

# THE IMPACT OF THE MAPUTO PROTOCOL IN LESOTHO



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## 1 Introduction

Since the Kingdom of Lesotho gained independence in 1966, it has been confronted with political instability attributed to an unhealthy relationship between the executive and security forces.<sup>1</sup> Over and above political instability, protection of human rights has also been challenged by poverty and food insecurity,<sup>2</sup> custom-inspired discrimination

against women<sup>3</sup> and a culture of impunity for perpetrators of human rights violations.<sup>4</sup> These challenges notwithstanding, Lesotho has also made some legislative and administrative strides towards protection of human rights. These include a human rights framework consisting of the 1993 Constitution, several pieces of legislation, policies and programmes as well as establishment of institutions which give effect to some of the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Research determining the impact of both the African Charter on Human and Peoples' Rights and the Maputo Protocol in Lesotho was conducted in 2012<sup>5</sup> and 2016.<sup>6</sup> This

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1 K Matlosa *Understanding political crisis of Lesotho post 2015 elections* (2017); see also 'The Kingdom of Lesotho conflict insight' *Institute of peace and security studies*, in which poverty, fragmented multiparty system and disregard for the rule of law are identified as major causes of political instability in Lesotho [www.ipss-addis.org/publications](http://www.ipss-addis.org/publications) (accessed 6 August 2020); see also RS Weisfelder *Free elections and political instability in Lesotho* (2015) <https://www.eisa.org.za/pdf/JAE14.2Weisfelder.pdf> (accessed 6 August 2020); see also Z Maundeni 'Political culture as a source of political instability: The case of Lesotho' <https://academicjournals.org/journal/AJPSIR/article-full-text-pdf/5F5BE7D40715> (accessed 6 August 2020).

2 According to UNDP, Lesotho is one of the least developed nations in the world, 57.1 per cent of the population lives below the national poverty line; see also G Callander 'The complex causes of poverty in Lesotho' *Borgen Magazine* 4 November 2017 <https://www.borgenmagazine.com/complex-causes-of-poverty-in-lesotho/> (accessed 6 August 2020).

3 T Makatjane and others 'HIV/AIDS related discrimination among females aged 15-24 in Lesotho' (2009) 13 (1) *Review of Southern African Studies* 64 who illustrate the high level of double discrimination based on sex and HIV status against young females in Lesotho.

4 Amnesty International *Lesotho: End culture of impunity to reverse recent spikes in human rights violations* (14 June 2017); see also Amnesty International 2019 Annual Report *Everything you need to know about human rights in Lesotho* [www.amnesty.org](http://www.amnesty.org) (accessed 15 October 2020).

5 T Thabane & I Shale 'The impact of the African Charter and the Maputo Protocol in Lesotho' in Centre for Human Rights (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2012) 79.

chapter is a continuation of this research and is intended to highlight measures that have been put in place with particular reference to the measures that illuminate the impact of the Maputo Protocol from 2016 to date. However, to contextualise the impact, some events which took place and laws adopted prior to 2016 are referred to.

From the time when Lesotho was a British protectorate to date, the legal system remains dual in terms of which customary law operates side by side with the received law.<sup>7</sup> The term 'received law' was used to refer to the laws passed in the Colony of Good Hope during Lesotho's protectorate times while in the modern context it is used to refer to statutory law and common law. While the general principle is that customary law is dynamic in nature and changes with society,<sup>8</sup> in Lesotho the term is used to refer to old customs and cultural practices which were codified into the Laws of Lerotholi in 1903. Although the status of the laws of Lerotholi has been a subject of debate amongst scholars,<sup>9</sup> in many cases, the Courts of Lesotho have regarded the Code as an authoritative source of Basotho customary law and have used it in

cases involving inheritance,<sup>10</sup> marriage,<sup>11</sup> succession to chieftainship<sup>12</sup> and many other cases which involve women.

In addition to domestic laws, Lesotho is party to several human rights instruments, which similar to the Maputo Protocol, mandate states parties to eliminate all forms of discrimination against women and to adopt legislative measures in that regard.<sup>13</sup> As Hlatshwayo illustrates in his review of the legal system of Lesotho in 2016, since ratification of the Maputo Protocol in 2004, there have been legislative strides towards bridging the gender gap and to implement provisions of the Maputo Protocol. Amongst these strides are Legal Capacity of Married Persons Act 2006, Land Act 2010, Companies Act 2011, Anti-Trafficking in Persons Act 2011 and Children's Protection and Welfare Act 2011.<sup>14</sup> These laws address, amongst others, husbands' marital power which was a source inequality and sexual violence within the marriage setting.<sup>15</sup> However, the legal framework does not adequately cover the objectives of the Maputo

- 6 S Hlatshwayo 'The impact of the African Charter and the Maputo Protocol in Lesotho' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 133.
- 7 SM Poulter *Legal dualism in Lesotho: A study of the choice of law question in family matters* (1981) 1.
- 8 R Ozoemena 'Living customary law: A truly transformative tool?' (2013) 6 *Constitutional Court Review* 147; see also AC Diala 'The concept of living customary law: A critique' (2017) 49(2) *Journal of Legal Pluralism and Unofficial Law* 143.
- 9 L Juma 'The Laws of Lerotholi: Role and status of codified rules of custom in the kingdom of Lesotho' (2011) *Pace International Law Review*; see also H Nyane 'The constitutional rules of succession to the institution of monarch in Lesotho' (2019) 22(1) *Potchefstroomse Electroniese Regsblad* 129.

- 10 See *Khasake-Mokhethi v Moloi* (CIV /APN/ 73/13) LSHC 22.
- 11 See *Letuka and another v Moiloa and others* (CIV/APN/41/2011) LSHC 123. In this case, the court relied on Laws of Lerotholi sec 34(1) which deals with payment of cattle after 'chobeliso' (elopement).
- 12 See *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea and others* (CC/5/2010) (*Masupha* case). In this case, the court upheld section 10 of Chieftainship Act 1968 in terms of which female children are excluded from succession to chieftainship as being part of Sesotho customary law as contained in the Laws of Lerotholi.
- 13 Lesotho acceded to ICCPR and ICESCR in 1992, ratified CEDAW in 2004 and CRPD in 2008. All of these instruments contain non-discrimination provisions in which state parties undertake to afford human rights to all without discrimination on the basis of sex.
- 14 Hlatshwayo (n 6).
- 15 Legal Capacity of Married Persons Act sec 7.

