right to respect for their private and family life. This provision aligns with international human rights instruments such as the Universal Declaration of Human Rights, particularly Article 12,¹²⁵ which asserts that no one shall be subjected to arbitrary interference with their privacy, family, home, or correspondence, nor to attacks upon their honour and reputation.

2.4.5. Lesotho Correctional Services (LCS)

The Lesotho Correctional Services Act governs the operations of correctional facilities within Lesotho.¹²⁶ Although primarily focused on the correctional system, the Act contributes to national security by addressing issues of rehabilitation and reintegration of offenders, which can impact crime rates and social stability. The Act emphasises the humane treatment of inmates, and maintaining their rights as an important aspect of broader national security, ensuring that justice systems do not contribute to social unrest. The main duties of the Act

¹²³ The Lesotho Constitution Sec 148 (1).

¹²⁴ National Security Service Act Sec 26 and 27.

¹²⁵ Universal Declaration of Human Rights art 12.

¹²⁶ The Lesotho Correctional Service Act 2016 Sec 34(a).

include ensuring the security and safe custody of all inmates detained in custody, prison or correctional facility. Also that the treatment and discipline of inmates therein is in accordance with the provisions of this Act. The Lesotho Correctional Services is tasked with contributing to the conservation and safeguard of a society that is just, peaceful and safe.¹²⁷

The above domestic instruments show that the legal framework on national security in Lesotho is multidimensional, involving various acts that collectively aim to safeguard the nation while balancing human rights.¹²⁸ Each piece of legislation plays a unique role in defining the responsibilities of security institutions and ensuring that national security measures do not unnecessarily infringe on individual rights. The interaction of these laws is crucial in forming a comprehensive approach to maintaining the security and stability of Lesotho.

Furthermore, the International Covenant on Civil and Political Rights,¹²⁹ to which Lesotho is a state party, reinforces the significance of the right to privacy. Article 17 of the International Covenant on Civil and Political Rights echoes the same sentiments expressed in the Universal Declaration of Human Rights by prohibiting arbitrary or unlawful interference with one's privacy, family, home, or correspondence.¹³⁰ In the context of Lesotho's legal framework, Section 11 serves as a national guarantee that reflects these internationally recognised standards, ensuring that privacy rights are not only acknowledged but also protected against unlawful encroachments. Consequently, the right to privacy in Lesotho plays a crucial role in promoting individual dignity, freedom, and security, while also aligning with broader international human rights norms.

2.5 Challenges Confronting National Security Agencies with Respect to Human Rights and Fundamental Freedoms

Security agencies face a unique set of challenges in balancing their constitutional duties and the imperative of protecting human rights. The first of these challenges is political instability. Lesotho has experienced political turmoil,¹³¹ making it difficult for security agencies to

¹²⁷ Maapesa, M. "National Security Policy as a Framework for Stability" (PhD Dissertation National University of Lesotho, 2022).

¹²⁸ Tlohang (n 4) 2018.

¹²⁹ International Covenant on Civil and Political Rights (ICCPR).

¹³⁰ Ibid.

¹³¹ Maundeni, Z. "Political Culture as a Source of Political Instability: The Case of Lesotho." (2010).

maintain stability without infringing on human rights.¹³² Political parties often engage in confrontational tactics, leading to tensions that require oversight from security forces.¹³³

Security operations sometimes can lead to human rights violations, especially in efforts to quell protests or dissent. An example of this is the Fobane killings of an entire family and retaliation in Liphakoeng in the Leribe District of Lesotho, where security forces beat the entire village including women, illustrating what agencies may face when trying to combat insurgent groups in the country.¹³⁴ This challenge is brought about by security agencies when they take extreme measures and end up not considering the need for human rights protection during their operations.

Limited resources and funding for security agencies can impact their effectiveness, leading to an over reliance on force subsequently, infringing on human rights due to desperation.¹³⁵ Security agencies face this challenge because limited resources and funding can significantly, hinder the effectiveness of security agencies, compelling them to adopt an over reliance on force in their operations.¹³⁶ When agencies lack adequate financial support and essential resources, they may resort to aggressive tactics as a primary means of maintaining order and addressing security threats, driven by a sense of urgency and desperation, this is supported by the notion that having adequate resources and funding security agencies will be able to procure modern equipment to counter anything that may threaten national security.¹³⁷ The gap created by insufficient funding ultimately jeopardises the delicate balance between ensuring public safety and preserving the fundamental rights and freedoms within society.¹³⁸

Ensuring that actions taken by security agencies comply with the legal framework is essential but challenging, particularly when security needs clash with legal principles.¹³⁹ For instance, where communication surveillance is necessary, it must be conducted in accordance with the law and in a proportionate manner.¹⁴⁰ However, one of the challenges to the application of the

¹³² Mothibe, T.H. “The Military and Democratization in Lesotho, Institute of Development Studies.” (1999). Available at: <http://opendocs.ids.ac.uk/opendocs/bitstream/handle> (accessed on 28 October 2015).

¹³³ Ibid.

¹³⁴ Staff Reporter, “LDF Raids Famo Leader’s Village” *Sunday Express* (Maseru, 27 April 2024).

¹³⁵ Wulf, H. “Security Sector Reform in Developing and Transitional Countries” (2004) Berghof Research Center for Constructive Conflict Management 5.

¹³⁶ Ibid.

¹³⁷ Gold, D. “The Costs of Terrorism and the Costs of Countering Terrorism” (2005) International Affairs Working Paper 3.

¹³⁸ Wulf 2004 (above) 2.

¹³⁹ Necessary and Proportionate. “International Principles on the Application of Human Rights to Communications Surveillance”. Available at: <https://necessaryandproportionate.org/about> (accessed on 4 February 2025).

¹⁴⁰ Ibid.

proportionality principle could be that it is a guideline, which governments are not legally bound to adhere to, especially when confronted with problems as serious as those that threaten national security.

Corruption and mismanagement within the security sector can undermine public trust, complicating the balance between effective law enforcement and respect for citizen's rights. This is noted by Yeh, who observes that corruption denied the relevant anti-corruption institutions a chance to implement reforms to enhance checks and balances. It paralyses and makes them ineffective in their operations.¹⁴¹ This hinders the rule of law, which is a precondition for the enjoyment of human dignity and thus, demands of the legal system consistency in protecting human rights.¹⁴² This is supported by Article 1 of the Universal Declaration of Human Rights, 1948, which states that all human beings are born free and equal in dignity and rights. It follows that the dignity of every individual should be protected regardless of their status or circumstances.

In Lesotho, citizens express strong reservations about the conduct and competence of the police. Amid a growing sense of insecurity in their neighbourhoods and homes, only one-third of Basotho say they trust the police, who rank high among the country's institutions in perceived corruption.¹⁴³ A majority of Basotho say the police routinely torture or abuse people in their custody, use excessive force in dealing with criminals, and engage in criminal activities.¹⁴⁴ Few think the police operate in a professional manner and respect citizens' rights while the majority of citizens overwhelmingly say the government is doing a bad job in reducing crime.¹⁴⁵

2.6 Conclusion

The definition of national security within the context of security agencies in Lesotho must be understood as a dynamic balance.¹⁴⁶ Security agencies are entrusted with the duty to protect the nation and its citizens while being constitutionally mandated to respect and uphold human

¹⁴¹ Yeh, S.S. "Corruption and the Rule of Law in Sub Saharan Africa" (2011) *African Journal of Legal Studies* 4, 187-208.

¹⁴² Riley, S. "Human Dignity and the Rule of Law" (2015) 11(2) *Utrecht Law Review* 91-105.

¹⁴³ Libuseng, M. and Tosin, S. "Lack of Professionalism, and Corruption among Police Failings Cite Brutality" (2022) *Afrobarometer Basotho Dispatch* No. 555; see also Kamau, P. and Gedion, O. and Tosin, S. "Kenyan's Cite Criminal Activity, Lack of Respect, and Corruption among Police Failings" (2022).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Judicial Officer's Association of Lesotho and Another v Right Honourable the Prime Minister Pakalitha Mosisili N O and Others* [2006] LSHC 150 (4 July 2006) at para. 12.

rights, failing which the courts will intervene. The limits within which the courts should operate must be such that they check any infringements of the express provisions set forth in a constitution.¹⁴⁷ Through the discussion above, it is evident that the challenge lies in establishing legal and operational guidelines in ensuring that national security does not come at the expense of fundamental freedoms and human rights.¹⁴⁸ Continuous dialogue, legal reforms, and judicial scrutiny remain essential in achieving this balance, ensuring that the security framework respects both the state's and the individual's interests.¹⁴⁹

This chapter has provided a comprehensive examination of national security, emphasizing its multifaceted definition and the critical components that contribute to its understanding. The chapter has explored the legal framework of Lesotho, which serves as a guiding tool for security agencies in their mandate to protect national security while ensuring adherence to human rights standards. Despite these frameworks, the chapter has shed light on the various challenges faced by security agencies, including the persistence of human rights violations. These violations have inevitably led to judicial interventions, which is discussed in the next chapter through a review of relevant case law. This ongoing tension between maintaining national security and upholding human rights highlights a complex dynamic that requires ongoing scrutiny and reform.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ DCAF (n 18).

CHAPTER THREE

JUDICIAL INTERVENTIONS IN RESPONSE TO VIOLATIONS: ANALYSING CASE LAW

3.1 Introduction

In the last few years, the delicate balance between national security and human rights has emerged as a contentious and pivotal theme within the realm of law and governance.¹⁵⁰ Security agencies, tasked with the crucial responsibility of maintaining order and protecting the state, often operate in high-pressure environments where their actions can significantly impact human rights. This chapter delves into the complex interplay between judicial interventions and the conduct of security agencies, particularly in light of notable case law that exemplify the tension between these two fundamental principles. Focusing specifically on the case of *Mofomobe and Shale v The Prime Minister and Others* (C of A (CIV) 51 of 23), this analysis illustrates how the judiciary has responded to allegations of abuses of human rights justified by the national security concerns. Through a careful examination of this case and several others, I explore the jurisprudence governing the conduct of security agencies, the principles of accountability, and the functions of the courts in protecting human rights from possible state overreach.

3.2 Legal Implications of National Security Versus Human Rights

The tension between national security and fundamental human rights and freedoms was enunciated in the *Mofomobe and Shale v The Prime Minister and Others* case.¹⁵¹ The court *a quo* addressed the right to privacy and protection against unjust property seizure. In this case, the National Security Service aimed to confiscate and examine the applicant's cell phones, claiming that the devices were used to communicate with certain members of the National Security Service who had disclosed confidential information. Additionally, the applicants were alleged to be involved in criminal activities, including murder and money laundering.¹⁵² In assessing the validity of search warrants, the court examined the seizure and search authority granted to the Prime Minister.¹⁵³ It assessed whether the process for issuing warrants includes adequate safeguards to prevent misuse of power, and determines if the warrants authorised by

¹⁵⁰ Jing, C. "The Impact of National Security on Human Rights a Comparative Study of Practice under the European Convention on Human Rights and in China" (Doctoral thesis Utrecht University, 2023).

¹⁵¹ (C of A (CIV) 51 of 23).

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

the Minister were issued by the appropriate authority.¹⁵⁴ The focus was on whether the language used in the warrants was unclear and excessively broad. It referenced the Constitution of 1993, the National Security Service Act of 1998; and the National Security Service Regulations of 2000. The court issued a ruling against the National Security Service, which subsequently filed an appeal.

The Appeal Court highlighted the need for security agencies to act within the law and safeguard citizen's rights, even while performing functions related to national security.¹⁵⁵ The Court underscored the necessity for any action taken to be justifiable within the constitutional framework and should not overreach into the realm of human rights.¹⁵⁶ The plaintiffs,¹⁵⁷ cell phones were sought to be examined by the National Security Service under the pretext of safeguarding national security. The National Security Service argued that examining their personal devices was necessary to prevent potential threats to the state, a rationale that is often employed in matters of national security.¹⁵⁸ The plaintiffs however, contested the action, asserting that it constituted an infringement on their rights to privacy and an unjust seizure of property without due process.

