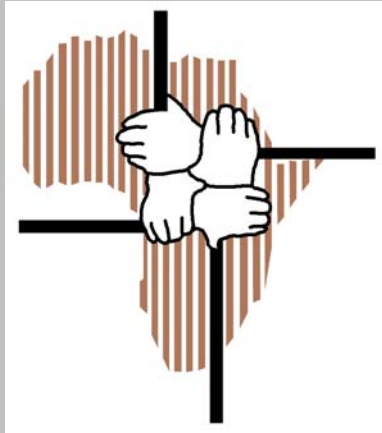


TRANSFORMATION RESOURCE CENTRE



**AFRICA DISCRIMINATION AND CITIZENSHIP
AUDIT LESOTHO REPORT**

Produced by,

WOMEN AND LAW IN SOUTHERN AFRICA-LESOTHO

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1. EXECUTIVE SUMMARY

This study provides analysis of the intersection between gender discrimination and access to citizenship. The overall aim of the study is to provide an overview and analysis of laws, case-laws and policies related to citizenship and discrimination on the basis of ethnicity, race and gender. The study provides a critical analysis of the extent to which Lesotho applies relevant international and regional instruments in addressing discrimination and ensuring citizens' access to rights. The study has outlined the lives of Basotho as largely characterized by parallel, dual systems with western, received or modern systems or influence on one side and traditional and customary way of life on the other, operating in duality. This parallel and dual system has influenced the way issues of health, education, religion and law are dealt with, sometimes creating uncertainty and conflict between the two systems. Likewise issues of citizenship have not escaped this parallel influence. Even though the legal system does not condone dual citizenship, practice points a different picture.

The social and historical background shows that Lesotho is a least developing country faced with challenges of poverty and productive resource limitations which in turn have a bearing on the social and economic inequalities between different sections of the population. Thus, a combination of socio-cultural and economic factors has affected resource allocation, administration and management resulting in discriminatory practices in accessing these resources. The challenges of unfavourable economic growth also have had a bearing on the patterns of citizenship-seeking and determination.

In Lesotho, there is a noted absence of adequate policy framework providing guidance on discrimination and citizenship. In this scenario, however, the country does have in place a policy that addresses gender discrimination, namely, the Gender and Development Policy (2003). The legal framework has measures in place to deal with discrimination and citizenship matters. The Constitution of Lesotho, (1993) provides direction and guidance on who qualifies to be a citizen of Lesotho and under what circumstances. Further citizens are protected from all forms of discrimination inclusive of race, ethnicity and gender. Dual citizenship is constitutionally forbidden. The Constitution of Lesotho provides that, upon attainment of the age of twenty one years, a citizen who is also found to be a citizen of some other country shall cease to be a citizen of Lesotho. In addition, there is in place Lesotho

Citizenship Order of 1971, a piece of legislation which provides and safeguards rights of citizenship. This law provides guidance on circumstances and procedures under which citizenship can be awarded or revoked. Regarding racial discrimination, the report to the United Nations on the International Convention on the Elimination of all Forms of Racial Discrimination¹, point to absence of racial discrimination cases featured before the Lesotho courts of law. Lesotho has ceded to international and regional instruments that promote and protect the rights of its citizens. Despite these initiatives, minimal efforts are currently being made to domesticate these commitments into national laws.

¹ UN International Convention on the Elimination of all Forms of Racial Discrimination, Fourteenth periodic report of States Parties- 1998

LIST OF ACRONYMS

CA	Court of Appeal
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHPR	Charter on Human and Peoples Rights
HC	High Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
JA	Judge of the Court of Appeal
JC	Judicial Commissioner's Court
OSIEA	Open Society Institute in East Africa
OSJI	Open Society Justice Initiative
OSIWA	Open Society Institute for West Africa
OSF-SA	Open Society Fund South- Africa
SACU	Southern African Customs Union
TRC	Transformation Resource Centre
TSC	Teaching Service Commission
UN	United Nations
UNDP	United Nations Development Programme
UDHR	Universal Declaration of Human Rights

2. INTRODUCTION

This report presents the Discrimination and Citizenship Audit, in mapping ethnic, racial and citizenship-based discrimination in Lesotho. The audit is a project of the Open Society Initiative for Southern Africa (OSISA), building on an initial citizenship audit in Africa, initiated by the Open Society Justice Initiative (OSJI). In Lesotho, this study is being implemented in partnership with Transformation Resource Centre (TRC). The study provides an analysis of the intersection between gender discrimination and access to citizenship. The goal of the study is to provide an analysis of laws, case-laws and policies related to discrimination on the basis of ethnicity, race, gender or any other ground as fully contained in the Monitoring and Evaluation Plan of the grant agreement with OSISA. It provides a critical analysis of the extent to which Lesotho applies the relevant international and regional instruments in addressing discrimination and ensuring citizens' access to rights. This exercise is intended to provide pointers and identify lacunae in the domestic legislation that results in lack of protection to vulnerable minority groups.