Protocol as various human rights violations against women including discrimination of women on the basis of customary law, domestic violence and sexual harassment remain unaddressed.

Sections 4 and 18 of the 1993 Constitution of Lesotho provide for non-discrimination on the basis of various grounds including sex. However, section 18(4)(c) excludes from the discrimination test, any laws or actions based on Sesotho customary law.<sup>16</sup> Several human rights treaty bodies including the African Commission on the Human and Peoples' Rights (African Commission) have raised concerns that constitutional insulation of discrimination is a barrier to achieving full equality.<sup>17</sup> Another challenge is that section 26(1) provides for equality and justice. It states that as follows:

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

However, section 25 states that principles contained in chapter three of the Constitution are non-justiciable in the courts of law, thus rendering the principle of gender equality illusory as one cannot challenge it in court on the basis of section 26.<sup>18</sup>

Owing to protracted political fragilities, Lesotho's first coalition government which had been in place for only

two years collapsed in 2014. In June 2015 commander of the Lesotho Defence Force (LDF) Lieutenant General Mahao was assassinated. The Southern African Development Community (SADC) intervened by sending a mission to Lesotho which was named the SADC Observer Mission in Lesotho (SOMILES) and by establishing a commission of enquiry into Mahao's death (SADC Commission).<sup>19</sup> The SADC Commission made four main recommendations.<sup>20</sup> One of the recommendations was comprehensive reforms covering the Constitution, security sector, public service and information and media as encapsulated in the SOMILES report.<sup>21</sup>

Pursuant to the recommendation, the parliament of Lesotho enacted the National Reforms Act of 2019 whose objective is to establish a National Reforms Authority (NRA) with mandate to manage, coordinate and lead the reforms process.<sup>22</sup> The constitutional reform process presents an opportunity to address constitutionally entrenched inequality which is incompatible with Lesotho's obligations under the Maputo Protocol and other interna-

16 African Commission *The Kingdom of Lesotho combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa* 113 www.achpr.org (accessed 12 November 2020).

17 CEDAW Committee *Concluding observations of the Committee on the Elimination of Discrimination against Women – Lesotho* CEDAW/C/LSO/1-4.

18 In the case of *Khathang Tema Baitsokele and another v Maseru City Council and Others* CC/1/2004 (*Baitsokele* case), the Constitutional Court held that principles contained in chapter three of the Constitution cannot be treated as fundamental human rights contained in chapter two of the Constitution.

19 SADC Commission of Enquiry into the circumstances surrounding the death of Brigadier Mahao whose mandate is contained in the Terms of Reference by the SADC Double Troika and domesticated by the Government of Lesotho through Legal Notice 75 of 2015 as amended by Legal Notice 88 of 2015.

20 The recommendations were expeditious and comprehensive criminal investigations, relieve of Lieutenant General Kamoli from his duties, constitutional reforms in relation to mandate of security institutions and facilitation of an amnesty for munity suspects and soldiers who had fled Lesotho.

21 SADC Commission (n 19) *Final report* 60.

22 National Reforms Authority Act Preamble.

tional human rights instruments. This opportunity may also be used to clarify the relationship between international human rights instruments and the domestic laws of Lesotho as well as justiciability of socio-economic rights.

## 2 Ratification of the Maputo Protocol

Lesotho signed the Maputo Protocol on 27 February 2004, ratified it on 26 October 2004 and deposited its instrument of ratification on 5 November 2004. No reservations accompanied the ratification. The power and process of ratification of international human rights agreements in Lesotho is executive-based.<sup>23</sup> It follows a process in terms of which the relevant ministry, in this case, the Ministry of Gender and Youth, Sports and Recreation (MGYSR), issues an instruction to the Ministry of Foreign Affairs (MFA) that a particular instrument be ratified. Both ministries then write a joint memorandum to Cabinet recommending such ratification. When the recommendation is approved, the MFA issues an instrument of ratification to the relevant ambassador who then deposits it with the General Secretary of the African Union. In other cases, the MFA writes the memorandum to cabinet on its own and if approved issues an instrument of ratification.<sup>24</sup> According to Director of Gender Department in the MGYSR, the former process was followed. That is, parliament played no role at all prior to and post ratification of the Maputo Protocol.

## 3 Government focal point

In 1995, Cabinet decided to establish a Human Rights Commission as well as a Human Rights Unit within the Ministry of Justice.<sup>25</sup> The Human Rights Unit was tasked with responsibility to coordinate all human rights issues across ministries.<sup>26</sup> In 2002, the MGYSR was created. Its functions were to facilitate proper integration of gender issues in development to ensure full involvement, participation and partnership of women and men.<sup>27</sup> Despite establishment of the Gender Department within the MGYSR, the Human Rights Unit remains the focal point for communication between government and the human rights treaty bodies including the African Commission. For instance, all communications relating to submission of periodic reports, questions to the government, human rights promotional visits, awareness raising to mention but a few, are directed to the Human Rights Unit, which in turn liaises with the MGYSR as the implementing ministry of women's human rights.