The crux of the case centred on whether the National Security Service's actions were justified under the notion of national security or whether it amounted to an abuse of power in violation of the applicant's rights.¹⁵⁹ At the heart of the dispute was the right to privacy which is increasingly viewed as a critical human right in legal systems globally. In this context, privacy is understood not merely as the absence of intrusion but as the essential ability of individuals to manage their personal information and communications free from governmental interference.¹⁶⁰ As Sakoane CJ indicated that;

In order to ensure that privacy receives the best and effective protection, the United Nations General Assembly, has resolved that all States must establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

transparency, as appropriate, and accountability for State surveillance of communications, their interception, and the collection of personal data.¹⁶¹

The question of examination of cell phones raised significant concerns about the scope of what constitutes private information, including personal messages, photographs, and contacts. The principle of protection against unjust seizure of property is equally crucial, as it protects individuals from arbitrary actions by state authorities.¹⁶² The principle requires that any seizure of property must be conducted lawfully, proportionally, and with respect for due process.¹⁶³ Sakoane highlighted that in the absence of clear legal justification or oversight, the actions of the National Security Service could be interpreted as a breach of both statutory and constitutional norms.¹⁶⁴

The case encapsulates the ongoing tension between national security concerns and the protection of human rights and fundamental freedoms specifically, the rights to privacy and protection against unjust seizure of property. It reflects broader implications for legal principles in Lesotho and illustrates the challenge of balancing state power with individual rights within a constitutional framework.¹⁶⁵ The case further illustrates the broader societal concerns that exist between the need for national security and the protection of human rights. The conflict of balancing state power with individual rights seem to lessen when security is viewed from an individual-centred perspective. “Indeed, human security and human rights have extensive overlaps.”¹⁶⁶ Cameron has observed in this regard that state’s actions can sometimes infringe upon human rights.¹⁶⁷

While on the one hand, the government is concerned with eliminating threats and to improve the operational effectiveness of security agencies it also has on the other hand, the obligation to safeguard human rights.¹⁶⁸ Concerning essential national interests, there is a notion that, at the peak of analysis, states can be seen focusing on one interest that is, national survival or the maintenance of sovereignty.¹⁶⁹ Sussex whilst discussing the definition of national security

¹⁶¹ Ibid at para 17.

¹⁶² *Big Brother Watch and Others v UK* [2021] ECHR 439 para 439 (25 May 2021).

¹⁶³ Ibid.

¹⁶⁴ (C of A (CIV) 51 of 23).

¹⁶⁵ Ibid.

¹⁶⁶ Jing, C. “The Impact of National Security on Human Rights a Comparative Study of Practice under the European Convention on Human Rights and in China” (Doctoral thesis Utrecht University, 2023). See also; Tadjbakhsh, S. and Chenoy, A. *Human Security: Concepts and Implications* (London: Routledge, 2007) 123.

¹⁶⁷ Cameron, I. *National Security and the European Convention on Human Rights* (Brill, 2021).

¹⁶⁸ *Hummatov v Azerbaijan*, Nos. 9852/03 and 13413/04, 144, 29 November 2007.

¹⁶⁹ Waltz, K. *Theory of International Politics* (New York: McGraw-Hill, 1979).

delved deeper into the components of national interest.¹⁷⁰ He argued that national survival can be seen as encompassing several specific interests, such as ensuring the protection of the country and its populace, promoting their well-being, and maintaining their principles, customs and traditions.¹⁷¹ However, this rationale must be scrutinised against the potential for state overreach and the erosion of human rights. The Court has established a clear boundary, emphasising that government intervention must not undermine the fundamental nature of rights involved, regardless of the significance of public interests.¹⁷²

The mandates of security agencies sometimes overlap, meaning that they sometimes perform the constitutional functions of another agency.¹⁷³ For instance, the over-intrusiveness of the Lesotho military into the law enforcement sphere within the Kingdom where it does not ordinarily have a role to play, in the normal course of things, should be handled by the police.¹⁷⁴ Governments often justify encroachments on personal freedoms on the basis of the need to safeguard national security. In the *Mofomobe* case, the National Security Service motive to act, citing national security concerns highlights how countering a potential threat can lead to a pre-emptive dismantling of privacy rights, potentially normalising surveillance practices that may not be subject to rigorous legal scrutiny.¹⁷⁵

The *Mofomobe* case serves as a critical examination of the delicate balance between national security and fundamental freedoms within the Lesotho legal landscape. It underscores the necessity for a clear legal framework that protects individual rights while allowing the state to fulfil its obligation to safeguard national security.¹⁷⁶ Reflecting on this case, it becomes evident that the ongoing dialogue about privacy, state power, and fundamental freedoms are crucial to understanding the trajectory of law and society in Lesotho.¹⁷⁷ My observation in this regard is that resolution of the case does not only impact the lives of the individuals involved but also resonate across the legal community, influencing future interpretations of fundamental freedoms and governmental authority.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Daniel, F. and O'Connell, A.J. "Agencies as Adversaries" (2017) California Law Review, 105 (5), 1375-1470.

¹⁷⁴ Okpaluba, C. "Establishing State liability for personal liberty violations arising from arrest, detention and malicious prosecution in Lesotho" (2017) African Human Rights Law Journal, 17(1), 134-162.

¹⁷⁵ (C of A (CIV) 51 of 23).

¹⁷⁶ Ibid.

¹⁷⁷ Phillip, L.T. "Towards the Justifiability of Socio-Economic Rights in the Legal System of Lesotho" (LLM Mini-Dissertation, National University of Lesotho, 2022).

The examination of a warrant's validity in relation to the authority regarding search and seizure is a pivotal aspect, especially in the broader discourse around human rights protection versus national security. The court primarily considers the personal information of the applicant. For example, in the United Kingdom, the Regulation of Investigatory Powers Act 2000 permits two kinds of interception warrants: a targeted warrant under Section 8(1) and an untargeted warrant under Section 8(4) of the Act.¹⁷⁸

The *Mofomobe* case puts into sharp relief, the critical issue, is how the courts delineate the boundary between necessary governmental actions to safeguard national security and the infringement of individual rights, particularly in contexts where government authority is implicated.¹⁷⁹ This issue was addressed in the *Big Brother Watch and Others v the United Kingdom* case.¹⁸⁰ It is noted that "The applicants were human rights non-governmental organisations that operated internationally and had connections with various individuals and entities. Under normal circumstances, these organisations would not typically attract the interest of intelligence agencies conducting targeted surveillance as permitted by Section 8(1) of the Regulation of Investigatory Powers Act."¹⁸¹

The non-governmental organisation's communications were, nonetheless, genuinely at risk of interception if their clients were under bulk surveillance as specified in Section 8(4).¹⁸² The court in the *Big Brother Watch and Others v the United Kingdom* case, ruled that the applicants could still be considered victims even with the availability "of effective domestic remedies. Essentially, the initial condition centred on the wording of the legislation. In contrast, part (b) of the second condition evaluated the probability of being subjected to surveillance, taking into account the unique aspects of the situation."¹⁸³ An individual may lodge a theoretical complaint regarding a law concerning covert surveillance.¹⁸⁴ This represents a legally valid compromise, as it is essential and justified to carry out secret surveillance for national security purposes, while at the same time, this practice encroaches upon individuals' right to privacy, but with the likelihood of being challenged.¹⁸⁵

¹⁷⁸ Regulation of Investigatory Powers Act, 2000.

¹⁷⁹ (C of A (CIV) 51 of 23).

¹⁸⁰ 58170/13, 62322/14 and 24960/15, ECHR 2018.

¹⁸¹ Regulation of Investigatory Powers Act 2000 (RIPA).

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Jing, C. "The Impact of National Security on Human Rights a Comparative Study of Practice under the ECHR and in China" (Doctoral thesis Utrecht University, 2023) 357.

¹⁸⁵ *Ibid.*

As the issue cannot be solved by informing the individual involved, the court has suggested judicial procedural measures as a solution.¹⁸⁶ These measures address the conflict by allowing the applicant to submit the case for judicial review without the need to demonstrate that they are being monitored by the government.¹⁸⁷ The court's assessment delves into the procedures surrounding the issuance of warrants, focusing on whether they incorporate adequate safeguards to prevent misuse of power by the executive. This requires a multi-faceted scrutiny. The court evaluated the statutory provisions that govern the warrant issuance process.¹⁸⁸

The effectiveness of judicial independence in contexts where national security is invoked often comes under scrutiny, as there can be pressures that skew judicial objectivity. However, such scrutiny is now on the executive because in the case of *Mofomobe*, the warrant was an executive warrant not a judicial one. The court had to justify that there is a need for safeguards that not only exist on paper but are also effectively operationalised.¹⁸⁹ This includes evaluating instances of abuse or misuse of warrants, the transparency of the process, and the availability of review or redress mechanisms for those affected by such actions.

The court's findings in the *Mofomobe* case necessitated recognising that the dichotomy of human rights and national security is a complex and nuanced issue. The court's role is not merely to apply the law but to engage in a larger ethical deliberation about rights, governance, and power. A useful exposition of privacy is found in the judgement of the supreme court of Canada in *R v Plant* where the learned judge said;

I do agree with that aspect of the Miller decision (*United states v Miller* 425 U.S. 435 (1976)) which would suggest that in order for the constitutional protection to be extended, the information seized must be of personal and confidential nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the charter should seek to protect a biographical core of personal information which individuals in free and democratic society would wish to maintain and control from

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

dissemination to the state. This would include information which tend to reveal intimate details of the lifestyle and personal choices of the individual.¹⁹⁰

On the sensitivity of national security, courts must be vigilant against the national security narrative and validity of warrants in that regard, which can often be invoked to justify overreach and misuse. The assessment of warrant validity is therefore, not limited to the legality of the issuance but must also incorporate an analysis of the motivations behind the assertion of national security. For example, in the case of *Powell*, due to the significant risk of abuse when exercising authority when enforcing search warrant, the courts scrutinised their validity with a keen concern for safeguarding the individual's freedom, their rights for privacy and property.¹⁹¹

Human rights in times of crises are extremely limited, such as in times of wars or national emergency.¹⁹² where governments often expand their powers, sometimes at the expense of individual rights. The court's hesitance or willingness to question the necessity of such expansion plays a critical role in maintaining the balance. For instance, the 2007-2008 post-election violence in Kenya led to the death of thousands of people and the displacement of many Kenyans also contributed to the need for prioritising national security.¹⁹³

The effectiveness of safeguards hinge on public perceptions and trust in the judicial system.¹⁹⁴ An erosion of faith in the judiciary as a protective entity against governmental overreach can significantly impact societal unity and adherence to the rule of law.¹⁹⁵ The courts have established guidelines for specific topics and have referred back to these guidelines in later cases that address similar issues. For example, in matters related to covert surveillance, the courts have outlined essential protections to prevent the misuse of authority.¹⁹⁶ In this regard, the constitutionality of the National Security Act was contested in the case *AK Roy v Union*

¹⁹⁰ (1993) 2 SCR 281.

¹⁹¹ 2005(5) SA 62(SCA) at 85C-F.

¹⁹² Tšoloane Mohlomi, "Famo gang wars fuel deadly violence in Lesotho that spills into South Africa" *Mail & Guardian* (Johannesburg, 16 September 2024); see also Lesotho Times, "Letsoela Clears the Air" *Lesotho Times* (Maseru, 19 August 2024).

¹⁹³ Fatima, F. and Yalim, U. *Preventing Post-Election Violence Based on the Kenyan Experience* (Stanford University, 2015).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Centrum För Rättvisa v Sweden*, No. 35252/08, 103, ECHR 2018. *Roman Zakharov v Russia*, No. 47143/06, 231, ECHR 2015. *Association for European Integration and Human Rights and Ekinidzhiev v Bulgaria*, No. 62540/00, 76, ECHR 2007. *Weber and Saravia v Germany* (dec), No. 54934/00, 95, ECHR 2006-XI. *Prado Bugallo v Spain*, No. 58496/00, 30, 18 February 2003. *Valenzuela Contreras v Spain*, 30 July 1998, 46, Reports of Judgments and Decisions 1998-V. *Amann v Switzerland* [GC], No. 27798/95, 56-58, ECHR 2000-II. *Huvig v France*, 24 April 1990, 34, Series A No. 176-B.

of India AIR 1982 SC 710, with arguments stating that it is an oppressive law that grants the executive arbitrary and excessive authority,¹⁹⁷ similar to the *Mofomobe* case. The petitioner argued that the National Security Act of 1980 violated Articles 14, 19, and 21 of the Constitution. However, unlike in the *Mofomobe* case, the court noted in the *Roy* case that the Act includes built-in safeguards to prevent the arbitrary use of power.¹⁹⁸ For example, when detention is ordered by the District Magistrate or the Commissioner of Police, the officer issuing the detention order must promptly communicate that decision along with the reasons from the state government..¹⁹⁹

The right to privacy may be limited by law when it is necessary for the interests of the Crown in law enforcement, and the courts often analyse cases based on their specific circumstances.²⁰⁰ For a law that the Crown invokes for law enforcement purposes to be constitutionally valid, it must satisfy certain requirements. Additionally, every individual is entitled to legal protection from unlawful or arbitrary intrusions into their privacy.²⁰¹ This means that any program for monitoring communications must operate under a law that is publicly accessible and must adhere to the constitution of the state as well as international human rights standards.²⁰² Furthermore, accessibility means that the law must not only be made available to the public, but also that it is accurate enough to allow the individual to adjust their behaviour, anticipating the potential outcomes of a particular action.