The first point of departure was determining clarity on the concepts of citizen and that of discrimination as the terms are often interpreted differently depending on the choice of law, orientation, circumstances facing an individual or country where such issues are in contention. The conceptual understanding is also determined by the policy interpretation and legal system in place. It is also important to note that the legal interpretation conferred upon the terms by a particular law of the country plays a critical role upon which concepts of citizenship and discrimination impact on one's gender, race, class, ethnicity and nationality. While some views expound citizenship as referring to one's identity, others view it as describing a political contrast that is supposed to govern the tangible aspects of the mutual responsibility between a State and its citizens². In contrast, discrimination is universally understood to mean; “³excluding and affording different treatment to different persons on the basis of difference and diversity”.

3. HISTORY AND SOCIO-POLITICAL BACKGROUND

Lesotho is a landlocked country, situated between 28 and 30 degrees south and between 27 and 30 degrees east and is completely surrounded by three

² <http://www.awid.org/ywl/msg00013.htm> Young women and citizenship

³ *ibid*

Provinces of the Republic of South Africa; namely Kwa-Zulu Natal, Free State and Eastern Cape.⁴ The country covers about 30, 300 squares kilometers, one third of which is classified as the lowlands and suitable for human settlement while the remainder is classified as the highlands. Lesotho has a total population of 2.2⁵ million people of which 900 000 are women.⁶ It is estimated that 84 percent of Basotho⁷ reside in the rural areas. The urban population is estimated to be around 300 000 with urbanization rate of 7-10 percent.⁸ Lesotho is faced with challenges of poverty, food insecurity and economic inequalities as well as high mortality rates, high prevalence rates (23.2 percent) of HIV and AIDS pandemic.

The present day Lesotho was founded in 1870 by the great King Moshoeshoe I who ingeniously formed the Basotho nation out of amalgamating the different clans of Sotho origin people and Nguni origin refugees who fled the 19th century *Mfecane* wars facing Southern Africa at the time. The refugees who settled in Lesotho had diverse backgrounds such as Xhosa, Zulu, Ndebele, Tswana, Swazi and other origins. Further, Lesotho is generally perceived to be one nation characterized by cultural homogeneity. This is a result of the dominance of one vernacular spoken official language. Notwithstanding, there is cultural and ethnic diversity because in the South of Lesotho there is a considerable number of Basotho with Xhosa origins who have retained their cultural identity and language yet they are *bona fide* citizens of Lesotho. Similarly, in the North of Lesotho, there is a notable population of Basotho of Indian origin who have maintained their cultural identity and rights of citizenship. This diverse make-up of Basotho people as a result of their origins has had differing ramifications for multi-discrimination and misunderstanding regarding citizenship. The lives of Basotho are largely characterized by parallel, dual systems whereby there is western, borrowed or modern influence and traditional and customary ways of life operating side by side. This parallel and dual way of life has influenced how issues of health, education, religion and law are dealt with, sometimes manifesting themselves and creating uncertainty or conflict. Likewise issues of citizenship have not escaped this parallel influence. Even though the legal system does not condone dual citizenship, practice points to a different picture.

⁴ Palmer V. and Poulter S., *The Legal System of Lesotho* 3

⁵ 2002 Lesotho Population Data Sheet, Ministry of Finance and Development Planning

⁶ Censorship Report 1996

⁷ Lesotho's People are known as the Basotho

⁸ *Ibid*

The King is the head of state.⁹ He is the constitutional Monarch vested with executive powers¹⁰. The King does not however exercise these powers himself instead he does so through the officers and/or authorities of the government.¹¹ There is a Prime Minister who is the head of the Government.¹² The legislative powers are vested in the Parliament that consists of the Senate and the National Assembly.¹³ The Senate has thirty-three (33) members while the National Assembly has one hundred and twenty (120). Members of the National Assembly are democratically elected whereas the Senate members are appointed into office.¹⁴ These are twenty-two (22) principal Chiefs and eleven (11) other candidates nominated by the King with the advice of the Prime Minister.

Before the 2007 general parliamentary elections, Lesotho was said to have attained democratic stability after many bouts of political turmoil that left the county economically vulnerable. Despite the positive picture of multi-party democracy, issues of inclusive representation remain a challenge. Representation of marginal groups such as women, the youth, people with disability and other ethnic minorities have not been paid sufficient attention. Women who make up the majority of the population are least represented in the political structures, compared to their male counterparts, especially in the National Assembly. After the February 2007 general elections, women occupy 28 out of 120 seats in the general assembly which number makes only 23 percent of women's representation in parliament. This lack of general inclusivity may lead to situations where issues of discrimination will not be given an adequate platform and paid the requisite attention they deserve.