Change of governments since 1995 came with restructuring of Ministries in Lesotho. For instance, in 2012 the Ministry of Justice was split into two ministries thus creating the Ministry of Justice, Human Rights and Correctional Services on the one hand and the Ministry of Law and Constitutional Affairs on the other.<sup>28</sup> At this time, the Human Rights Unit was shifted to the Ministry of Law. In 2020, the two ministries were merged again into the Ministry of Law and Justice. The changes notwithstanding

23 Thabane & Shale (n 5).  
24 Thabane & Shale (n 5).

25 Cabinet decision of 1995.  
26 As above.  
27 Government of Lesotho <https://www.gov.ls/ministry-of-gender-youth-and-sports/> (accessed 3 November 2020).  
28 As above.

ing, the Human Rights Unit remains the government focal point on all human rights matters. The challenge with this arrangement is that the unit is understaffed and therefore under a lot of pressure to coordinate all human rights issues in the country.<sup>29</sup> The advantage is that it provides a centralised institution to communicate with the African Commission and other human rights treaty bodies and to follow up implementation of the African Commission's recommendations with each relevant ministry.<sup>30</sup>

#### 4 Domestication or incorporation

Unlike other countries such as South Africa and Zimbabwe in which there are constitutional provisions that dictate the circumstances under which international instruments shall be applied,<sup>31</sup> the Constitution of Lesotho is silent as to the place which international instruments occupy in the hierarchy of laws in the national legal system. Lesotho has inherited Roman-Dutch law and its legal traditions including a dualist approach to international law.<sup>32</sup> As a result, the Maputo Protocol is not part

of the legal system of Lesotho until such a time that there will be an Act of Parliament which domesticates it. It assumes a lower status than all national laws including the Constitution and other pieces of legislation. In the case of *Senate Gabasheane Masupha v Senior Resident Magistrate of the Subordinate Court of Berea District and Others*,<sup>33</sup> the Court of Appeal relegated the Maputo Protocol and other undomesticated international human rights instruments to nothing other than mere interpretation aids. It stated that: '[T]hese instruments it is clear, are aids to interpretation, not sources of rights enforceable by Lesotho citizens'.<sup>34</sup>

As illustrated by Thabane and Shale,<sup>35</sup> an equally dualist approach to international instruments had been adopted in earlier cases such as *Joe Molefi v Government of Lesotho*, where court explicitly stated that, in order for the international instruments to be incorporated in Lesotho, it would be essential for those instruments to be domesticated before the court can regard their provisions as enforceable.<sup>36</sup> This was reiterated in the case of *Basotho National Party and Another v government of Lesotho and Others*,<sup>37</sup> where the applicants sought an order directing the government of Lesotho to take necessary steps, in accordance with its constitutional processes, to adopt such legislative and other meas-

29 The unit has only two staff members, the Chief Legal Officer and the Principal Legal Officer. At the time when it was established, it was staffed with four personnel. Currently a new structure has been proposed to staff the unit with at least 16 members comprising Human Rights Counsel, Deputy Human Rights Counsel, Chief Legal Officer, Principal Legal Officer, Legal Officer, three researchers, support staff including two secretaries, two drivers, two messengers, two office assistants and a registry.

30 As above.

31 The Constitution of South Africa sec 39; the Zimbabwean Constitution sec 326(1) makes customary international law part of the law of Zimbabwe while sec 327(3) states that international treaties ratified by the executive shall only become part of the law of Zimbabwe upon incorporation by an Act of Parliament.

32 WCM Maqutu & AJGM Sanders 'The internal conflict of laws in Lesotho' (1987) 20(3) *The Comparative and International Law Journal of Southern Africa* 377; see also I Shale

'Historical perspective on the place of international human rights treaties in the legal system of Lesotho' (2019) 19 *African Human Rights Law Journal* 194.

33 The *Masupha* case (n 12) in which the courts including the upper court of the land, upheld the discriminatory provision. This was a blow not only to the Basotho women, but to all women in the African region.

34 *Masupha* case (n 12) para 22.

35 Thabane & Shale (n 5).

36 *Joe Molefi v government of Lesotho* 1967-70 LLR 237.

37 *Basotho National Party and Another v government of Lesotho and Others* Cons. Case No 5/2002 [2003] LSHC 6 (1 January 2003).

ures necessary to give effect to the rights recognised in international conventions such as the African Charter. The Court stated that ‘these Conventions cannot form part of our law until and unless they are incorporated into municipal law by legislative enactment’. It stressed that by granting the orders sought, it would usurp functions of the executive and the legislature.

The practice has however not been consistent since in other cases involving human rights, the courts have invoked provisions of international human rights instruments without questioning their domestication. For instance, in the case of *Peta v Minister of Law, Constitutional Affairs and Human Rights*,<sup>38</sup> the Court made reference to several international human rights instruments including the African Charter. In the case of *Security Lesotho v Moepa*,<sup>39</sup> the Court cited international human rights instruments, including article 26 of the African Charter. In *Rex v Malefetsane Mohlomi and Others*,<sup>40</sup> the Court referred to the African Charter on the Rights and Welfare of the Child. It can be concluded therefore that the modern trend, especially where human rights are concerned, is that Lesotho does not stick to the tenants of dualism but tilts more towards upholding human rights, to the extent of invoking undomesticated international human rights instruments.

Despite the unclear status of the Maputo Protocol in the legal system of Lesotho, although not completely so, many of its aspects have been incorporated into the laws of Lesotho. For instance, the Legal Capacity of Married Persons Act of 2006, which eliminated

marital power. This is consistent with article 6 of the Maputo Protocol in which states undertake to ensure that men and women enjoy equal rights and are regarded as equal partners. The Education Act of 2010 provides for equality in the provision of free and compulsory education. However, the Bill of Rights is compatible with the Maputo Protocol only to the extent of civil and political rights.<sup>41</sup> Socio-economic rights are not protected as fundamental human rights but are contained in chapter three of the Constitution as principles of state of policy. In this regard the Bill of Rights is incompatible with the Maputo Protocol. The incompatibility is further illuminated by section 25 of the Constitution in terms of which socio-economic rights cannot be justiciable in the courts of law.<sup>42</sup> The Constitution was enacted in 1993 and the Maputo Protocol ratified in 2004. However, no amendments were made in order to align the Constitution with Lesotho’s obligations under the Protocol.

## 5 Legislative reform

In 2000, that is, prior to Lesotho’s ratification of the Maputo Protocol, the Lesotho Law Reform Commission, together with non-governmental organisations (NGOs) which work in the area of women’s rights embarked on a reform process which was aimed at a general review of laws and how they affect women’s rights. The review process was aimed at recommending repeal of discriminatory laws and enactment of laws which protect women’s rights. The process took many years during which the committee also advocated for the ratification of the Maputo

38 CC 11/2012 [2018] LSHC 3 (18 May 2018).

39 Cons. Case No 12 of 2014.

40 Review case No 06/2013 CR. No10/2013/ Review Order No 1/20.

41 The Constitution of Lesotho secs 4 to 20.

42 *Baitsokoli* case (n 18).