The court's evaluation of warrant validity illustrates the delicate balancing act between affirming national security measures and upholding human rights. The findings underscore the necessity for robust safeguards against potential abuses of power and thus, highlight the role of an independent judiciary as a bulwark against the erosion of fundamental freedoms. Many governments however, believe it is inevitable to prioritise security over freedoms and that rigidly defending human rights could threaten both the safety of the state and the well-being of its citizens.²⁰³ The rationale behind this perspective is that certain rights may need to be curtailed to protect the greater good, ensuring stability and safety within society.

¹⁹⁷ AIR 1982 SC 710.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Janneke, J.H. "The European Court of Human Rights and the National Courts: Giving Shape to the Notion of Shared Responsibility" (Janneke Gerards and Joseph Fleuren, 2014).

²⁰¹ International Covenant on Civil and Political Rights, Art 17.

²⁰² *Ibid.*

²⁰³ Hippel, K.V. *Europe Confronts Terrorism* (Palgrave Macmillan, 2000).

National security concerns often lead to the expansion of executive powers, sometimes at the expense of individual rights, as highlighted above which must be checked to prevent abuse and violation. Confronted with practical challenges and political pressures, government officials are compelled to reassess guidelines, policies, and tools while seeking to balance national security and human rights.²⁰⁴

National security, in its definition, is important for every nation. In the sense that without a secure state, there is no one to safeguard human rights for but should also align with international human rights norms.²⁰⁵ Analysing the *Mofomobe* case against this backdrop can illuminate discrepancies between national practices and international expectations, providing a clearer framework for future deliberations and established guidelines for protecting individuals against state actions. Key international instruments like Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, enshrine the rights to privacy, due process, and freedom from arbitrary detention. This framework highlights that any measures taken in the interest of national security must respect these fundamental rights.

The legitimacy of security agencies actions in the context of national security progressively hinges on accountability mechanisms.²⁰⁶ It includes the right of affected individuals to seek redress and challenge the legality of warrants in a court of law. The need for transparency in the issuance of security related warrants cannot be overstated. The *Mofomobe* case presents an opportunity to assess whether there are counterbalancing influences in place to allow for public scrutiny of actions taken in the name of national security, thereby contributing to a more informed discourse on the limits of state power.

Proportionality is crucial to apply in assessing whether measures taken such as the issuance of warrants are necessary and not overly broad. This involves evaluating the nature of the security threat against the potential infringement of individual rights. A lack of proportionality could render the actions of the state arbitrary and unjustifiable. Reasonableness and proportionality

²⁰⁴ Jing, C. “The Impact of National Security on Human Rights a Comparative Study of Practice under the ECHR and in China” (Doctoral thesis Utrecht University, 2023) 357.

²⁰⁵ Han, D. “On the Relations between National Security and Human Rights Defined in the Constitution of the People’s Republic of China” (2019) *Journal on the Human Rights* 18, 551.

²⁰⁶ Strom, K. “Delegation and Accountability in Parliamentary Democracies” (2000) *European Journal of Political Research* 37, 261-289.

of government actions are required as highlighted in the *Kituo Cha Sheria & 8 Others v Attorney General* case.²⁰⁷

The Constitution of Lesotho as previously mentioned, with specific reference to Sections 11 and 17 focus on the protection against freedom from arbitrary seizure of property and guarantees the right to privacy.²⁰⁸ These provisions lay the groundwork for ensuring that citizen's rights are protected from overreach by state actors especially, within the realm of security.

Section 26(2) of the National Security Service Act of 1998 allocates certain powers to the intelligence service, including the issuing of warrants. The language and scope of the Act significantly, impacts on how broadly this agency can exercise its powers, particularly regarding surveillance and data collection. The National Security Service Regulations of 2000 further details out procedures and limits regarding national security activities, often reflecting a balance between operational effectiveness and legal safeguards on individual rights.²⁰⁹ A fundamental issue highlighted in the analysis is whether the language of the warrants is clear and appropriate.²¹⁰ If warrants use vague terms that could lead to broad interpretation, this could allow law enforcement officers to operate without the necessary checks. Unclear language can lead to overreach, where officials might justify surveillance or detention based on ambiguous terms rather than a specific legal basis.

The excessively broad scope warrants that the lack of specificity could incorporate a broad range of individuals or communications, infringing on the privacy rights guaranteed in the Constitution. This is where the fundamental rights articulated in Sections 11 and 17 are crucial. They provide a legal framework to challenge power that could otherwise lead to arbitrary actions based on vague statutory authority.²¹¹ The issues involve not just legal interpretations but also ethical considerations. The more ambiguous the terms of a warrant, the higher the risk that citizen's rights could be violated. This could lead to potential abuses of power, eroding public trust in security agencies and government institutions. National security, by itself, is unclear, as noted by Zwart, who emphasises that "human rights" is a vague term that blends

²⁰⁷ Petition 19 & 115 of 2013 [2013] eKLR.

²⁰⁸ Constitution of Lesotho, 1993.

²⁰⁹ National Security Service Regulations of 2000.

²¹⁰ Ibid.

²¹¹ Ibid.

legal and philosophical discussions. In this context, legal discourses pertain to the rights established in human rights agreements.²¹²

Agencies may argue that broad warrants are necessary for effective counter-terrorism or crime prevention.²¹³ However, it raises the question whether such justifications could hold when they infringe on human rights especially, when the language fails to provide adequate clarity and limits. Judicial oversight and safeguards and the role of the judiciary in interpreting these terms and ensuring that rights are upheld is indispensable. The courts must be willing and able to critically review the language and breadth of warrants.²¹⁴ Their role is to provide a check on legislative and executive actions, ensuring that national security measures adhere to constitutional protections, supporting the notion that any terms dealing with national security must be clear and concise.²¹⁵

In analysing the Court of Appeal's emphasis in the *Mofomobe* case on the need for government agencies to act within the law while safeguarding citizen's rights, it is crucial to consider several layers of legal and ethical implications that arise within this context. The court's insistence on actions being justifiable within the constitutional framework highlights a fundamental principle of democratic governance and the rule of law. As Friedrich Hayek points out, the rule of law requires that "government in its all actions is bound by rules fixed and announced beforehand."²¹⁶ This principle serves as a cornerstone to limiting arbitrary power by establishing that government actions must be grounded in law. In situations involving national security, it is easy for agencies to justify actions on the basis of urgent threats. However, the court's ruling serves as a reminder that such justifications must still align with constitutional provisions and respect for human rights.²¹⁷

The court's ruling reflects the ongoing tension between the imperatives of national security and the protection of human rights.²¹⁸ For example, the right to privacy might encompass a person's expectation that their communications remain confidential, as well as the freedom to select

²¹² Spyridon, F., Zwart, T. and Fraser, J. *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar Publishing, 2013).

²¹³ Hippel, K.V. *Europe Confronts Terrorism* (Palgrave Macmillan, 2005).

²¹⁴ Jones, W.C. "The Constitution of the People's Republic of China" (1985) Washington University Law Quarterly.

²¹⁵ *Ibid.*

²¹⁶ Hayek, F. *The Road to Serfdom* (G. Routledge & Sons, 1946).

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

their preferred way of life.²¹⁹ However, the need for security can sometimes lead to disproportionate measures that violates rights such as freedom of expression, privacy, and due process as Tsakyrakis notes, these rights are not “amenable to any meaningful form of quantification.”²²⁰

In addition, another dilemma security agencies face may be the proportionality test in trying to balance the two, where proportionality is not viable in the quantitatively comparable sense. When measuring the interest of protecting personal communications from interception versus the interest of detecting a terrorist plot for example, it is uncertain which one should prevail.²²¹ Thus, it remains a challenge but by emphasising that actions related to national security must not overreach into the human rights sphere, the court underscores the importance of establishing checks and balances that prevent the misuse of power under the banner of national security.²²²

In the Indian setting, a similar Act like the one in the *Mofomobe* case was criticised on the grounds that it places arbitrary power in the hands of the government and is often misused by the authorities.²²³ Referring back to the *Roy* case, the court noted that the Act leaves scope for arbitrariness on the part of the executive but such discretion has to be allowed to the government to enable it to protect the general interest of society.²²⁴

Another critical aspect of the ruling in the *Mofomobe* case is the call for accountability and oversight of law enforcement and intelligence agencies. In a similar vein, Maree, emphasised that the lack of oversight of the police and armed forces in India “has encouraged an atmosphere that promotes the human rights violations. This condition will persist as long as security forces have the illusion that, no matter how often they infringe human rights, they are beyond the law when they operate to defend national security. The right to an effective remedy is a non-derogable right enshrined in the Act.”²²⁵

²¹⁹ Ibid.

²²⁰ Tsakyrakis, S. “Proportionality: An Assault on Human Rights” (2009) International Journal of Constitutional Law 3 (7), 468-493.

²²¹ Ibid.

²²² Ibid.

²²³ Maree, V.B. “Balancing National Security and Human Rights” (School of Law, Institute of Science and Technology University Kattankulathur Campus, 2024).

²²⁴ AIR 1982 SC 710.

²²⁵ Maree, V.B. “Balancing National Security and Human Rights” (School of Law, Institute of Science and Technology University Kattankulathur Campus, 2024).

The *Mofomobe* judgment implies that there should be mechanisms in place to evaluate the actions of these agencies, ensuring that they do not operate in a vacuum or with impunity.²²⁶ Such oversight could include judicial review, independent monitoring bodies, or legislative scrutiny, which are essential to uphold democratic norms and protect citizens from potential abuses of power.²²⁷

The ruling may serve as a touchstone for evaluating the legality of actions taken by state agencies in the name of national security. The principle of legality is the basic concept in criminal and international human rights rule.²²⁸ It invites further inquiry into how courts may balance competing interests in future disputes, potentially influencing the development of jurisprudence in this area. The case could lead to subsequent discussions around the robustness of constitutional safeguards and the need for clearer legislative frameworks that define the boundaries and the scope of national security measures under the principle of separation of powers.²²⁹

In essence, the South African Court of Appeal's decision in *Albutt v Centre for the Study of Violence and Reconciliation*²³⁰ is significant not just for its immediate implications but also for its broader reflections on the values of fairness, transparency, accountability, and the rule of law in governance as highlighted in Section 57(1)(b) of the Constitution of the Republic of South Africa.²³¹ It serves as a critical reminder that national security considerations must not come at the expense of fundamental human rights, and that all actions of state agencies must be rooted in a commitment to constitutional democracy. In *Kaunda v President of the RSA*, the court had to consider the executive's power.²³² The case concerned 69 South African citizens who were arrested and held in custody. The applicants sought a range of relief, including an order declaring that the government was under an obligation firstly, to extradite the applicants to South Africa to be criminally prosecuted and secondly, to take steps to protect the applicants in relation to their conditions of imprisonment.²³³

²²⁶ (C of A (CIV) 51 of 23).

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *De Lange v Smuts* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at para 60.

²³⁰ 2010 (3) SA 293 (CC).

²³¹ Constitution of South Africa, 1996.

²³² 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC).