Further, after the February 2007 national elections the political environment in Lesotho has depicted mixed signals. After the ruling party, Lesotho Congress for Democracy won the elections; the opposition parties contested the validity and fairness of the elections results. Consequently, this resulted in protests against the ruling party. This has brought instability in the country and has attracted intervention by SADC and civil society organizations to try and restore normality across the country. However,

⁹ The Constitution of Lesotho 1993, section 44

¹⁰ *ibid* section 86

¹¹ *ibid*

¹² The constitution of Lesotho *supra* section 87

¹³ *ibid* section 54

¹⁴ The Constitution of Lesotho *supra* sections 56 and 55 respectively

despite these efforts, the political environment has been deteriorating to an extent that the government declared a state of emergency in June 2007. And various instances of arrests of civilians and charges of treason have befallen some of Basotho citizens on the basis that they have displayed intentions to topple the government or at least threaten the stability thereof. To this effect a number of high treason cases are still pending in the High Court of Lesotho.

Lesotho's economy is closely tied to that of the Republic of South Africa with Lesotho being the dependent partner. This dependency derives from the country's reliance on migrant labour remittances and its share from the Southern African Customs Union (SACU). The country is classified as one of the 49 least developed countries of the world with a per capita income of USD 423 (2001). This figure shows that 68 percent of the population is living below the poverty line. In 2005 it was ranked 149¹⁵ out of 177 countries on the UNDP Human Development Index.¹⁶ The country's land area is predominantly highlands with a limited natural resource base. The growth potential of the agricultural sector is therefore limited due to the scarcity of arable land. This background shows that Lesotho is a least developing country faced with challenges of poverty and resource limitations which have a bearing on the social and economic inequalities between different sections of the population. Thus, a combination of socio-cultural and economic factors has affected resource allocation, administration and management resulting in discriminatory practices in accessing productive resources like land, livestock and capital. The challenges of unfavourable economic growth have also influenced patterns of citizenship-seeking and determination whereby Basotho citizens tend to seek residence outside of the country without renouncing their rights in Lesotho.

4. THE POLICY AND LEGAL FRAMEWORK

In Lesotho, there is a noted absence of adequate policy framework providing guidance on discrimination and citizenship. In this scenario, however, the country does have a policy that addresses gender discrimination. Lesotho has adopted a Gender and Development Policy (2003) which commits the state to ensure that all sectors of development address gender inequalities that permeate all sectors of society. In addressing gender equality, the policy re-affirms the government's commitment to provision and decentralization

¹⁵ UNDP Human Development report 2005

¹⁶ Bureau of Statistics 2004

of services to the poor, especially marginal groups. The Policy further addresses inequalities cutting across social, racial, legal, cultural, economical and political spheres.

The legal framework on the other hand has measures in place to deal with discrimination and citizenship matters. The constitution of Lesotho, (1993) provides direction and guidance on who qualifies to be a citizen of Lesotho and under what circumstances. In addition, the statutory¹⁷ framework spells out measures for acquiring citizenship, for regulating immigration procedures and also for alien control. This legal framework is under a dual system that comprises customary law operating side by side with the general law (statutes and common law). However, there is general observation that in practice, common law dominates, particularly in the determination and interpretation of citizenship. Further, the legal system comprises of the judiciary whose main function is to uphold the law¹⁸. The judiciary is made up of Court of Appeal and the High Court. There are ten Magistrate's Courts found in the towns of the ten (10) districts of Lesotho. These courts administer the common law. At parallel level with the Magistrate's Courts is the Judicial Commissioner's (JC) Court which though only found in the capital, Maseru district, it operates through a rotational sitting basis throughout all the ten districts of Lesotho. Below these courts are the Basotho central and local courts. The Judicial Commissioner's Courts, Central and Local Courts adjudicate over customary matters only and all the parties/litigants in these courts are Basotho. All these courts have primary powers to sit as courts of first instance in both criminal and civil matters. However, the High Court is the only court with primary jurisdiction to decide over citizenship and racial matters.

5. DEFINITIONS

In Lesotho there are three ways in which rights of citizenship may be attained. First, it is by right of birth whereby one or both parents are Basotho. Second, it is by right of descent, that is, whereby a person is born outside Lesotho and one or both parents are Basotho. Third, it is an instance whereby a person attains Lesotho citizenship by way of naturalisation. In this case once a person satisfies the specifications spelled out in the Lesotho Citizenship Order of 1971, he or she is allegeable to register as a Lesotho Citizen.