Protocol, which Lesotho ratified in 2004.<sup>43</sup> Some of the laws which were a result of this process include the Legal Capacity of Married Persons Act, 2006 (LCMPA). The main object of the LCMPA is to ensure equality within all marriage settings whether customary or civil. It mainly repealed marital power in terms of which a married woman was regarded as a minor and subject to guardianship of her husband with no right to own property, to enter into contracts or to sue or be sued in her own name.<sup>44</sup>

According to Women and Law in Southern Africa (WILSA), a decade after the enactment of the LCMPA, due to several factors such as absence of guidelines on implementation of the Act, culture and lack of understanding by stakeholders, many married women have not benefited from its intended objective. For instance, in terms of the LCMPA, a spouse married in community of property may not alienate property belonging to the joint estate or mortgage it, or bind himself as surety without consent of the other spouse.<sup>45</sup> However, due to poverty, the majority of women fail to afford legal fees to seek remedies against their spouses as contemplated in section 8 of the Act. Furthermore, due to the socialisation that husbands are heads of families and therefore responsible for livestock and agricultural fields belonging to the joint estate, WILSA has received reports in which traditional leaders have registered agreements in which such are sold without wives' consent.

Following enactment of the LCMPA in 2006, no further legislative

reforms relating to the rights of women were made until 2010/2011 when there was massive enactment of laws which protect women in various ways. According to the Law Reform Counsel, while the reform process had begun in 2000, ratification of the Maputo Protocol in 2004 propelled the process and informed the content of the laws that were enacted thereafter. These laws mandate equality between men and women. For instance: the Land Act of 2010 provides for equal access to land; the Education Act of 2010 provides for equal access to education; the Penal Code Act of 2010 provides for medical abortion where continued pregnancy threatens the life of either the mother or the foetus; the Anti-Trafficking in Persons Act of 2011 addresses trafficking which disproportionately affect women and girls; the Children's Protection and Welfare Act of 2011 provides for equal treatment of boy and girl children; the Companies Act of 2011 gives women the right to be directors in companies without spousal consent; and the National Assembly Elections Act of 2011 provides for equal political participation including affirmative action.

The text of the above laws does not explicitly refer to the Maputo Protocol. Nevertheless, the assumption is that they were enacted in order to align the national legal framework with the obligations contained in the Maputo Protocol. However, the challenge is that these laws do not 'speak to each other'. That is, there are some inconsistencies which impede their full implementation. For instance, the Land Act allows all persons above the age of 18 years, women included, to acquire and register rights to land in their own names. However, according to the Land Administration Authority, a woman married in community of property is not

43 *Baitsokoli* case (n 18).

44 Legal Capacity of Married Persons Act sec 3.

45 Legal Capacity of Married Persons (n 45) sec 7.

allowed to register rights to land in her own names to the exclusion of her husband. One would assume that this prohibition is a step back towards application of the LCMPA as well as the Maputo Protocol. However, Justice Banyane, a judge of the High Court, correctly indicated that this is in line with the LCMPA whose aim is to balance the equilibrium between spouses and not necessarily to elevate women above their husbands with regard to ownership and control of property which is part of the joint estate. She stated that 'where individual or separate ownership is desired, then spouses have a choice to marry out of community of property.' Thus, by enabling married women to hold title to land, and where married in community of property to do so jointly with their husbands, the Land Act ensures equality between spouses in line with the Maputo Protocol. The other challenge is that in the rural areas, land has not yet been leased in accordance with the Land Act of 2010. As a result, residential, commercial and agricultural lands remain registered in the names of husbands to the exclusion of their wives married in community of property. This has also led to disinheritance of such women by the extended family upon death of her husband.

The reality for many Basotho women is also bleak in areas such as education. For instance, the Education Act of 2010 provides for equal access to education. While enrolment in primary schools is higher for girls than boys, the statistics reduce significantly from secondary schools to institutions of higher learning.<sup>46</sup> The reduction is attributed to various factors including sexual harassment of female pupils by

teachers,<sup>47</sup> early and forced child marriages,<sup>48</sup> and poverty.

Over and above challenges of implementing the existing laws, Lesotho also has fragments of laws which are incompatible with the Maputo Protocol. For instance, section 18(4) of the Constitution lists customary law as one of the exceptions to the principle of equality and non-discrimination. As a result, there are various discriminatory laws and judicial decisions which have been justified on the basis of customary law. For instance, the Court of Appeal in the *Senate Masupha* case held that limitation of succession to chieftainship to male children to the exclusion of females is not discriminatory as it is based on customary law.<sup>49</sup>

Since 2016, legislative reform to domesticate the Maputo Protocol has focused on domestic violence as well inheritance and succession. However, due to government's bureaucracy, the laws have not yet been tabled before parliament.<sup>50</sup> According to the Law Reform Commission Counsel, there was a comprehensive review of laws prior to ratification of the Maputo Protocol. However, greater efforts for its domestication were done post-ratification. The challenge with the piece-meal alignment process is that it is slow and in the

47 See the case of *Sechaba Tsolo v Teaching Service Tribunal and 3 Others CIV/ APN/ 2014* (unreported). In this case, a male teacher was dismissed for misconduct and sexual harassment of a female learner. A criminal case is pending in the Magistrate Court of Maseru.

48 Gender Links 'Lesotho: fight to end early child marriages rages on' <https://genderlinks.org.za/news/lesotho-fight-to-end-child-marriages-rages-on/> (accessed 2 March 2021).

49 The *Masupha* case (n 12).

50 As at March 2021, the Domestic Violence Bill was still with the Ministry of Gender while the Inheritance and Succession Bill had been submitted to the Parliamentary Drafting Counsel.



meantime, women continue to suffer discrimination. Also, because the domestication process has not been given much priority, there has not been additional resource allocation as a result of ratification of the Maputo Protocol.