²³³ *Ibid.*

Montesquieu wrote in time to influence both the drafting of the French Declaration of the Rights of Man in 1789.²³⁴ He highlighted Article 16 of the Rights of Man, which provides that “Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution.”²³⁵ His thesis was that separating the judicial, executive and legislative powers would enhance the liberty of the subject by preventing tyranny, violence, oppression and suppression of human rights. In the context of *Mofomobe*, supporters might advocate for the National Security Service’s right to access personal devices as a means to prevent and investigate activities that could endanger national security on time. In order to avoid diffusing power so completely that the government is unable to take timely measures in the public interest, public safety and order, the state may not deviate from its primary function, which is to protect its citizen, necessitating security agencies to access personal devices if need be in the best interest of the public.²³⁶

National security agencies often play crucial role in preventing serious crimes.²³⁷ By accessing personal devices, agencies claim they can better track and enforce laws related to those committing acts that threaten the nation’s security and public order, thereby justifying the intrusion into individual freedoms when warranted.²³⁸ However, Maree argues that expanded powers given to government forces to protect national security have culminated in systematic unlawful searches and detention, disappearances, extrajudicial executions and violence, including abuse.²³⁹ No attention is paid to the fact that the right to life, the right to unlawful arrest and incarceration and the right not to be exposed to barbaric, inhuman or abusive punishment or care are both non-derogable and non-limitable freedoms enshrined in the Constitution and in the International Covenant on Civil and Political Rights.

These arguments show that it is crucial to consider the implications of prioritizing security over individual rights. Invasive national security practices pose significant risks to individual freedoms, particularly the rights to privacy and protection against unjust property seizure. In the *Mofomobe* case, the implications for fundamental freedoms are profound. The right to privacy includes the freedom from having one’s private life and communications pried into.²⁴⁰

²³⁴ Montesquieu, S., Louis, C. and Montesquieu, C. *The Spirit of Laws* (The Lawbook Exchange Ltd, 2005).

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ Richard, E. *Crime in an Insecure World* (Polity, 2007).

²³⁸ *Ibid.*

²³⁹ Maree, V.B. “Balancing National Security and Human Rights” (School of Law, Institute of Science and Technology University Kattankulathur Campus, 2024).

²⁴⁰ *Ibid.*

However, in order to combat such vices as organised crime and terrorism, security agencies may have to conduct investigations involving spying into the private affairs and communications of certain persons in order to obtain information that is necessary to prevent the crime from being committed or to hold the perpetrators accountable.²⁴¹ Such investigations are conducted through electronic surveillance and interception of private communications.²⁴²

The power to conduct surveillance and intercept private communications is necessary and justified in circumstances where the state needs to combat organised crime, terrorism and similar vices. The right to privacy is a cornerstone of democratic societies and legal systems. Critics like Paul argue that the confiscation and examination of personal devices without sufficient legal grounds constitutes an invasion of privacy and undermines the trust between the state and its citizens, disrupting the social contract essential for a free society.²⁴³ As already highlighted, individuals have a right to privacy, including the right to the privacy of their personal communications. Although the African Charter on Human and People's Rights does not expressly recognise the right to privacy, the obligations of governments to respect and protect certain elements of this right are inferred from other fundamental rights that are expressly guaranteed in the Charter.²⁴⁴

Serious concerns have been raised regarding how governments conduct investigations in a manner that excessively undermine the enjoyment of individual privacy.²⁴⁵ There is significant risk that national security measures can lead to abuse of power by state authorities. Mavedzenge notes that the executive approach as described above has certain conceptual deficiencies, which increase the risk of abuse of power with the potential to obliterate the enjoyment of the right to privacy and other rights.²⁴⁶

Historical precedents suggest that governments may use national security justifications to curtail dissent, many governments conduct surveillance and intercept private communications as a way of gathering information necessary to forestall attempts to commit crimes or to identify perpetrators, for purposes of holding them accountable through the criminal justice

²⁴¹ Mavedzenge, J.A. "The Right to Privacy v National Security in Africa: Towards a Legislative Framework which Guarantees Proportionality in Communications Surveillance." (2020) 12 *Journal of Legal Studies* 360-390.

²⁴² *Ibid.*

²⁴³ Ohm, P. "The Fourth Amendment in a World Without Privacy" (2011) *Mississippi Law Journal* 81.

²⁴⁴ Ouguerouz, F. *The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (BRILL, 2021).

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

system.²⁴⁷ Some countries have enacted legislation to regulate interception of private communications, while in some countries, such authority is provided for and regulated through counter-terrorism legislation. The chilling effect on freedom of expression as perceived threat of intervention by security agencies can deter individuals from expressing their views openly.²⁴⁸ People may censor themselves to avoid scrutiny, which ultimately stifles democratic discourse, critical thought, and the vibrant exchange of ideas that are vital in any democracy.²⁴⁹

3.3 Legal Principles and Human Rights Standards in Lesotho

A crucial aspect of case law revolves around the legality of security agencies involvement in civil affairs and the justification for their actions. The judiciary has often reiterated that any security agencies action needs to be within constitutional boundaries. The *Maseko v Attorney General* case highlights the challenge of striking a balance between protecting human rights and upholding national security.²⁵⁰ This case, which reached the Court of Appeal as a *habeas corpus* application, addressed the legitimacy of the appellant's arrest and detention under section 13(1) of the Internal Security (General) Act 24 of 1984.²⁵¹ It underscores the importance of establishing liability for wrongful arrests and unlawful detentions while ensuring that human rights are not compromised in the name of national security.

The *Maseko* case provides a critical analysis of the legal boundaries surrounding wrongful arrest and unlawful detention, highlighting both the potential for government overreach and the essential safeguards necessary for protecting individual liberties.²⁵² The case emphasises the tension between the state's need to maintain security and the necessity to uphold individual rights, a balance that is at the heart of many legal discussions regarding human rights.²⁵³ This case serves as a reminder of the government's responsibility to ensure that any arrest or detention is grounded in law and justified by clear and reasonable standards. Under section 13(1) of the Internal Security (General) Act, the terms of the arrest must be strictly adhered to, and any deviation can lead to unlawful detention claims.²⁵⁴

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ LAC (1990-1994) 13.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

Moreover, the case spotlights the judiciary's role as a check on executive power. The Court of Appeal's ruling on the application for *habeas corpus* signifies the judicial system's commitment to protecting citizen rights against unlawful encroachments by the state.²⁵⁵ Advocates for human rights like Karen argue that the ramifications of unlawful detentions extend beyond the individuals affected.²⁵⁶ They set a precedent that can embolden state actors to commit further violations. Therefore, decisions originating from cases like *Maseko*, reinforce a crucial barrier against the erosion of personal freedoms and the rule of law.

In the Lesotho case of *Bolofo v DPP*, the Court of Appeal considered an appeal on an application for bail, requiring the court to balance two competing interests namely, the interests of the criminal detainees in their basic right to liberty, on the one hand, and the interests of the community in criminal suspects being prosecuted, on the other.²⁵⁷ On deliberating on the provisions of sections 6(3)(b) and 6(5) on personal liberty and sections 12(1), (2) and (8) on the right to a fair trial of the Constitution, Steyn P who delivered the judgment of the unanimous court, held that the Constitution was not enacted merely for purposes of promoting the Kingdom as a country that expresses a commitment to acceptable international norms and standards of behaviour but rather that it is a solemn and effective covenant regulating the relationship between the Crown and its citizens.²⁵⁸ As many nations grapple with the challenges of ensuring the rule of law while addressing security concerns, the interpretation and enforcement of this principle become essential.

The principles that govern the use of force are essential to the sustenance of a democratic society and the balance between maintaining public safety and protecting individual rights is delicate.²⁵⁹ The *Bolofo* case illustrates the ongoing struggle within a developing legal framework, reflecting broader themes of governance and human rights. As democracies continue to evolve, the dialogue surrounding proportionality and necessity in the use of force remains pivotal not just as a legal principle, but also as a reflection of the values and priorities of society as a whole. Each society must navigate this complex landscape, weighing the immediate need for security against the long-term imperative of preserving human rights.

²⁵⁵ *Ibid.*

²⁵⁶ Karen, E. "Anti-impunity and the Turn to Criminal Law in Human Rights" (Cornell L. Rev. 100 2014); see also Howard, T. *The International Commission of Jurists: Global Advocates for Human Rights* (University of Pennsylvania Press, 2010).

²⁵⁷ LAC (1995-1999) 231.

²⁵⁸ *Bolofo* (n 22 above) 247D-E.

²⁵⁹ Necessary and Proportionate, *International Principles on the Application of Human Rights to Communications Surveillance* (2014). Available at: <https://necessaryandproportionate.org/principles> (accessed on 4 January 2025).

The *Bolofa* case serves as an important legal precedent that underscores the delicate balance between individual rights and community safety within the justice system. The court's observation regarding the need to balance the competing interests of criminal detainee's rights to freedom against the community's interest in the prosecution of criminal suspects raises significant points for consideration. This duality invites a nuanced discussion about the implications of justice, rights, and societal welfare. The case exemplifies the ongoing struggle within the legal system to reconcile the rights of individuals with the needs of the community. While protecting the freedom of accused individuals aligns with fundamental human rights principles, it must be balanced against the imperative of public safety and the efficient administration of justice. Each case presents distinct challenges, demanding judges to navigate the complex terrain with foresight and ethical consideration. Ultimately, a fair justice system must reflect a commitment to both protecting individual rights and ensuring the well-being of the entire society.

Conversely, critics of cases like *Maseko* might argue that excessive scrutiny of state actions regarding security can hinder effective law enforcement.²⁶⁰ Laws such as the Internal Security Act are sometimes deemed necessary for maintaining public order and national security especially, in times of unrest or heightened tension. The interpretation of what constitutes wrongful arrest and detention can be subjective and thus, overly strict interpretations can undermine enforcement efforts and the ability of authorities to act swiftly in protecting public safety.

Additionally, the concerns raised by such cases may contribute to a sense of apprehension among law enforcement agencies. The fear of legal repercussions could lead to hesitancy in acting against genuine threats, thereby potentially endangering public safety.²⁶¹ Handler asserts that the law must strike a balance that allows governmental bodies to perform their necessary functions without feeling overly constrained or fearfully litigious.²⁶² Laurence posits that while safeguarding individual freedoms is essential, there should also be an acknowledgment of the challenges faced by law enforcement in effectively carrying out their

²⁶⁰ Mavedzenge, J.A. "The Right to Privacy v National Security in Africa: Towards a Legislative Framework which Guarantees Proportionality in Communications Surveillance" (2020) *African Journal of Legal Studies*, 12 (3): 360-390.

²⁶¹ Logan, C. "Ambitious SDG Goal Confronts Challenging Realities: Access to Justice is Still Elusive for Many Africans" (2017) *Afrobarometer Policy Paper No. 39*.

²⁶² Handler, J.F. *Law and the Search for Community* (Quid Pro Books, 2010).

duties.²⁶³ The United Nations Rapporteur similarly observed that judicial involvement in oversight should not be viewed as a panacea, but rather, judicial warranting or review of the digital surveillance activities of intelligence and or law enforcement agencies have amounted effectively to an exercise in rubber-stamping.²⁶⁴

The use of force should be proportionate and necessary.²⁶⁵ As one would expect in any fledgling democracy like Lesotho where the military constantly plays the role of neutralising the rule of law and the enforcement of fundamental human rights and freedoms, they should act in the manner that is proportionate to the threat they intend to counter. The principle of proportionality is critical in discussions surrounding law enforcement and military action, especially in developing democracies where the structures of governance and human rights are often tested.²⁶⁶ In a democracy, the need to maintain civil order should be balanced with the rights of individuals.²⁶⁷ Where communication surveillance is necessary, it must be conducted in accordance with the law and in a proportionate manner. Excessive force by law enforcement or military entities can lead to human rights violations, public dissent, and ultimately, a breakdown in trust between citizens and the state.²⁶⁸

The principle of necessity is also important. The courts should only endorse the use of force when absolutely essential to safeguard public welfare. The United Nations Human Rights Committee has interpreted article 17 of the International Covenant on Civil and Political Rights as imposing a duty on state parties to ensure that “any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.”²⁶⁹ Moreover, a proportionate response ensures that the measures taken by law enforcement officers reflect the severity of the threat. There are notable instances where disproportionate responses have led to unintended escalations, resulting in loss of life and social unrest. Addressing protests with military force, for example, can exacerbate tensions and lead to a

²⁶³ Tribe, T. “Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism” (1975) Harv. L. Rev. 682.

²⁶⁴ United Nations Special Rapporteur, “The Right to Privacy in the Digital Age” A/HRC/27/37 (2014) para 38.