¹⁷ Citizenship Act of 1967, Lesotho Citizenship Order of 1971

¹⁸ *ibid* Chapter XI

5.1 The 1993 Lesotho Constitution, 1993

5.1.1 Citizenship

The 1993 Lesotho Constitution provides a general clause conferring citizenship on its subjects. The said clause is provided for under article 37 of the constitution which states that;

“Every person who immediately before coming into operation of this constitution is a citizen of Lesotho under the Lesotho Citizenship Order 1971 shall, on the coming into operation of this Constitution and subject to any provision made in or under this Chapter, continue to be a citizen of Lesotho.”

Further the 1993 Lesotho Constitution defines an alien as a person who is not a citizen of Lesotho.¹⁹ In essence what the constitution does is to confer to all persons rights of citizenship as long as they are proven to have been regarded as having citizenship rights under the citizen statute. It does not however define in specific terms what a citizen of Lesotho is, nor does it give conditions upon which such rights may be obtained. It seemingly appears that by and large rights to citizenship are limited within the four corners of the Lesotho Citizenship Order of 1971. What the constitution does is merely to give legitimacy to that statute without necessarily impeaching on the modalities thereof. The implications of this is that the constitution being the supreme and recent law should have provided broader parameters within which citizens rights are protected rather than to affirm provisions of an already existing statute.

5.1.2 Discrimination

The Lesotho Constitution of 1993 provides fundamental human rights and freedoms of all persons, including non-citizens who reside in Lesotho. Section 18 in particular, has been designed to preclude any form of discrimination, including racial discrimination. The section stipulates that every citizen in Lesotho is entitled to freedom from discrimination. This freedom from discrimination entails affording the same treatment to all persons irrespective to their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities of or

¹⁹ Section 43 of the Constitution.

restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. This proviso is however derogated from under section 4 (a) whereby the constitution justifies discrimination with respect to persons who are not citizens of Lesotho. This implies therefore that any law made in Lesotho which is discriminatory in nature may not, by virtue of its application to non citizen, be challenged in court of law. It has also been observed that under the principles of state policy, Lesotho undertakes to adopt policies which are 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.²⁰

Further, the constitution affords all its citizens freedom of movement throughout Lesotho, the right to reside in any part of Lesotho, the right to enter and leave Lesotho and immunity from expulsion from Lesotho. This right is however not absolute from imposition of restrictions where it is in the public interest to do so. For persons who are not citizens of Lesotho, this limitation is stipulated under section 7(3) (d) which states that “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes proviso for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Lesotho. This state of affairs was reiterated by Justice Ramodibedi, in the case of Adelaja Otubanjo²¹ whereby he explicitly stated that “the rights of aliens in Lesotho are dealt with primarily by the Constitution and the Act”²². Section 4 of the Constitution affords the fundamental human rights and freedoms to “every person in Lesotho.” One of these rights is freedom of movement, which in turn is specifically stated (section 7(1)) to include the right to enter Lesotho and to reside anywhere in the country. But this latter provision is qualified in the following terms; laws may be made inter alia “for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Lesotho.”

²⁰ Sec. 26, Lesotho Constitution, 1993.

²¹ Adelaja Otubanjo v Director of Immigration and Minister of Home Affairs COA/ CIV/ 35/2005

²² Aliens Control Act, 1966

5.2 The Citizen Chapter of the Constitution

When the Lesotho Constitution of 1993 was enacted, Chapter IV was devoted to citizenship thereby making it (citizenship) a constitutional right accorded to persons qualifying under the same chapter. It is however, not a fundamental human right protected under Chapter II of the Constitution. The 1993 Lesotho Constitution thus confers the rights of citizenship to different people. The different situations upon which a person may be afforded rights of citizenry are outlined below;

Sec. 37 Persons who are citizens on the coming into operation of the Constitution

Every person who immediately before the coming into operation of this Constitution is a citizen of Lesotho under the Lesotho Citizenship Order 1971 shall, on the coming into operation of this Constitution and subject to any provision made in or under this Chapter, continue to be a citizen of Lesotho.

This particular proviso implies that all persons who had attained rights of citizenship before the 1993 Constitution shall continue to be so. The law does not impose any limitations on who shall continue being the citizen of Lesotho and affords all persons who satisfy this law, the same rights and their enjoyment.

Sec. 38 Persons born in Lesotho after the coming into operation of the Constitution

(1) Subject to the provisions of subsections (2) and (3), every person born in Lesotho after the coming into operation of this Constitution shall become a citizen of Lesotho.