## 6 Policy reform and adoption

Since establishment of the MGYSR, the government of Lesotho has adopted several policies consistent with the principles contained in the Maputo Protocol although these policies do not explicitly mention the same. Hlatshwayo has made reference to policies adopted prior to 2016.<sup>51</sup> Since 2016, Lesotho has continued to adopt policies which are aligned to the Maputo Protocol. These policies include the Gender and Development Policy 2018-2030 whose mission is to advance gender equality as enshrined in global and regional gender-related instruments that Lesotho is party to, as well as the national framework. It addresses the new and emerging national, regional and global gender issues. It confronts gender issues such as gender-based violence and feminised human immunodeficiency virus (HIV) epidemic.<sup>52</sup> The policy is aligned to the Maputo Protocol. It mentions the Maputo Protocol as well as other international human rights instruments ratified by Lesotho but states that they have no legal implications at the domestic level due to non-domestication. The policy is intended to be implemented through multi-sectorial approaches inclusive of all government ministries, local authorities, civil society organisations (CSOs), academics institutions, private sectors and development agencies.<sup>53</sup>

In 2018, Lesotho adopted the second National Development Strategic Plan (NDSP II) 2018/19-2022/23 which replaced the NDSP 2012/12 - 2016/17. The NDSP II acknowledges that customary law, gender stereotypes and gendered norms sometimes undermine gender equality, economic opportunities and also limit women and girls from negotiating safe sex.<sup>54</sup> Although it does not mention the Maputo Protocol, in line with its objectives, the NDSP II contains the duty to address the inequalities which were left by NDSP I and pursue gender strategic interventions with projects and programmes which specifically target women's participation and build women and girls' leadership skills for social, economic and political development throughout its provisions.<sup>55</sup> It also acknowledges the gender gap in the education system and factors that lead to a gendered skills development.<sup>56</sup> With regard to HIV and Acquired Immunodeficiency Syndrome (HIV/AIDS), the NDSP II acknowledges that gender inequality and gender-based violence place women and girls at a greater risk of infection and urges the government of Lesotho to undertake reforms to address the inequalities.<sup>57</sup>

The key strategy of the Education Sector Strategic Plan 2016-2026 is to mainstream gender across programmes, curricula, and policies at all levels in the education sector and to advocate for gender equity and equality.<sup>58</sup> Its target is to eliminate gender disparities at all levels of education by 2026.<sup>59</sup> The Ministry of Education and Training is entirely responsible for the implementa-

51 Hlatshwayo (n 6).

52 Gender and Development Policy (2018-2030) 15.

53 As above.

54 NDSP II paras 3, 49, 153.

55 NDSP II paras 3, 248.

56 NDSP II para 264.

57 NDSP II paras 27-271.

58 Ministry of Education and Training *Education Sector Plan 2016-2026* (2016) 104.

59 As above.

tion of the Plan and therefore will take the needed initiatives for coordination, reporting, monitoring and evaluation and regular interactions with the stakeholders.<sup>60</sup>

The National Health Strategic Plan 2017-2022 has been developed to address the Sustainable Development Goals (SDGs). It aims to achieve Universal Health Coverage, including access to essential health care services, safe, effective, quality and affordable essential medicines. It is also aimed at increasing the population of women of reproductive aged (15-49 years) who have their need for family planning satisfied with modern methods. The other objective is to provide micronutrients to mothers, children and family and to scale up comprehensive screening and early treatment of cervical cancer in women of childbearing age.<sup>61</sup>

The HIV and AIDs Strategic Plan 2018-2023 replaced the 2011-2016 HIV and AIDS Strategic Plan which had been extended to 2018 to align with the NSDP and respond to United Nations political declaration on HIV and AIDS of 2016.<sup>62</sup> The Plan is fully compatible with the Maputo Protocol in that its main objective is to empower women and enable men, women, boys and girls access to health and HIV services without discrimination.<sup>63</sup> Although the Plan does not make reference to the Maputo Protocol, its objectives implement article 14(1) of the Maputo Protocol in that it eradicates gender inequality, harmful gender norms and gender-based violence by empowering women and girls to exercise their reproductive rights

and to be protected from violence and harmful practices.<sup>64</sup> Further compatibility with the Maputo Protocol is in the objective to increase awareness of rights and decrease stigma and discrimination by enhancing meaningful participation and coordination for stronger inclusion with people living with HIV, women and girls.<sup>65</sup> The objectives of the plan are to be achieved by stakeholders strengthening the multi-sectorial capacity to prevent and address gender-based violence and harmful practices at the national and district levels and ensuring that linkages between sexual gender-based violence, sexual and reproductive health rights and HIV are clear.<sup>66</sup> The National Vision 2020 pursues gender equity and equality among the Basotho society. It hopes to uproot discrimination and appoint more women in areas of responsibility and decision making in both the public and private sectors.<sup>67</sup>

## 7 Impact on the judiciary

Jurisprudence which makes explicit reference to the Maputo Protocol is very scarce due to the principle of dualism in terms of which undomesticated international human rights instruments are not regarded as part of the national legal framework.<sup>68</sup> The only two cases in which the Maputo Protocol was referred to were decided prior to 2016 and discussed in detail by Thabane and Shale in 2012 and by Hlatshwayo in 2016. These are the *Senate Masupha* case,<sup>69</sup> and case of *Molefi Tsepe v The Independent Electoral Commission and*

60 Education Sector Plan (n 58) 105 & 109.

61 Ministry of Health *National Health Strategic Plan 2017-2022* (2017) 42.

62 Ministry of Health *HIV Strategic Plan 2018-2023* (2018) 53.

63 As above.

64 HIV Strategic Plan (n 62) 55.

65 HIV Strategic Plan (n 62) 53.

66 HIV Strategic Plan (n 62) 55.

67 Government of Lesotho *Lesotho Vision 2020* (2018) 12.

68 See the case of *Basotho National Party and Another v Government of Lesotho and Others Constitutional Case No 5/2000* (2003) LSHC 6, 22.