²⁶⁵ International Principles on the Application of Human Rights to Communications Surveillance officially launched in September 2013 during the session of the UN Human Rights Council in Geneva. Available at: <https://necessaryandproportionate.org/about> (accessed on 4 February 2025).

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Toonan v Australia* Communication No. 488/1992 at para. 8.3 and *Antonius Cornelis Van Hulst v Netherlands*, Communication No. 903/1999 at para 7.3; also see *M.G v Germany*, Communications No. 1482/2006 at paras 10.1 and 10.2.

cycle of violence rather than peace. Therefore, adherence to the principle of proportionality can de-escalate situations and maintain public order while respecting human rights.

International bodies and scholars argue for a human-centric approach to national security. One of such scholars is Andrew who asserts that he is very defiant in any approach to national security that is not centred around humans, that is to say, which is not human-centric.²⁷⁰ Kofi Annan, former United Nations Secretary-General's discourse on human security emphasizes that real national security should focus on people's safety and well-being rather than just state security.²⁷¹ This aligns with literature on human rights and security, which discusses the essential balance that must be struck between securing the state and protecting individual rights and freedoms.

3.4 Conclusion

This chapter has critically examined the role of judicial interventions in addressing allegations of human rights violations in Lesotho, particularly through the lens of the *Mofomobe and Shale v Prime Minister and Others* case among others. The judiciary's engagement in these cases underscores the delicate balancing act between safeguarding national security and upholding the rule of law and individual rights. Through an analysis of legal principles, the chapter highlights how the judiciary navigated the complexities of national interest versus human rights concerns, reinforcing the necessity of legal oversight in governance. The next chapter delves into the historical journey of human rights in Lesotho, drawing insightful comparisons with Kenya. The exploration provides a broader context for understanding the evolution of legal frameworks in both nations and their implications for human rights protection.

²⁷⁰ Liaropoulos, A. "Cyber-Security: A Human-Centric Approach" (2015) In European Conference on Cyber Warfare and Security: Academic Conferences International Limited. Oxford, UK, 189.

²⁷¹ Annan, K. *Human Security and Intervention* (Vital Speeches of the Day 66, No. 1 (1999): 5. Available at: <https://press.un.org/en/1999/19990920.sgsm7136.html> (accessed on 20 September 1999).

CHAPTER FOUR

LESOTHO GOVERNMENT'S OBLIGATION TO PROTECT THE CONSTITUTIONAL RIGHTS OF ITS CITIZENS

4.1 Introduction

The government of Lesotho faces the complex challenge of ensuring national security while simultaneously safeguarding the fundamental human rights of its citizens.²⁷² In a region shaped by socio-political instability and economic difficulties, the balance between maintaining order and protecting individual freedoms becomes crucial.²⁷³ This chapter explores the extent to which the Lesotho government can implement measures aimed at securing its populace against various threats be they internal, such as crime and civil unrest, or external, related to geopolitical factors without infringing on the very rights that form the cornerstone of its democratic framework. The chapter seeks to illuminate the delicate interplay between state security and human rights protection, questioning where the line should be drawn, and how the government can navigate the intricate landscape responsibly.

4.2 Scope of Human Rights Protection

The protection of citizens' constitutional rights encompasses a range of actions aimed at ensuring their safety, welfare, and overall prosperity.²⁷⁴ The constitutional obligation to protect the citizens of Lesotho manifests in various forms, including implementation of effective public safety measures, upholding of human rights, and the maintenance of national security.²⁷⁵ Public safety initiatives involve law enforcement agencies and community programs designed to prevent crime and ensure a safety for all individuals.²⁷⁶ Simultaneously, human rights protection serves to secure individual's freedoms, ensuring that every citizen can enjoy their rights without fear of infringement.²⁷⁷

Public security encompasses the efforts to prevent and protect against incidents that may endanger the safety and well-being of the community, including significant risks, harm, or

²⁷² John, D. and Matooane, M. "Stock theft and human security: Case study of Lesotho." (2005) 85 Institute for Security Studies Monographs 113.

²⁷³ Tlohang, L.W. "Demilitarising the Mountain Kingdom: an action research project in Lesotho" (PhD Dissertation, 2018).

²⁷⁴ Department Research Degree Committee, *Maritime Domain Awareness in the Canadian Safety and Security Program* (2013) (Scientific Brief).

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

property damage.²⁷⁸ The governments is responsible for the protection of its citizens, that is individuals within its jurisdiction, organisations, and institutions from threats that could compromise their health, safety, and overall prosperity.²⁷⁹ In addition, public security is the proactive measures taken to prevent and safeguard against incidents that may pose a risk to the safety and well-being of the general populace.²⁸⁰ This encompasses a broad range of potential threats, including crime, natural disasters, terrorism, and other significant hazards that could lead to harm or loss of property. The overarching goal of public security is to create a safe environment where individuals can thrive without the looming fear of danger or injury.²⁸¹

Typically, the obligation for ensuring public security falls on the state, which implements various strategies and policies aimed at protecting citizens and the infrastructure within their jurisdictions²⁸² This protection extends to individuals, communities, organisations, and institutions, all of which deserve a secure setting for their activities and daily lives.²⁸³ By addressing potential threats to safety, public security measures contribute to the overall prosperity and survival of society, fostering a climate of trust and stability that is crucial for the development of healthy and vibrant communities.²⁸⁴

Another aspect of protection of citizens is by adhering to the civil and political rights. Civil and political rights are a category of entitlements that safeguard a person's freedom from interference by governments, social institutions, and private entities.²⁸⁵ They encompass the fundamental ability to engage in the societal and governmental aspects of life. Typically, such rights include ensuring personal physical and mental well-being, safety, protection against bias or prejudice, the right to privacy, and freedoms regarding ideas, expression, faith, dress, gathering, and movement²⁸⁶

National security involves safeguarding and defending a sovereign nation, including its people, economy, and institutions, and is regarded as the responsibility of the government.²⁸⁷ Initially

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Fokina, A.O. et al, *Normative Determination of Guarantees of Political Rights in the Sphere of Administrative Justice* (No. 72, Amazonia Investigation, 2023).

²⁸⁶ Ibid.

²⁸⁷ Joseph, R.J. *Defining National Security: The Non-Military Aspects* (Council on Foreign Relations, 1993).

designed to safeguard against military assaults, national security is now broadly recognized to encompass non-military aspects as well, including protection from terrorism, crime reduction, economic stability, energy supply security, environmental preservation, food safety, and cyber-security.²⁸⁸ National security threats encompass not only the actions of other countries but also activities by violent non-state groups, drug cartels, organized crime groups, multinational corporations, and the impact of natural disasters.²⁸⁹

National security plays a crucial role in citizen protection, as it involves safeguarding the nation against external threats that could jeopardise the safety and stability of its populace. This entails not only military defence as mentioned above, but also intelligence efforts aimed at thwarting potential attacks or espionage. By fostering an environment where citizens feel secure in their homes, communities, and nations, the comprehensive approach to protection enhances public trust and promotes a sense of well-being. Ultimately, the effective protection of citizens is a foundational pillar of a thriving society, contributing to their prosperity and peace of mind. Generally, security is protection from, or resilience against potential harm or other unwanted coercion.²⁹⁰

4.3 Key Factors for the Government in Security and Human Rights

It is worth reiterating that the above discussion centres around human rights. Human rights are universally recognised moral principles or norms that establish standards of human behaviour and are protected under national and international laws.²⁹¹ These rights are considered inherent and inalienable, meaning they belong to every individual everywhere around the world simply because they are human, irrespective of factors such as nationality, ethnicity, religion, or socio-economic background.²⁹² They include a wide array of civil, political, economic, social, and cultural freedoms and protections, such as the right to life, freedom of speech, safeguarding from slavery, and access to education.²⁹³ It implies that all actions and policies undertaken by the government should respect and uphold human rights.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Gee, D. "Rethinking Security: A discussion paper". Available at: <https://rethinkingsecurity.org.uk/wp-content/uploads/2016/10/rethinking-security-a-discussion-paper.pdf> (accessed 10 May 2016).

²⁹¹ Ball, O. and Gready, *The No-Nonsense Guide to Human Rights* (New Internationalist, 2006).

²⁹² Ibid.

²⁹³ Ibid.

The government of Lesotho, like many other nations, faces the challenging task of protecting its citizens through security agencies while simultaneously upholding their human rights. This can be traced as far back as 1966 when Lesotho gained independence from British colonial rule. Nevertheless, the obligation of protecting human rights has since then, been the government's priority. The Independence Order in Council provided in section 4(1) states that existing laws should be amended as necessary to align with the said Order which provided for protection of fundamental human rights and freedoms.²⁹⁴

It is observed that "The Kingdom of Lesotho has been an independent country since 1966, its experience with democracy has been limited since gaining independence from the United Kingdom."²⁹⁵ This has negatively impacted the protection of human rights in efforts to maintain national security. Constitutional democracy was introduced in the country in 1993, yet undemocratic political turmoil has persisted in the country.²⁹⁶ In 1998, an army mutiny led to the deployment of armed forces from Southern African Development Community to help stabilise the situation and suppress a potential military coup.²⁹⁷ The Constitution as the *grundnorm* from which all other laws derive their legitimacy from, the government relies mainly on it to protect human rights. The government also applies regional, continental and global instruments in protecting human rights, such as the Southern African Development Community Protocol on Politics, Defence and Security Cooperation, the African Charter on Human and People's Rights and the United Nations Convention Against Torture, demonstrating its commitment to national security through the promotion and protection of human rights. Additionally, Chapter II of the Constitution of Lesotho, titled "Protection of Fundamental Human Rights and Freedoms,"²⁹⁸ contains several significant provisions.

The government's measures in ensuring security is by the establishment of law enforcement agencies, which are however, plagued by officers who violate the human rights they are supposed to protect. For instance, on 13 January 2022, Napo Mafaesa, a human rights lawyer, was taken into custody by police officers on suspicion of hiding a firearm that belonged to his

²⁹⁴ Lenka, T.C.L. "A Historical and Comparative Study of Human Rights Violations in Criminal Investigations in Lesotho" (PhD Dissertation, University of the Free State, 2010).

²⁹⁵ Limpitlaw J. Media Law Handbook for Southern Africa – Volume 1.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ The Lesotho Constitution of 1993 Sec 4(1).

client.²⁹⁹ He was taken to Mabote Police Station, where he was tortured in an attempt to implicate himself, he repeatedly insisted he had no knowledge of the gun.³⁰⁰ They bounded his legs and hands before placing a flat tube against his face, restricting him from breathing.³⁰¹ While assaulting him, they continuously splashed cold water on his face. He was ultimately released at dawn on the 14 January 2022, leaving him in an intense pain.³⁰²

In a separate incident, Mateboho Matekane from Ha Pita in Maseru was arrested on 30 November 2021, on charges of stealing group savings.³⁰³ She informed Amnesty International that she was taken to Lithoteng Police Station, where she was beaten with a spade, including on her buttocks, until she urinated on herself and lost consciousness. As a result of the torture she endured, she experienced significant pain that prevented her from working, leading her to file a lawsuit against the police for torture.³⁰⁴ On May 19, 2022, 35 individuals were persecuted by the police and members of the army while demonstrating against power outages in Liseleng, located in the Thaba-Tseka district.³⁰⁵ The victims included women, who were physically assaulted and forced to crawl and roll several meters in a muddy terrain.³⁰⁶ They were subsequently charged with disturbing the peace.³⁰⁷

These incidents of human rights abuse comprehensibly demonstrate perpetual unlawful acts of torture and abuse employed by law enforcement personnel and soldiers. These incidents also highlight the authorities total lack of effective response to hold perpetrators accountable. Generally, it is accepted that indemnity orders for such brutal acts are unlawful, and they should never be tolerated,³⁰⁸ particularly in a democracy environment where individuals are held responsible for their unlawful deeds. It is therefore crucial to emphasise the sanctity of life.³⁰⁹ To respond to abuse of human rights, the government has established an office of the Ombudsman. As outlined by the Constitution of Lesotho,³¹⁰ the Ombudsman is mandated to

²⁹⁹ Relebohile Tsoamotse, “Rogue LCS officers named and shamed” *Public Eye* (Maseru, 1 September 2024. Available at: <https://publiceyenews.com/2024/01/09/rogue-lcs-officers-named-and-shamed/> (accessed on 21 April 2025).