(2) Save as provided in subsection (3), a person shall not become a citizen of Lesotho by virtue of this section if at the time of his birth neither of his parents is a citizen of Lesotho, and – (to be analyzed in terms of children’s rights)

(a) one or both of his parents possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Lesotho; or

(b) One or both of his parents is an enemy alien and the birth occurs in a place then under occupation by the enemy.

(3) A person born in Lesotho on or after the coming into operation of this Constitution who is disqualified to become a citizen of Lesotho by virtue of subsection (2) of this section shall become a citizen of Lesotho if he would otherwise become stateless.

Under this provision, rights of citizenry are limited to people born in Lesotho after 1993. The conditions attached restrict rights of citizenship to all people who not qualify under the law to be citizens of Lesotho. It does not discriminate one on the basis of gender, race, ethnicity, racial group, religion etc, rather provides a general restriction to all.

Sec. 39 Persons born outside Lesotho after the coming into operation of the Constitution

A person born outside Lesotho after the coming into operation of this Constitution will become a citizen of Lesotho at the date of his birth, if at that date either of his parents is a citizen of Lesotho otherwise than by descent.

This is in accordance with the second requirement under which a person qualifies to be a Mosotho citizen, i.e. by way of descent.

Sec. 40 Marriage to Lesotho citizen

(1) Any woman who, immediately before the coming into operation of this

Constitution, is or has been married to a person -

(a) Who continues to be a citizen of Lesotho by virtue of section 37 of this

Constitution; or

(b) who, having died before the coming into operation of this Constitution would, but for his death, have continued to be a citizen of Lesotho by virtue of that section, shall be entitled, upon making application and upon taking the oath of allegiance, to be registered as a citizen of Lesotho.

(2) Any woman who, after the coming into operation of this Constitution, marries a citizen of Lesotho shall be entitled, upon making application and upon taking the oath of allegiance, to be registered as a citizen of Lesotho.

The Citizenship case²³, in dealing with the issue of citizenship of a woman and her children provided inter alia;

“The acquisition of citizenship through the father would appear to be a reflection of the fact that the wife and children of a man, as head of the family, are more likely to settle in the country of which he is a citizen and thereby acquire a genuine link with that country than in the country of which she is a citizen (if different).”

In the case of Lesotho, any person whose parent or both is a Mosotho, whether born in or outside Lesotho acquires rights of citizenship. This can either be by way of birth or descent respectively.

This is reiterated by the fact that in Lesotho, and in most parts of Africa, citizenship has always been patrilineal by descent from male citizens and matrilineal in the case of illegitimate children of female citizens. What the section implies is that a non- Mosotho woman married to a Mosotho can get citizenship if she so wishes but the same is not true of a non-Mosotho man married to a Mosotho woman. Before the enactment of the **Legal Capacity of Married Persons Act of 2006**, Basotho women were not allowed the same benefits that were allowed Basotho men to enjoy their citizenship due to the concept of marital power which gave a husband married in community of property absolute power over the property and person of his wife. This meant that, for instance, a wife married under such a regime would not be allowed to obtain a traveling document without her husband giving consent to its issuance, yet the same requirement was not necessary for her husband. This position no longer holds as the new law requires them to obtain one another’s consent in dealing with any matrimonial issues, including property. It must be emphasized that the **Legal Capacity of Married Persons Act** is comparatively a better legal weapon trying to harmonize rights and responsibilities of men and women of that has ever come this far.

5.3. Dual Citizenship

Issues of dual citizenship have a constitutional bearing. Dual citizenship implies a situation where a person holds citizenship of two different countries at the same time. In Lesotho, this issue of dual citizenship is dealt with under section 41 of the 1993 Constitution. Subsection (1) provides that “any person who, upon the attainment of the age of twenty one years, is a

²³ The Attorney General for the Republic of Botswana vs. Unity Dow

citizen of Lesotho and also a citizen of some country other than Lesotho shall cease to be a citizen of Lesotho upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a citizen of Lesotho by descent, made and registered such declaration of his intentions concerning residence as may be prescribed by Parliament.”

Further, the constitution provides that a citizen of Lesotho shall cease to be such a citizen if -

- (a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Lesotho by voluntary act (other than marriage);
- or
- (b) having attained the age of twenty-one years, he otherwise acquires the citizenship of some country other than Lesotho and has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as may be prescribed (sec.41(2)).

Subsection (3) thereof states that a woman who -

- (a) Becomes a citizen of Lesotho by registration under the provisions of section 40 of this Constitution; and
- (b) is immediately after the day upon which she becomes a citizen of Lesotho also a citizen of some other country, shall cease to be a citizen of Lesotho upon the specified date unless she has renounced the citizenship of that other country, taken the oath of allegiance, and made and registered such declaration of her intentions concerning residence as may be prescribed.