69 The *Masupha* case (n 12).

*Others*.<sup>70</sup> The latter remains the only case in which the Constitutional Court relied on the Maputo Protocol and other human rights instruments, although undomesticated, to uphold affirmative action in local government elections.<sup>71</sup>

The blow on the use of the Maputo Protocol to protect the rights of women was however experienced in the *Senate Masupha* case in which the court decided that section 10 of the Chieftainship Act in terms of which only first born male children can succeed to chieftainship is not discriminatory as it is, in accordance with section 18(4) of the Constitution is exempt from the non-discrimination provisions of section 18. The court did not consider arguments made on behalf of the *amicus curiae* referring to Lesotho's human rights obligations under the various international human rights instruments, including the Maputo Protocol, the African Charter and Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).<sup>72</sup>

Although the courts maintain a strict conservative approach to international human rights instruments, members of the judiciary have participated in several trainings meant to familiarise them with international human rights law in general, and the Maputo Protocol in particular. In 2014, Equality Now, Shale Chambers and WILSA held a training for lawyers on the use of Maputo Protocol to advance women's rights through litigation. Also invited to this training was Mahase, a judge of the High Court. In 2015, there was another training in which four

female judges and magistrates were trained about the Maputo Protocol and other international human rights instruments which protect the rights of women. Sadly, of the four judges, two are deceased, one retired and only Mahase remains. Despite the trainings, jurisprudence of the Courts of Lesotho still reflects resistance to apply the Maputo Protocol and other international instruments in other cases except in constitutional cases, which are very rare. Banyane has attributed this resistance to lack of domestication as well as lack of judicial training on human rights and trends in other jurisdictions which are in a similar position as Lesotho and how they have advanced protection of human rights through international human rights instruments.

## 8 Use by civil society

There is awareness of the Maputo Protocol amongst the CSOs in Lesotho. The awareness is reflected by participation in the sessions of the African Commission, filing of shadow reports to Lesotho's state party report to the African Commission and public awareness campaigns about the Maputo Protocol. For instance, the Federation of Women Lawyers (FIDA-Lesotho) and Women and Law in Southern Africa (WILSA) joined the Senate Masupha case as *amici curiae* to raise arguments that Lesotho has obligations under the African Charter, Maputo Protocol and CEDAW to eliminate all forms of discrimination against women including in succession to chieftainship. After exhaustion of local remedies, FIDA in collaboration with Southern African Litigation Centre (SALC), assisted Senate to lodge a communication before the African Commission challenging compliance of

70 *Ts'ephe v Independent Electoral Commission and Others* (C of A (Civ) No 11/05 CC 135/05) (NULL) (2005) LSHC 93 (20 April 2005).

71 CIV/APN/135 [2005] LSHC 96 (27 April 2005).

72 The *Masupha* case (n 12).

section 10 of the Chieftainship Act with article 2 of the Maputo Protocol.

Further awareness is indicated by the fact that in 2019, Transformation Resource Centre (TRC) lodged a shadow report to Lesotho's State Party Report to the African Commission while the FIDA-Lesotho assisted Southern Africa Litigation Centre (SALC) to compile and file a shadow report to Lesotho's Universal Periodic Review Report.<sup>73</sup> Awareness is also illustrated in the public awareness campaigns conducted by various CSOs. For instance, the Lesotho Council of NGOs (LCN), in line with the Maputo Protocol, promotes gender mainstreaming in development and also publicises and advocates for equality in its promotion of women's participation in politics and leadership,<sup>74</sup> as well as women empowerment projects.<sup>75</sup> In this regard, WILSA pursues women's human rights in a legal context through awareness raising campaigns and even produced a documentary on pressing women's human rights issues in Lesotho. It also runs a free legal advice centre for women, empowerment programmes for women in leadership positions, and awareness campaigns on property and inheritance rights. As far as the national reforms process is concerned, WILSA is running two programmes which are informed by provisions of the Maputo Protocol. One is the programme to amplify women's voices in the reforms process and another is on women, peace and security. The latter is done in

collaboration with African Women Leadership Network (AWLN). The aim is to explore the role that women can play to ensure peace and security and in conflict resolution in order to contribute to the 'Lesotho we want' which is the drive behind the reforms process.

## 9 Awareness by lawyers

According to Thabane and Shale, lawyers in Lesotho are of the opinion that since the African Charter and the Maputo Protocol have not been domesticated in national law, they cannot be used either for interpretation purposes or to persuade the courts.<sup>76</sup> As Hlatshwayo indicated, there have been a number of trainings organised by the Law Society on human rights law in general.<sup>77</sup> Amongst these there have been specific trainings in which women's rights under the Maputo Protocol have been interrogated. For instance, in 2014, the Law Society of Lesotho in collaboration with Equality Now, Shale Chambers and WILSA, hosted a two-day training for lawyers on using the Maputo Protocol. Moreover, in 2015 the International Commission of Jurists (ICJ) and the Law Society held 'Women's leadership in the legal profession national training'.

## 10 Higher education and academic writing

There is only one proficient law school in Lesotho namely the National University of Lesotho, which conducts training on human rights under the Faculty of Law. The subject, Human Rights is offered together with International Humanitarian Law at undergraduate level, Bachelor of Laws (LLB) five year

73 SALC 'SALC shadow report – Lesotho's 3rd Universal Periodic Review 35th session' (Jan-Feb 2020) <https://www.southernafricalitigationcentre.org/2019/07/03/salc-shadow-report-lesothos-3rd-universal-periodic-review-35th-session-jan-feb-2020/> (accessed 12 November 2020).

74 LCN 'The status of women in Lesotho 2015' [www.lcn.org.ls](http://www.lcn.org.ls) (accessed 1 November 2020).

75 As above.

76 Thabane & Shale (n 5).

77 Hlatshwayo (n 6).

programme. It has been offered as a core subject since 1981.<sup>78</sup> Advanced International Human Rights Law is offered as part of the Master of Laws (LL.M) programme. Students at both undergraduate and postgraduate levels have written dissertations on women's human rights including those contained under the Maputo Protocol.<sup>79</sup> Gender content is also included in courses in the department of Development Studies, African languages, Theology and History. Development Studies offers these courses at both undergraduate (Bachelor of Arts), and postgraduate (Master of Arts) levels.