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ Lenka, T.C.L. “A Historical and Comparative Study of Human Rights Violations in Criminal Investigations in Lesotho” (PhD Dissertation, University of the Free State, 2010).

³⁰⁹ Amnesty International Report of 1992.

³¹⁰ Constitution of Lesotho, 1993.

carry out several responsibilities, including the following: “(a) The Ombudsman may investigate actions taken by any officer or authority in the course of exercising their administrative duties when it is claimed that a person has experienced injustice as a result of those actions.”³¹¹

In addition, one of the significant elements covered in the Constitution is the establishment of a Human Rights Commission and Human Rights Commission Act, 2016.³¹² Although the commission has not yet been operationalised, its provisions signify an important step towards institutionalising the protection of human rights in Lesotho. The primary role of the Human Rights Commission, as envisioned by the Constitution, would be to safeguard and promote the human rights and freedoms of individuals in Lesotho.³¹³

The government ought to enforce the laws in place to protect human rights while maintaining national security. The legal framework and the human rights obligations deriving therefrom especially, from the Constitution of Lesotho, guarantees fundamental rights and freedoms, including freedom of expression provided for in section 14, assembly provided for in section 15, and section 11 provides for privacy and family life. Any protective measures taken by the government through national security agencies must be rooted in the law and must respect these constitutional provisions. The fifth safeguard is established under section 12(9) of the Lesotho Constitution, which affirms the fundamental principle that all court processes, including the issuing of rulings, must be conducted publicly.³¹⁴ This principle of open justice is significant because it enables the media to attend court sessions and observe the proceedings.³¹⁵

The government is obligated to adhere to international human rights standards contained in instruments such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights, which emphasise the importance of protecting human rights even while addressing security concerns. Some international human rights covenants prioritise human rights alongside security issues. Sarah contends that certain Civil and Political Rights are unequivocal, as highlighted in Article 7 of the Covenant, which bans torture, as well as

³¹¹ Ibid.

³¹² Lesotho 1993 (rev. 2018) Constitution.

³¹³ Ibid.

³¹⁴ Limpitlaw J. Media Law Handbook for Southern Africa – Volume 1.

³¹⁵ Ibid.

inhumane and mistreatment or punitive measures in Article 8(1), which bans slavery.³¹⁶ Additionally, Joseph Schultz and Castan assert that a government is not allowed to restrict a non-derogable right except if it has been suspended under Article 4 or has included an exception.³¹⁷ They also assert that when limitations are allowed, they should typically be established by national legislation. This means that the situations in which limitations will be enforced must be clearly defined in a readily available law, whether it be statutory or based on common law.³¹⁸ However, they caution that such laws should not be so ambiguous as to allow excessive discretion and unpredictability in their application.³¹⁹ To safeguard citizens, the principle of proportionality is essential. Actions taken by security agencies should be essential and appropriate in relation to the valid goals of national security, public safety, or crime prevention.

4.4 Balancing Act

The tension between law enforcement and human rights has remained a major hurdle to the Lesotho society. In *Pretty v United Kingdom*³²⁰ it was highlighted that the authority of the police to conduct searches and seize items violates the Convention if it fails to adhere to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or moral, or for the protection of the rights and freedoms of others.³²¹

Section 76 (1) of the Lesotho Police Act provides that: “The Commissioner shall be liable in civil proceedings in respect of the wrongful acts of Police Officers under his command, in the performance or purported performance of their functions, and accordingly be joined in

³¹⁶ Joseph, S. “Civil and political rights” (2016) *International Human Rights Law* 105-122.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ (2002) 35 ECHR 1 at para 61.

³²¹ Clayton, R. and Tomlinson, H. *Civil Actions Against the Police* (London: Sweet & Maxwell, 1992).

proceedings in respect of such wrongdoings.”³²² This legal redress is efficient for civil claims, brought against law enforcement. Numerous court applications have sought compensation for various issues, including agony, commercial losses, abuse, grievous bodily harm, wrongful detention, illegal searches and property seizures, detention without trial, and offensive language directed at suspects and crime victims by the police.³²³ Regarding this matter, since democracy was reinstated in 1993, we have started to see some level of accountability from the government in prosecuting individuals responsible for human rights violations in court. However, this situation remains unsatisfactory, as it is typically only the less favoured officers who are held accountable, while those in favour with management frequently escape punishment.³²⁴

4.5 Security Challenges in Lesotho and the Reforms Process

The protection of human rights and freedoms are guaranteed by the Constitution of Lesotho, though implementation is often hampered by political instability and enforcement challenges. Unlike in Kenya where national security is threatened by terrorist groups,³²⁵ Lesotho’s national security has been threatened by the government instability. Unfortunately, adjacent nations and the regional body such as Southern African Development Community have repeatedly intervened but were not successful in guaranteeing lasting stability and safety in Lesotho.³²⁶ Factors such as the tense relationships within the security forces and between these forces, civilians, and political leaders have contributed to the instability.³²⁷ Military interference in Lesotho's politics dates back to the 1970s, contributing to instability, culminating overthrowing of government and conflict between leaders of the law enforcement agencies.³²⁸ Lesotho has seen acts of insurgency until recently when Famo killings emerged, fuelled by involvement in illegal mining in South Africa, which has spread into the rampant killing of civilians causing the government to ban the Famo gang activities and their music.³²⁹

³²² Section 76 of Lesotho Mounted Police Services Act No. 7 of 1998.

³²³ Liphapang, L. “A historical and comparative study of human rights violations in criminal investigations in Lesotho” (PhD Dissertation, University of the Free State, 2010).

³²⁴ Mosito, K.E. and Molapo, T. “Disciplinary code and procedure in the public service in Lesotho: An exploratory investigation” (2015) 22 Lesotho Law Journal 89-116.

³²⁵ Mwangi, O.G. and Mwangi, C.W. “The securitization of political discourse in reinforcing regimes of power in Kenya” (2019) 7 Language, Discourse & Society 55-73.

³²⁶ Maapesa, M. “National Security Policy as a Framework for Stability” (PhD Dissertation National University of Lesotho, 2022).

³²⁷ Ibid.

³²⁸ Mothibe, T.H. “The military and Democratization in Lesotho, Institute of development studies” (1999). Available at: <http://opendocs.ids.ac.uk/opendocs/bitstream/handle> (accessed on 28 October 2015).

³²⁹ Tsoloane Mohlomi, “Famo gang wars fuel deadly violence in Lesotho that spills into South Africa” *Mail & Guardian* (Pretoria, 16 September 2024).

Since gaining independence, Lesotho has had no official policy regarding national security, and throughout the years, agencies in the security sector were criticised for playing a role in the country's governance instability and uncertainty.³³⁰ As a result, there has been increased emphasis on reforming the security sector during national discussions.³³¹ The national reforms in Lesotho emerged as a response to the country's history of governments instability and vulnerabilities in the security sector. The instability has been linked to various causes, such as weak government institutions, the dominance of elites in the political arena, and the engagement of security forces in politics.³³² The discussion processes indicated that security agencies have traditionally played a central role in political instability and insecurity within the country. It was proposed that reviewing and restructuring the national security agencies could be a key step toward establishing lasting peace.³³³

4.6 Comparative Analysis between Lesotho and Kenya

This comparative analysis of how Lesotho and Kenya address terrorism and insurgency while balancing human rights, involves examining the legal frameworks, government actions and prevailing societal challenges in both jurisdictions. Here is an overview highlighting these aspects, along with recommendations.

4.6.1 Kenya

In Kenya, the judiciary plays a crucial role in counter-terrorism courts by upholding the rule of law, emphasising the importance of maintaining judicial independence. “The right to be tried before a competent, independent, and impartial court is enshrined in Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, and various regional treaties and conventions that are fundamental to international human rights framework.”³³⁴

The establishment of counter terrorism courts includes mechanisms for judicial oversight, which provides a layer of protection for human rights.³³⁵ These courts aim to ensure fair trials and prevent arbitrary detention, although challenges remain in practice.³³⁶ One of those challenges is that despite these efforts, there has been criticism regarding the government's use

³³⁰ Zibani, M. “Political culture as a source of political instability” (2010) The case of Lesotho.

³³¹ The Lesotho we Want: Dialogue and Reforms for National Transformation, (n 61) 2018, 14.

³³² Ibid.

³³³ Ibid 14.

³³⁴ United Nations Office on Drugs and Crime, “Human Rights and Criminal Justice Responses to Terrorism” (2014) 8.

³³⁵ Okurut, E. “Preventing human rights violations by law enforcement during counterterrorism operations in Kenya and Uganda” (PhD Dissertation, University of Pretoria, 2017).

³³⁶ Ibid.

of force and cases of extrajudicial killings linked to anti-terrorism operations.³³⁷ Human rights organisations have expressed concern over the balance between security and the protection of human rights.³³⁸

The Kenyan Constitution (2010) lacks a direct provision on terrorism, but it embodies the principles contained in various international human rights conventions. This is contained in Article 5 and 6, which provide for ratification of treaties that enshrine provisions on terrorism, which become part of Kenyan Law. Thus, the Kenyan Constitution guarantees that all legislative and administrative measures must comply with its provisions, including the bill of rights and the rights and freedom of each individual.³³⁹

In Kenya, they acknowledge that acts of terrorism are conducted clandestinely and therefore, secret evidence and its admissibility is acceptable in terrorism related trials.³⁴⁰ The clandestine nature of terrorist plots, their activities, and modes of operation require specialised investigation methods often referred to law enforcement agencies, which have a wide array of investigative techniques at their disposal when combating terrorism due to the developments in modern technology.³⁴¹ These may include technologically enabled covert surveillance and/or human intelligence, whether informants or undercover agents planted by law enforcement agencies to infiltrate terrorist groups.³⁴² Common methods are used by intelligence agencies to collect information that can be used in preventing, detecting and prosecuting acts of terrorism. The United Nations Convention against Transnational Organized Crime encourages state parties to make use of undercover agents and participating informants in the investigation of organised crime organisations.³⁴³ At times this violates human rights.

The Kenyan Anti-Terrorism Act (2012) provides a framework for defining terrorism, prosecuting offenders, and empowering law enforcement agencies.³⁴⁴ However, this framework has raised concerns regarding infringement of human rights, particularly concerning arbitrary detention and extrajudicial killings. Maud Kadye observes that Kenya has

³³⁷ Kamau, J.W. "Is counter-terrorism counterproductive? A case study of Kenya's response to terrorism, 1998-2020" (2021) 28 South African Journal of International Affairs 203-231.

³³⁸ Ibid.

³³⁹ Onyango, O.P. "Institute of Diplomacy and International Studies Counter Terrorism and Human Rights Nexus: The Case Study of Kenya" (University of Nairobi, 2015).

³⁴⁰ Onyango, O.P. "Counter Terrorism and Human Rights Nexus" (2015) The Case Study of Kenya.

³⁴¹ United Nations Office on Drugs and Crime, "Human Rights and Criminal Justice Responses to Terrorism" (2014) 8

³⁴² Ibid 88 & 89.

³⁴³ UNODC, "Human Rights and Criminal Justice Responses to Terrorism" (2014) 90.

³⁴⁴ Kenya Anti-Terrorism Act, 2012.

anti-terror acts, among them, the Prevention of Terrorism Act, which has been in force since 2012.³⁴⁵ At the same time, not only is terrorism and its related activities criminalised, but the law gives government the power to ban membership of designated terrorist groups.³⁴⁶ The counter terrorism laws seek to isolate and freeze the assets of terrorist groups and also give the police and other security agencies expanded investigative, surveillance and enforcement powers with respect to terrorism. Terrorism-related crimes are prosecuted in domestic courts in accordance with domestic laws.³⁴⁷

Prior to the enactment of the Prevention of Organized Crimes Act of 2011 and the Prevention of Terrorism Act of 2012, all counter terrorism measures and strategies were done outside any legislative framework, hence subjecting human rights to violation. According to the International Federation for Human Rights 2007 report, the government of Kenya published the Suppression of Terrorism Bill in 2003, which, would have allowed the police to arrest terrorism suspects and carry out searches without authorisation from the courts.³⁴⁸ The Bill provided for several actions that could have had serious violations of human rights, including lengthy detention of presumed suspects, and exemption of security agents from prosecution if they were considered to have used reasonable force in their fight against terrorism.³⁴⁹ After widespread criticism by civil society organizations and a section of parliamentarians, the government withdrew the Bill in February 2004. Thereafter, the government, through the security agencies, embarked on robust counter terrorism measures including establishment of the National Counter Terrorism Centre and the Anti-Terrorism Police Unit.³⁵⁰

In analysing the opportunities created by the Kenyan anti-terrorism laws Kenya operated without a substantive anti-terrorism law for nearly a decade after the withdrawal of the 2003 and later, 2006 Bills. In 2012, the Prevention of Terrorism Act, 2012 was enacted into law by Parliament. Consequently, the new legislation provides extensive safeguards for the rights of individuals and organizations involved in counter-terrorism efforts while ensuring security. Unlike the Suppression of Terrorism Bill (2003), which aimed to define “terrorism” as the

³⁴⁵ Kadve, M. “Nakobi Attacks: Kenya’s Anti-Terrorism Laws” *The Student Lawyer* (2013).