The above constitutional provisions forbidding dual citizenship can be argued to be restrictive especially where this duality could have had a developmental benefit. For instance, majority of Basotho are migrant workers in South Africa, some of these migrants choose to acquire dual citizenship in order to qualify for better working conditions. In support of this assertion, in the case of *Mokoena*²⁴ in interpreting loss of citizenship under section 8 (2)(a) of the **Lesotho Citizenship Order of 1971**, the judge pointed that this law ‘... does not deal with a Lesotho citizen who is domiciled in Lesotho but acquires a citizenship of the Republic of South Africa, while he is working there. If the intention was that such a person

²⁴ Mokoena vs. Mokoena CIV/APN/216/2005 [UNREPORTED]

should lose his residence and domicile, then Parliament should have specified this. It would be wrong to read into such a person's act an intention to terminate rights of domicile and residence into the Order.'²⁵ This case illustrates that losing one's citizenship on the basis of having acquired another one for economic purposes seems unjustifiable and economically disadvantageous to a migrant who did not display any intention whatsoever of giving up Lesotho citizenship.

The constitutional restriction can be argued to be against the spirit of freedom expounded in the different international instruments that Lesotho has acceded to. Further, the provisions seem to be discriminating against women as they are not afforded the same rights as men to confer citizenship rights to their spouses by virtue of marrying foreign men, while their male counterparts could do so.

5.4. Powers of Parliament

(1) Parliament may make provision for the acquisition of (1) citizenship of Lesotho by persons who are not eligible or who are no longer eligible to become citizens of Lesotho under the provisions of this Chapter.

(2) Parliament may make provision for depriving of his citizenship of Lesotho any person other than a person who became or becomes

(a) a citizen of Lesotho by virtue of having been born in Lesotho; or

(b) a citizen of Lesotho by descent, unless he would thereby become stateless.

(3) Parliament may make provision for the renunciation by any person of his citizenship of Lesotho.

By placing issues of citizenship under socio-economic and political rights the constitution, Lesotho is taking a deliberate stand to revoke any decision to confer citizenship. The consideration may be that such a decision may be taken where there is a perception that granting such citizenship may not to be in the best interests of the country²⁶. It is further noted here that the language used in the powers of parliament implies that decisions by parliament to grant citizenship would only affect men. There is no attempt to use gender inclusive language to incorporate women's concerns.

²⁵ Ibid, page 12

²⁶ *Adelaja Otubanjo vs. Director of Immigration and Minister of Home Affairs (C of A (CIV) No. 35/05*

5.5 The Lesotho Citizenship Order, 1971

The Lesotho Citizenship Order of 1971 provides two scenarios under which a person may acquire a citizenship in Lesotho. These are citizenship by naturalization and citizenship by registration.

“citizen by naturalization” means

- (a) a person who under the provisions of subsection (3) of section 23 of the Lesotho Independence Order 1966 became a citizen of Lesotho by virtue of his having been naturalised in Basutoland before the commencement of the 4th day of October 1966;
- (b) a person who under subsection (2) of section 13 of the Lesotho Citizenship Act, 1967 became a citizen of Lesotho by naturalisation; and
- (c) a person who, under subsection (2) of section 18 of this Order, is a citizen of Lesotho by naturalisation issued in respect of him under section 17 of this Order;

“citizen by registration” means –

- (a) a person who under the provisions of subsection (3) of section 23 of the Lesotho Independence Order 1966 became a citizen of Lesotho by virtue of his having been registered in Basutoland before the commencement of the 4th day of October 1966;
- (b) a person who under subsection (2) of section 13 of the Lesotho Citizenship Act, 1967 became a citizen of Lesotho by registration by virtue of a certificate of registration issued in respect of him under section 12 of the Lesotho Citizenship Act of 1967; and
- (c) a person who, under subsection (2) of section 18 of this Order, is a citizen of Lesotho by of registration by virtue of certificate of registration issued in respect of him under section 17 of this Order.

These provisions aptly define the circumstances under which citizenship may be acquired in Lesotho. The two statutes outlined do not put racial or ethnic restrictions as a basis upon which citizenship can be withheld or nullified. However, gender restrictions are noted by failure to use gender neutral language. Usage and reference to a person as *his/him* in sec (a) and (b) of both laws clearly shows that this law was referring to issues of citizenship as they affect men. These provisions do bring out issues of discriminations to the extent that they exclude women. The laws points to gaps in citizenship rights of women and should be amended to be in

harmony with anti-discriminatory provisions that Lesotho has committed herself to in the constitution and different international, regional and national instruments.