There are also scholarly articles which refer to the Maputo Protocol. Scholarly work which was done prior to 2016 has been referred to by Hlatshwayo.<sup>80</sup> Since then, there have been articles which address issues such as Lesotho's COVID-19 response through lockdown and how such affected rights of women in the formal sector.<sup>81</sup>

## 11 Impact on independent state institutions

Lesotho does not have a functional Human Rights Commission yet. However, legislation aimed at its establishment and operationalisation has

been enacted.<sup>82</sup> There are several independent oversight state institutions whose work has an impact on protection and promotion of human rights. These include Office of the Ombudsman, established under section 134 of the Constitution of Lesotho, as amended. The Ombudsman is generally constitutionally empowered to act against injustice suffered by persons due to the conduct of a government department, local government authority or statutory corporation.<sup>83</sup> The injustice may include human rights violations.<sup>84</sup> There is also the Directorate of Corruption and Economic Offences (DCEO) and the Police Complaints Authority (PCA). The Maputo Protocol does not feature in the programmes of these institutions. The institutions did not participate in the Lesotho state party report and have not made follow-ups on the concluding observations made by the African Commission to Lesotho's initial report on the Maputo Protocol which was considered in 2019.

## 12 State reporting

In 2016, Hlatshwayo identified the MGYSP as solely responsible for state reporting.<sup>85</sup> However, as the focal point for coordination of all human rights matters, the Human Rights Unit is responsible for state reporting.<sup>86</sup> As far as the Maputo Protocol is concerned, the Human Rights Unit liaises with the MGYSR.<sup>87</sup> Lesotho has submitted only

78 I Shale 'Update: The Law and Legal Research in Lesotho' (2014) <https://www.nyulawglobal.org/globalex/Lesotho1.html> (accessed 13 November 2020).

79 S Letsie 'The implementation of article 14 of CEDAW: A study in Lesotho' LLB Dissertation (2020).

80 Hlatshwayo (n 6).

81 T Ramakhula 'Locking down women's rights through COVID-19 response measures in Lesotho's informal sector' *IAWL* <http://www.africanwomeninlaw.com/post/locking-down-women-s-rights-through-covid-19-response-measures-in-lesotho-s-informal-sector> (accessed 5 November 2020).

82 Sixth Amendment to the Constitution Act 2011 and Human Rights Commission Act 2016; see also *Development for Peace Education & Transformation Resource Centre v Speaker of the National Assembly & Others* Cons Case No5/2016.

83 The Constitution of Lesotho (n 42) sec 135.

84 I Shale 'Country Report Lesotho' (2015) 3 *African Disability Rights Handbook* at 195.

85 Hlatshwayo (n 6) 135.

86 Chabane (n 24).

87 Chabane (n 24).

one report under the Maputo Protocol. This report was submitted in 2018 as part B of the combined second to eighth report under the African Charter.<sup>88</sup> The initial report ought to have been filed in 2006, that is, two years after ratification of the Protocol. Reasons advanced for delay in reporting include lack of financial and technical resources and political instability.<sup>89</sup>

In April 2017, the Women's Rights Unit of the Centre for Human Rights provided technical assistance and trained government officials and members of CSOs on the African human rights system, scope and content of the African human rights instruments as well as state party reporting process.<sup>90</sup> The training led to compilation and filing of Lesotho's initial report under the Maputo Protocol in 2018 and its presentation before the African Commission in May 2019.<sup>91</sup> Preparation and compilation of the report was very inclusive. Several CSOs, media houses, academia and government ministries were part of information gathering, deliberations and compilation of the final report. The process was deemed as more inclusive than previous reports in which CSOs and other NGOs were only invited for validation of an already completed report.<sup>92</sup> The report

was presented by the Minister of Justice, Mr. Mokhele Moletsane. The government delegation was made up of ten people including the Principal Secretary, Attorney General and officers from seven ministries.<sup>93</sup> Of the ten, five were women, thus reflecting adequate representation of women.

For the first time NGOs with observer status with the African Commission filed shadow reports to the state party report. The report was submitted by Transformation Resources Centre (TRC).<sup>94</sup> Although it does not directly address part B of the report which covers the Maputo Protocol, the shadow report addresses blind spots that TRC found wanting in Lesotho's compliance with the African Charter and yet unaccounted for in the second to eighth combined report and initial state report under the Maputo Protocol.

### 13 Communications

There have been at least three communications sent to the African Commission in which Lesotho was a party. The first communication was in *Ntaka v Lesotho*.<sup>95</sup> The matter was held inadmissible because Lesotho had not yet ratified the Banjul Charter at the time of the events complained about.<sup>96</sup> The second was *Eyob Asemie v Kingdom of Lesotho*.<sup>97</sup> In this communication, the complainant

88 *The Kingdom of Lesotho: Combined 2nd to 8th Periodic Report* (n 16).

89 *The Kingdom of Lesotho: Combined 2nd to 8th Periodic Report* (n 16) para 3.

90 Centre for Human Rights 'The centre for human rights coordinates African Charter and Maputo Protocol drafting workshop in Lesotho' <https://www.chr.up.ac.za/news-archieve/2017/565-the-centre-for-human-rights-coordinates-african-charter-and-maputo-protocol-drafting-workshop-in-lesotho> (accessed 1st November 2020).

91 The 64th Ordinary Session of the African Commission on Human and Peoples' Rights, held in Sharm El Sheikh, Egypt from 24 April to 14 May 2019.

92 Interview with Adv. L Leeu Lesotho Council of NGOs (LCN) Human Rights and Democracy coordinator on 11 October 2020.

93 Human Rights Unit (then in the Ministry of Law), MGYSR, MFA, Ministries of Education, Health, Social Development, Justice.

94 Transformation Resource Centre 'Shadow report on human rights situation in Lesotho in response to Lesotho's combined second to eighth periodic report' <http://www.trc.org.ls/wp-content/uploads/2019/10/Shadow-Report.pdf> (accessed 2 November 2020).

95 Communication 33/89 7th African Commission AAR Annex IX (1993-1994).

96 As above.

97 Communication 435/12 16th Extraordinary Session 20 to 29 July 2014.

and his family had sought political asylum in Lesotho from Ethiopia. However, they became stateless after renouncing Ethiopian citizenship but not being called for Lesotho citizenship as expected. This communication was held inadmissible for failure to exhaust local remedies in accordance with article 56(5) of the Banjul Charter.<sup>98</sup>

The third communication is *Senate Gabasehane Masupha's v Lesotho*. The communication challenges Lesotho's Chieftainship Act in terms of which succession to chieftainship is restricted to first born male children. The case has not reached finality. Thus, Lesotho's mechanisms for compliance and implementation of communications from the African Commission have not yet been tested by a real decision from the African Court.