³⁴⁶ Golder, B. and Williams, G. “Balancing National Security and Human Rights” (2006) 47.

³⁴⁷ Erickson, R.J. *Legitimate use of Military Force against State-Sponsored International Terrorism*, Vol 10 (Alabama: Air University Press, 1989).

³⁴⁸ FIDH, “Human rights violation in Sub-Saharan African Countries in the Name of Counter-Terrorism: A High risk situation.” *International Federation for Human Rights*. No. 483/2 (November 2007). 13.

³⁴⁹ Mogire, E. and Agade, K.M. “Counter-terrorism in Kenya” (2011) 29 *Journal of Contemporary African Studies* 473-491.

³⁵⁰ Okoth, O.F. “Counterterrorism Strategies and Performance of the National Police Service in managing terrorism in Lamu County, Kenya” (PhD Dissertation, MMUST, 2019).

Prevention of Terrorism Act, 2012 specifically defines “acts of terrorism”, acknowledging that the term “terrorism” has multiple interpretations. The Act excludes religious, ideological, and ethnic reasons typically associated with terrorism.³⁵¹ This implies that “regardless of the motive be it religious, ethnic, ideological, or political as long as the perpetrators aim to inflict harm, the act will still be classified as terrorism.” In contrast to other nations where anti-terrorism legislation is often utilised to stifle dissent, the Prevention of Terrorism Act, 2012 clearly defines what constitutes a terrorist act and specifically excludes protests, demonstrations, or industrial actions from being considered acts of terrorism.³⁵² The Kenyan government has actively been engaged in combating terrorism particularly, from groups like Al-Shabaab.³⁵³ This has led to extensive military operations and a clampdown on human rights, often justified as aiming to achieve national security purposes.

4.6.2 Lesotho

Unlike Kenya, Lesotho is yet to consider establishing specialised courts to handle counter-terrorism cases, promoting the rule of law and due process. The Lesotho government has mostly only relied on the Internal Security Act of 1984 in addressing insurgency threats, particularly against groups linked to the Famo gangs, controversial movements with a history of violence. The reliance on older security measures raises concerns about the adequacy of current legal frameworks to tackle present-day threats effectively.³⁵⁴ Another concern is freedom of expression and assembly.³⁵⁵

Although the Constitution of Lesotho does not have any explicit provision addressing terrorism, it upholds human rights principles consistent with international standards.³⁵⁶ In addition, Lesotho does not allow admissibility of secret evidence to be used in trials concerning terrorism or insurgency like Kenya.³⁵⁷ The legal framework in Lesotho emphasises transparency and due process, reflecting a commitment to upholding human rights in legal proceedings. The prohibition of secret evidence in Lesotho means that all evidence presented

³⁵¹ Mwazighe, C.L. “Legal Response to Terrorism: Case Study of the Republic of Kenya” (2012) Naval Postgraduate School, California, US 74.

³⁵² Ibid.

³⁵³ Rotich, K.H. “Al-Shabaab Militia, a Threat to Security in the Horn of Africa: A Case Study of Kenya” (PhD Dissertation, University of Nairobi, 2020).

³⁵⁴ Tlohang, L. “Demilitarising the Mountain Kingdom: An action research project in Lesotho” (PhD Dissertation, 2018).

³⁵⁵ Weisfelder, R.F. “The decline of human rights in Lesotho: An evaluation of domestic and external determinants” (1976) 6 African Issues 22-33.

³⁵⁶ Mamoee, M.A. “Banking confidentiality with reference to anti-money laundering and terrorist financing measures in South Africa and Lesotho” (PhD Dissertation, North-West University 2018).

³⁵⁷ Trewhela, P. “Within the secret state: The Directorate of Military Intelligence” (1992) 8 Searchlight South Africa 19.

in court must be accessible to the defendant.³⁵⁸ This approach aims to ensure fairness in trials and enhance the accountability of the prosecuting authorities. As such, it aligns closely with human rights norms that guarantee the right to be informed of the charge or alleged offence.³⁵⁹

While the adherence to transparency is admirable, the absence of secret evidence can hinder effective prosecution against clandestine terrorist activities.³⁶⁰ Intelligence agencies may be reluctant to share sensitive information that could compromise national security, leading to challenges in gathering sufficient evidence to convict accused individuals of terrorism.³⁶¹ Such limitations can create a legal environment where terrorist activities may continue unchallenged due to the difficulty of obtaining prosecutable evidence. Furthermore, in a context where terrorism and insurgency might emerge from socio-economic grievances, the inability to act decisively due to restrictions on evidence could leave the state vulnerable to the rise of militant groups. This can create a security vacuum which insurgent movements may exploit.

Lesotho needs to develop strategies focused on addressing human rights issues, including counter-terrorism efforts, while ensuring compliance with the rule of law.³⁶² Lesotho specific problems of dealing with insurgency groups and other terrorist related issues that may arise rather than just replicate the national security policies of other countries.³⁶³ Community policing and engagement programs have been conducted by members of Lesotho Mounted Police Services coordinated by chiefs and community policing forums to counter radicalisation. However, allegations of police brutality and human rights abuses have persisted.³⁶⁴ Lesotho's approach has been less focused on proactive counter-terrorism and more on the political dimensions of insurgency.³⁶⁵

³⁵⁸ Makhofola, F.J. "The Escalating Police Brutality in Lesotho in Effecting Arrest Precipitated by Coalition Governments" (PhD Dissertation, National University of Lesotho 2020).

³⁵⁹ Vitkauskas, D. and Dikov, G. *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (Council of Europe 2012).

³⁶⁰ De Peralta, G., Ricardo and Simeral, R.L. "Ensuring the End Game: Facilitating the Use of Classified Evidence in the Prosecution of Terrorist Subjects" (PhD Dissertation, Naval Postgraduate School 2010).

³⁶¹ Ken, R. "The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence" (2010) Research Studies of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.

³⁶² Maapesa, M. "National Security Policy as a Framework for Stability" (PhD Dissertation National University of Lesotho, 2022).

³⁶³ Vaudran, L. "SADC shouldn't scrap Lesotho from its agenda just yet" (2019) Institute for Security Studies. Available at: <https://issafrica.org/iss-today/sadc-shouldnt-scrapesotho-from-its-agenda-just-yet> (accessed on 3 April 2019).

³⁶⁴ The National Strategy for Prevention and Countering Violent Extremism and Terrorism 2024.

³⁶⁵ *Ibid.*

Human rights concerns have been highlighted, particularly regarding suppression of freedom of expression and assembly in the wake of political unrest.³⁶⁶ Balancing security and human rights, both countries face the challenge of finding the right balance between ensuring national security and protecting human rights. In Lesotho, the focus on political stability often overshadows systemic abuses against human rights. Onuma recommends a more centralised approach to human rights in the governance framework, emphasising legal accountability for abuses by national security forces.³⁶⁷ He further, recommends a review of anti-terrorism laws to ensure that definitions are precise and do not provide latitude to infringe on legitimate civil liberties but must be intended to prevent arbitrary detentions and the misuse of power.³⁶⁸ Lesotho lacks independent oversight bodies to monitor security operations and ensure that accountability can mitigate abuses while addressing threats.³⁶⁹ Community engagement in implementing programs that foster collaboration and raise awareness of human rights can effectively counteract radicalisation while enhancing respect for human rights and fundamental freedoms.³⁷⁰

4.7 Conclusion

In conclusion, Lesotho and Kenya's approaches to terrorism and insurgency reflect broader regional challenges in balancing security with human rights. They both adopt different approaches to addressing terrorism and insurgency while attempting to balance national security and human rights concerns. Kenya's establishment of specialised counter terrorism courts reflect an effort to incorporate the rule of law into its counter terrorism strategy, despite ongoing challenges in safeguarding human rights. In contrast, Lesotho's reliance on outdated security measures raises serious concerns about fundamental freedoms and the possibility of for inherent rights violation.³⁷¹ Both countries, however, embody principles of international human rights conventions, emphasising the need for a comprehensive and rights-respecting approach to security challenges. Kenya balances national security with the use of secret

³⁶⁶ Makhofola, F.J. "The Escalating Police Brutality in Lesotho in Effecting Arrest Precipitated by Coalition Governments" (PhD Dissertation, National University of Lesotho 2020).

³⁶⁷ Yasuaki, O. "Towards an Intercivilisational Approach to Human Rights. For Universalization of Human Rights through Overcoming of a Westcentric Notion of Human Rights" (1997) 7 Asian Yearbook of International Law 21-82.

³⁶⁸ Ibid.

³⁶⁹ Ramonate, M. "A situational analysis of civilian police oversight agencies in the ministry of police and public safety, Lesotho" (2022) The Africa Governance Papers 10-31.

³⁷⁰ Gavrielides, T. and Santiago, I. "Human Rights and Prevention of Violent Extremism" *18th Informal ASEM Seminar on Human Rights*. Available at: <https://www.asef.org/images/docs/Background%20Paper> (accessed on 24 April 2025).

³⁷¹ Kelly, B.D. and Donnelly, M. *Handbook of Mental Health Law* (Routledge (2023)). Available at: <https://doi.org/10.4324/9781003226413> (accessed on 19 April 2025).

evidence, often at the potential cost of fair trial rights. Lesotho prioritises human rights and transparent legal processes, which can undermine effective counter-terrorism efforts.

This chapter has thoroughly explored the intricate balance between government action in the realm of national security and the protection of human rights, particularly within the context of Lesotho. It has highlighted the critical need for reform as the country navigates the complexities of ensuring citizen safety while upholding human rights and fundamental freedoms. The comparative analysis with Kenya, illustrates how different legal frameworks can shape the government's approach to national security. In re-iterating Kenya's implementation of the terrorism act alongside its specialised courts for such matters, serves as a juxtaposition to Lesotho, which currently lacks similar legislative measures. The absence creates a distinct vulnerability in Lesotho, as the government may find itself lacking appropriate legal tools to manage security threats effectively without infringing on human rights.

Moreover, through this analysis, it becomes evident that while both countries face challenges related to national security, the methods employed to address these issues are crucial in determining the level of human rights protection afforded to citizens. Incidents of human rights abuses in both nations underscore the need for vigilance and accountability, reinforcing that any security measures adopted must be carefully crafted to prevent the erosion of civil liberties.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Summary

This chapter provides a comprehensive summary of the study, synthesising the main arguments and findings while highlighting key points and issues that emerged throughout the research. It encapsulates the core objectives of the study, illustrating how the research questions have been responded to.

The objectives of the study were to focus on the context of Lesotho to identify and analyse the challenges security agencies face in reconciling their constitutional duties with the need to uphold human rights and fundamental freedoms. The study explored Lesotho's legal framework governing national security agencies to determine their effectiveness in meeting operational needs while protecting human rights and fundamental freedoms.

It also analysed case law, highlighting the conflict between national security prerogatives and the obligations to protect human rights, while also assessing how legal constraints influence the operations of security agencies. Lastly, it identified the existing gaps within the legal framework and investigated the practical implications of human rights protections on the operations of national security agencies, ultimately proposing enforcement measures that ensure balance between operational efficiency and the safeguarding of human rights.

5.2 Findings

The study reveals that since gaining independence, Lesotho has consistently struggled to uphold the protection of human rights and fundamental freedoms while addressing issues of national security. Instead, there has been a plethora of violations of human rights by security agencies brought about by challenges of insecurities, including issues associated with power struggles, particularly around election periods, as well as issues related to government impunity, pose significant threats to the protection of human rights and fundamental freedoms in Lesotho. The challenges narrated and discussed in this study are mainly brought about by actions of security agencies in the process of their role in law enforcement obligation.