In summation, it can be articulated that in Lesotho, there are three ways in which citizenship may be acquired. The first one is by birth, whereby a person is born from both parents who are Lesotho citizens. Secondly, it is where by a person is born outside Lesotho and one or both of his parents are Basotho. For instance, this scenario entails situations where a parent or both of them are on diplomatic mission outside Lesotho. Lastly, it is by way of naturalisation, in which case a person has to satisfy the provisions of The Lesotho Citizenship Order as provided above. It is also prudent to state that, these citizenship rights are similar to any person who indeed qualifies on any of the above irrespective of his or her sex, race, ethnicity, religion, colour, or any other circumstance as stipulated in the constitution.

5.6 Race Relations Order Of 1971

This Order prohibits discrimination on racial grounds in places of public resort. Section 3 of the Order provides inter alia; “No person shall be discriminated against in relation to access to any public resort or facilities or services of a public nature.”²⁷ The Order further stipulates that an employer shall be held responsible for acts of racial discrimination conducted by an employee whether or not the employer had any knowledge of/or approved the facts²⁸. The remedy that is available to the aggrieved party is that he/she has the option to apply to the High Court to compel the wrongdoer to comply with the provisions in terms of which there has been violation²⁹. The Order further states that any person who deliberately aids, induces or incites any person to discriminate on racial grounds is guilty of an offence. According to Lesotho’s reports to the United Nations on the International Convention on the Elimination of all Forms of Racial Discrimination³⁰, so far, there have been no cases on the basis or racial discrimination that have gone before the Lesotho courts of law.

5.7. Case Law

Looking at issues of discrimination and citizenship in Lesotho, it appears that previous case law does not depict any specifications that pronounce the

²⁷ Sec. 3 of Race Relations Order, 1971

²⁸ Ibid, Sec.6

²⁹ Ibid, sec. 8

³⁰ UN International Convention on the Elimination of all Forms of Racial Discrimination, Fourteenth periodic report of States Parties- 1998

status quo in as far as the above issues are concerned. However, few cases that have been perused through give highlights on issues of *intention* to renounce one's rights of citizens rather than specifically expounding on issues of *discrimination*. Hence in *Mokoena vs. Mokoena and Others*³¹ the presiding judge decided that citizenship by birth or descent could not be just lost by mere acquisition "...of another citizenship to get a job while his domicile remains in Lesotho." He further stated that "only citizenship of Lesotho by naturalization or registration can be lost in terms of **Section 23 of the Lesotho Citizenship Order 1971** by Ministerial act" In other words, what the judge was saying here is that a person's citizenship could not just be lost without proving his or her intention to do so. And if that is what the Parliament had intended, it ought to have specified so, without the courts having to "read into such a person's an intention to terminate rights of domicile and residence into the Order"³².

In the case of *Adelaja Otubanjo vs. Director of Immigration*³³ the appellant who was a Nigerian citizen, applied to the Teaching Service Commission ("TSC") of Lesotho in 2000 to take up a teaching post. He was admitted to the Lesotho Teaching Service. On entry into Lesotho he applied for a permit for indefinite sojourn (or indefinite permit, as it is also termed) and a permit for temporary sojourn (temporary permit). This was in terms of sections 6 and 7 respectively of the Aliens Control Act, 16 of 1966 (the Act). These sections provides as follows:

Sec.6 (1) states that; an application by an alien for a permit to enter Lesotho for the purpose of indefinite sojourn therein shall be made before his entry into Lesotho, in the form and manner prescribed by regulation, shall contain the information for which provision is made in the said form and shall be submitted to the Minister in a manner and by means prescribed by regulation.

Section 7 thereof relates to conditions under which a temporary permit may be granted or may be refused to be granted. It further provides that whenever such permit is granted with conditions, every condition must be set forth in the temporary permit.

³¹ CIV/APN/216/2005

³² *ibid*, page 12

³³ *Adelaja Otubanjo vs. Director of Immigration and Minister of Home Affairs* (C of A (CIV) No. 35/05

Apparently the appellant's application for a temporary permit was granted "pending permit 184.2001" which is a reference to the application for an indefinite permit. This temporary permit was entered in his passport, together with the explicit endorsement "until 28-03-2002".

On 27 March 2002 the appellant was notified in writing, on behalf of the Minister that the Minister (hereafter referred as second respondent) had declined to grant the indefinite permit. He was also advised that his temporary permit would not be renewed on its expiry (the next day) and that he should arrange to leave Lesotho by then. It was on the basis of these events that the appellant lodged this application in the High Court of Lesotho against the decision of the second respondent not to renew his temporary permit and grant him an indefinite sojourn. He applied to the High Court to declare this decision of the second respondent as null and void, of no force and effect on account that it failed to observe rules of natural justice. The applicant's application was dismissed, hence the appeal to the Court of Appeal against the ruling of the High Court. The applicant contended that the High Court Judge was wrong in dismissing the application, because he was entitled to a hearing "before the decisions under challenge were reached." These decisions are said to be the refusal of his application for an indefinite permit, and that his temporary permit would not be renewed on its expiry. The entitlement to a hearing is based on a claim of legitimate expectation, in turn founded on the fact that the applicant had successfully applied to the Government of Lesotho (through the TSC) to take up employment here.