#### 14 Special mechanisms and promotional visits of the African Commission

The African Commission fulfils its human rights promotion mandate in various forms including promotional visits to states parties to the African Charter and its protocols.<sup>99</sup> As far as Lesotho is concerned, the latest promotional visit was between 8 and 13 October 2018.<sup>100</sup> The promotional visit focused on encouraging compliance with the African Charter. According to the African Commission's Press Release, the objectives of the mission were to:

promote the African Charter and other instruments of the African Union,

including the Maputo Protocol;<sup>101</sup> promote the adoption of steps to give effects to the rights therein through various means including legislative, administrative, judicial and other measures; raise awareness about the African Commission to Lesotho's CSOs and government departments; exchange views on how to improve human rights compliance in Lesotho; follow up adherence with recommendations of the 2012 promotional visit and Concluding Observations adopted by the African Commission; and encourage reporting under article 62 of the African Charter.<sup>102</sup>

#### 15 Factors that may impede or enhance the impact of the Maputo Protocol

It has been almost two decades since Lesotho ratified the Maputo Protocol. It has had an impact in the legal system of Lesotho in that there are several laws which were enacted following its ratification. Although there is still a gap, the Maputo Protocol has also been publicised amongst government Ministries and CSOs. Credit for the publication must be given to the Centre for Human Rights, University of Pretoria which provided technical assistance to Lesotho for compilation and filing of its initial report on the Maputo Protocol to the African Commission in 2018. The filing had been preceded by several trainings in which the scope and content of the Maputo Protocol and the African Charter and their implications for people of Lesotho were discussed. The level of impact of this training was also illustrat-

98 16th Extraordinary Session (n 97) para 74.

99 F Viljoen *International human rights law in Africa* (2017) 379.

100 African Commission 'Press Release on the promotion mission of the African Commission on Human and Peoples' Rights to the Kingdom of Lesotho (8-12 October 2018) <https://www.achpr.org/pressrelease/detail?id=19> (accessed 9 September 2020).

101 As above.

102 As above.

ed by the fact that for the first time, an NGO from Lesotho filed a shadow report to Lesotho's periodic report.<sup>103</sup>

Another factor which has enhanced impact of the Maputo Protocol is that there are many Lesotho nationals who have ascended to African Union higher decision-making structures. For instance, former Justice Kelello Justinia Mafoso-Guni was a member of the African Court on Human and Peoples' Rights. She was one of the first judges therein and she and Sophia Akuffo were the female judges.<sup>104</sup> Other Basotho in higher decision-making structures include Professor Mafa Sejanamane as the ambassador to the African Union.<sup>105</sup> Lesotho also has chairmanship of the African Union Specialised Technical Committee on Public Service, Local Government, Urban Development and Decentralisation (AU-STC8) by Lesotho's Minister of Local Government.<sup>106</sup> Dr Khabele Matlosa is the Director for Political Affairs at the African Union Commission.<sup>107</sup> Lesotho has also had several members of the Pan-African Parliament including Mr Oziel Hlalele Motaung, Mrs Malebaka Flory Bulane, Mr Letuka Nkole, Mr Thabang Nyeoe, and Mrs Khauhelo Deborah Raditapole. Lesotho also hosts the headquarters of the African Committee of

Experts on the Rights and Welfare of Children (ACERWC).<sup>108</sup> These milestones should fill Basotho with a sense of co-ownership and co-agency in AU mandates and instruments. However, to date, there has not been a session of the African Commission held in Lesotho. This, it is believed would increase the impact of the Maputo Protocol in the country.

Lesotho also has the opportunity to enhance impact of the Maputo Protocol through the comprehensive reforms process. Although the reforms are largely oriented towards justice and security sector stability, the CSOs have insisted that women's voices in the process must be amplified within the seven thematic areas through representation and participation. As a result, the National Reforms Authority (NRA) has resolved to mainstream gender in all issues which will be dealt with as part of the reform process.

Despite the above strides, there still exist factors which impede a greater impact of the Maputo Protocol in the society generally and amongst lawyers and the judiciary in particular. For instance, Basotho find it hard to buy into eliminating customary and cultural discrimination in matters of succession to chieftainship as this will also have an impact on the monarchy. This matter is at the national level considered so crucial that Lesotho made a reservation to article 2 of the CEDAW.<sup>109</sup> This is because, to a large extent, Lesotho is

103 Transformation Resource Centre (n 94).

104 JI Levitt *Black Women and International Law: Deliberate Interactions, Movement and Actions* (2015) 54.

105 African Union Press Release 088/2018.

106 Government of Lesotho 'Lesotho acquires chairmanship of AU STC-8 bureau' <https://www.gov.ls/lesotho-acquires-chairmanship-of-au-stc8-bureau/> (accessed 1 November 2020).

107 African Union 'About political affairs (DPA)' <https://au.int/en/directorates/about-political-affairs-dpa> (accessed 1 November 2020).

108 African Union 'Report of the 29th session of the African Committee of Experts on the Rights and Welfare of the Child' para 111 in which Lesotho reiterated its readiness to host secretariat of the ACERWC [https://www.acerwc.africa/wp-content/uploads/2018/07/Report\\_29th\\_Ordinary\\_Session\\_ACERWC\\_English.pdf](https://www.acerwc.africa/wp-content/uploads/2018/07/Report_29th_Ordinary_Session_ACERWC_English.pdf) (accessed 9 October 2020).

109 MA Freeman 'Reservations to CEDAW: An Analysis for UNICEF' (2009).



still a socially patriarchal country. Section 18(4)(c) of the Constitution of Lesotho reflects protective devices for the socio-cultural setting of patrilineality amongst generally traditional members of Basotho society, and more so in matters of chieftainship and monarchy. The impact of the Maputo Protocol may have also been impeded by the prioritisation of UN treaties,<sup>110</sup> at least prior to 2018.<sup>111</sup>

110 For instance, reference is often made to CEDAW to the exclusion of the Maputo Protocol and other African Human Rights Framework.

111 *The Kingdom of Lesotho: Combined 2nd to 8th Periodic Report* (n 16).