Chapter one provides a general overview of the dissertation. It provides the background, research problem, research questions, objectives of the study, hypothesis, significance of the

study, literature review and the methodology used in conducting the study. The chapter highlights the fact that Lesotho is a state party to all international human rights instruments³⁷² in addition to the domestic constitutional obligation to safeguard human rights and freedoms of its nationals. The literature review illustrates that the intersection of human rights and national security is a complex issue. It provides a comprehensive perspective with regard to the necessary shift in law to meet contemporary legal needs.

The second chapter makes an in depth analysis of the study, beginning with defining what national security is, and then highlighting its various components before proceeding to contextualise the meaning of national security as it applies to Lesotho. The chapter also delves into the national security legal framework specific to Lesotho. It examines the existing laws and regulations that govern security agencies and assesses how these frameworks shape the approach of national security agencies in their operations. Furthermore, the chapter highlights the intricate challenges faced by these agencies in balancing national security concerns with the protection of human rights and fundamental freedoms. This discussion sheds light on the tensions that arise when security measures are implemented, which may sometimes infringe on human rights. The chapter provides a comprehensive overview of how the competing interests are navigated within the context of Lesotho, offering insights into the legal, ethical, and practical implications faced by national security agencies in their efforts to maintain both security and human rights.

Chapter three focuses on relevant case law, highlighting the tension between the national security mandate and human rights protection, as well as the impact of legal constraints on the law enforcement operations of security agencies.³⁷³ The chapter reveals that national security agencies are faced with a mammoth task of respecting human rights when dealing with matters of national security, including for example, how they are currently dealing with the Famo killings in the country. The chapter further reveals that actions taken by national security agencies, needing to comply with the legal framework is essential but challenging particularly, when security needs clash with legal principles.³⁷⁴ The Constitution, lays down the bill of rights and obligates adherence to all the fundamental rights and freedoms contained therein and as

³⁷² Shale, I, “Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy.” *African Human Rights Law Journal* (2019) 19 (1), 193-218.

³⁷³ *Prime Minister and Others v Machesetsa Mofomobe and Another* (C of A (CIV) 51 of 23).

³⁷⁴ International Principles on the Application of Human Rights to Communications Surveillance, officially launched in September 2013 during the session of the UN Human Rights Council in Geneva. Available at: <https://necessaryandproportionate.org/about> (accessed on 4 February 2025).

such operations involving surveillance or intelligence gathering must adhere to constitutional protection against unlawful searches, seizures and invasion of privacy.

The fourth chapter investigates what the government ought to take into consideration when dealing with issues of security and human rights, as national security centres on the protection of human rights. The chapter also underscores elements of the balancing act between ensuring the protection of state securing and respecting human rights, in view of easing the tension that exists between law enforcement agencies and the citizens of the country regarding the protection of their human rights. Hence the need for security sector reforms. Worth pointing out is that, factors that have played a role in the Lesotho's instability is the tense relationship within the security sectors and between these agencies themselves, as well as civilian population, including the political leadership. The chapter further delves into a comparative analysis on how Lesotho and Kenya address security concerns resulting from terrorism and insurgency groups, while balancing human rights protection. In this regard, the discussion delved into the legal framework, government actions, and prevailing societal challenges in both jurisdictions. It is observed that there are several legislative gaps, which are exploited by terrorist suspects in seeking to defeat the ends of justice. The Kenyan Constitution lacks an explicit provision against terrorism, but it embodies the principles that are contained in various international human rights conventions. Unlike Lesotho, Kenya has an Anti-Terrorist Act.³⁷⁵

The findings on how national security agencies in Lesotho navigate the dilemma of enforcing national security while upholding human rights were made. It was also found that emerging security challenges have caused many countries to update their terrorism legislation, necessitating that surveillance must align with international human rights instruments. Courts in the European Union have ruled that human rights must be respected at all times.³⁷⁶ However, states like the United States³⁷⁷ and Israel prefer a security-centric approach when dealing with national security as opposed to human-centric approach and hence, reported incidents of extreme torture in dealing with suspects of terrorist acts by Israel.³⁷⁸ The courts have ruled that certain interrogative methods employed by the Israel Defence Force contradict the values

³⁷⁵ Kenya Anti-Terrorism Act, 2012.

³⁷⁶ Kadi, P. and Barakaat, A. *International Foundation v Council of the European Union and Commission of the European Communities*, 3 September 2008 (European Court of Justice).

³⁷⁷ Hafetz, J. "Resisting Accountability: Transitional Justice in the Post-9/11 United States," (2015) *International Journal of Human Rights* 19(4): 429–446.

³⁷⁸ *Public Committee Against Torture in Israel v Government of Israel* HCJ 769/02.

enshrined in the Israeli legal system, obligating the state to respect human rights.³⁷⁹ The Constitution of Lesotho provides a framework for human rights protection in chapter 2 and the establishment of different security agencies and their responsibilities. For instance, Section 146(1) of the Constitution establishes the Lesotho Defence Force, Section 147(1) establishes Lesotho Mounted Policer Service, Section 148(1) establishes National Security Service and Section 149(1) establishes Lesotho Correctional Service.³⁸⁰ However, in light of this, security agencies often face pressure to prioritise national security leading to potential conflicts in their operations.³⁸¹

It was further noted that security agencies in Lesotho operate within a complicated environment that has over the years, been characterised by political instability and socio-economic challenges brought about by internal political crisis. The historical grievances and political dynamics have influenced the actions of security personnel and security agencies, which often operate with an ambiguous mandate that can result in arbitrary decision making and abuse of power.³⁸² Moreover, the problem of limited resources and lack of funding ultimately, was noted to lead to security agencies resorting to the use of disproportionate force.³⁸³ To comply with the legal framework is generally challenging especially, when security needs clash with legal principles. Corruption and mismanagement were also found to be one of major challenges in balancing the need for state security and the protection of human rights.

The case law that showcases the conflict between the national security mandate and human rights protection was discussed,³⁸⁴ leading to the revelation that Lesotho's existing legal framework lacks adequate safeguards in dealing with matters of national security and human rights protection. The court ruled in the *Mofomobe* case that Section 26 of the National Security Service Act lacks safeguards and therefore, unconstitutional and accordingly, highlighted the need for security agencies to act within the law in safeguarding citizen's rights.³⁸⁵ In this manner, the study revealed that Lesotho's existing legal framework does not address the crucial questions of security agencies' obligation to protect human rights, an unnecessary lacuna which the court ruled, should be addressed.

³⁷⁹ Medina, B. "Domestic human rights adjudication in the shadow of international law: The status of human rights conventions in Israel" (2017) 3 Israel Law Review 331-388.

³⁸⁰ Constitution of Lesotho, 1993.

³⁸¹ Murray, C. "Protecting Human Rights in Constitutions" (2023).

³⁸² Limpitlaw, J. Media Law Handbook for Southern Africa – Volume 2.

³⁸³ Ibid.

³⁸⁴ *Prime Minister and Others v Machesetsa Mofomobe and Another* (C of A (CIV) 51 of 23).

³⁸⁵ Ibid.

5.3 Recommendations

Based on the findings of this study and the challenges highlighted, the following recommendations are proffered:

5.3.1 Enhancement of safeguards and internal reform

The country is already on the path of constitutional reforms and as such, should in the meantime, embark on crafting comprehensive policies and procedures to establish adequate safeguards within the state security sector. The government needs to develop a standardised protocol for evaluating and mitigating the risks associated with national security operations. National security agencies need to be restructured internally to improve their operations. This can be done by amending the national Constitution to remove provisions that require the heads of security agencies to report to the Prime Minister or any political authority. Such amendments would help regulate the agencies operations more effectively, ensuring that their leaders are not influenced by political directives and can function independently.³⁸⁶

5.3.2 Establishment of independent oversight body

The government needs to create an independent oversight body tasked with monitoring the actions of security agencies. This body should include representatives from diverse sectors such as civil society, human rights organisations, and legal experts to ensure proper accountability and transparency. The involvement of civil society organisations in monitoring the actions of security agencies will ensure adequate protection for victims of human rights violations. Proper accountability mechanisms need to be established to ensure that there are clear disciplinary procedures for misconduct, which must consistently be enforced against those who violate human rights standards. In addition, the government must establish ways of fostering engagement between national security agencies and the local communities. This can build trust and help agencies understand and respect the rights and concerns of members of the communities they serve. There also needs to be effective collaboration with international human rights organisations to adopt best practices and protocols for preventing corruption and ensuring respect for human rights in the course of law enforcement operations.

5.3.3 Enactment of terrorism legislation

The government of Lesotho has an obligation to enact terrorism-related laws to ensure they align with contemporary challenges and international best practices. Such laws must establish

³⁸⁶ Maapesa, M. "National Security Policy as a Framework for Stability" (PhD Dissertation National University of Lesotho, 2022).

clear definitions and frameworks to guide the implementation of anti-terrorism measures effectively. The need to review and reform existing policies that may contribute to abusive practices, such as those related to detention, surveillance, use of force, and engagement with vulnerable populations cannot be overlooked.

5.3.4 Secure adequate funding

The government of Lesotho needs to ensure adequate and sustainable funding for national security agencies, focusing on sufficient resource allocation for training, technology, and personnel development. A budget review process should involve various independent stakeholders to ensure that resources are distributed equitably.

5.3.5 Implement comprehensive training programs

The government of Lesotho equally has an obligation to develop and mandate ongoing training programs for national security personnel. The training programs must encompass the latest tactics, technologies, legal frameworks including especially, modules on human rights protection to ensure that the security sector personnel are not only well equipped to handle evolving threats but importantly also that in doing so, human rights are not violated in the process. Regular training on human rights for all national security sector personnel is crucial to raise awareness about their obligations and the importance of protecting citizen's rights. In addition, national security agencies need regular training on crisis management and conflict resolution, which is essential in responding to situations more ethically and effectively.

5.3.6 Address political and reactionary dynamics

There must be a deliberate commitment to depoliticise security operations by promoting policies based on evidence and best practices rather than on political interests and agendas. National security agencies must engage in constant dialogue that fosters a collaborative approach between government, security agencies and local communities.

5.3.7 Clarify jurisdictional authority

Emphasis must be placed on clarifying the roles and responsibilities of various national security agencies to eliminate jurisdictional overlaps that lead to inefficiencies. Clear lines of authority and responsibility must be established to foster better inter-agency collaboration.

5.3.8 Leverage modern technology

The government needs to heavily invest in modern technologies to enhance the operational capabilities of security agencies. This includes adopting advanced surveillance tools, data analytics, and cybersecurity measures to better address contemporary security challenges. The proposed modern technology should be utilized for monitoring and implementing solutions

such as body cameras to monitor police interactions and document misconduct, which could be used in enhancing accountability.

5.3.9 Corruption and mismanagement

Addressing corruption and mismanagement within security agencies is crucial for safeguarding human rights and ensuring that security forces serve the public effectively and ethically. The establishment of independent oversight bodies to monitor the operations and activities of security agencies is recommended. These bodies should have the authority to investigate allegations of corruption and human rights violations, promote transparency in operations, budgeting, and procurement processes within security agencies and importantly also, create safe channels for whistle-blowers to report misconduct without fear of retaliation. This will encourage accountability within security agencies. The government needs to in addition, adopt strict recruitment standards by implementing rigorous background checks and psychological evaluations during the recruitment process to ensure that recruited personnel are those that have the suitability to uphold human rights.

5.4 Concluding Remarks

The findings presented illustrate significant deficiencies in the current national security framework in Lesotho, notably the absence of adequate safeguards and independent oversight, a lack of terrorism legislation, insufficient funding, and inadequate training. Additionally, the political nature of security operations and the overlapping jurisdictions of various agencies complicate the effectiveness of national security efforts, which often translates into adverse impact on the civilian population.

Addressing these issues is imperative for developing a robust, transparent, and accountable security environment that not only protects national interests but also ensures adequate protection of human rights and fundamental freedoms. By adopting the recommendations outlined above, the government of Lesotho and various stakeholders can take meaningful steps toward reforming the security apparatus, enhancing operational effectiveness, and fostering public trust in the national security institutions. A strategic approach that prioritizes systematic changes, technological advancements, and inclusive governance will better prepare the security environment for future challenges while reinforcing the integrity and credibility of the institutions involved.

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