In handing down the judgment, the judge stated that "the written application process in the present case afforded the appellant both notice of the decision and the opportunity to advance what he wished in support of his application. At no stage did he seek in addition an interview or other opportunity to be heard in person." The judge further reiterated that the answer which the second respondent gave the applicant was made explicitly in terms of section 6 and 7 of the Act and therefore the respondent's, in making his decision, applied the principle of social and economic conditions of Lesotho; and the general interests of its existing population. The judge further emphasised that indeed, the respondent had followed a fair procedure in the decision he made against the applicant's contentions, and therefore, it was in the respondent's discretion whether or not to extend the applicant's temporary permit or award him the permanent sojourn.

On the basis of this, the appellant's application failed. It may therefore be assumed that states, Lesotho in this case, having regard to the privileges and responsibilities which attach to interests of its nationals, is at liberty to decide who stays and does not within its territory, and its discretion in determining that should not be challenged merely by alleging legitimate expectation. In Lesotho, there is no specific body which deals with racial discrimination. However, there is an office of Ombudsman, which deals with complaints from the public. Similarly, no case dealing with racial discrimination has ever been lodged.

Generally, it may be commented that in Lesotho, although there is the law provides for issues of citizenship, there has not been much disputes around issues of discrimination and citizenship. As it has been shown above, where such cases arise, there were merely on issues of loss or acquisition of citizenship. It is further concluded that matters of discrimination and citizenship have not found any ground in Lesotho, at least, this far. If they do exist, it would be assumed that probably they have not reached the justice system in which case a basis it would be determined whether there is need to address them.

6. INTERNATIONAL INSTRUMENTS

Lesotho has ratified and acceded to several international human rights instruments such as conventions, covenants and declarations. These instruments include the following:

- a) The Universal Declaration of Human Rights, 1948
- b) The International Covenant on Civil and Political Rights, 1966
- c) The International Covenant on Economic, Social and Cultural Rights, 1981
- d) The International Convention on the Elimination of all forms of Discrimination Against Women, 1966
- e) The Charter on Human and People's Rights, 1992
- f) The International Convention on the Elimination of All Forms of Racial Discrimination , 1971

6.1 The Universal Declaration of Human Rights

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This implies that rights of citizens of any state should be afforded full rights

without discrimination of any kind. By acquiring citizenship through birth in Lesotho, a person is afforded the fundamental human rights and protection thereof. Where violation occurs, courts of law are to be invoked so as to remedy the situation. Hence, if a citizen is discriminated against on whatever basis not justified by law, such an act would be declared unconstitutional as it would be against the spirit of the constitution to do so.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Further, no distinction shall be made on the basis of the political, jurisdiction or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty. The interpretation of this article speaks to the fact rights of citizens are enshrined in the principal law of each country, which is the constitution. Right of citizenship, like all other rights entitles a person to full participation in all matters of the country for which he or she is a citizen. In Lesotho, the same proviso forms part of the constitutional law and therefore brings forth the fact that citizenry is a fundamental right that needs to be respected and protected.

Article 13 (1): Everyone has the right to freedom of movement and residence within the borders of each state.

(2): Everyone has the right to leave any country, including his own, and return to his country. When reading Chapter II of the Lesotho Constitution, it does afford its citizens rights to freedom of movement within Lesotho and beyond. A citizen of Lesotho has full rights to leave and return to Lesotho without having to lose his or her rights of citizenry unless the contrary is proved. This is evidenced in the case of *Mokoena vs. Mokoena*³⁴ where the judge reiterated the fact that renunciation of citizenship of Lesotho must be registered with the “Registrar General in terms of section 22(1) of the Lesotho Citizenship Order 1971, which could even be revoked by the Minister responsible if its acceptance is not conducive to the public good.”

Article 14 (1): Everyone has the right to seek and to enjoy in other country asylum from prosecution.

Article 15 (1): Everyone has a right to a nationality.

³⁴ CIV/APN/216/2005, page 10

(2): No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

6.2 The International Covenant on Civil and Political Rights

Article 2 (1): Each party to the covenant undertakes to respect and ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant.

Article 2(2): Where not already provided for by existing legislative or other measures, each state to the covenant undertake to take the necessary steps in accordance with its constitutional processes and the provisions of the covenant to adopt such legislative and other measures as may be necessary to give effect to the rights recognized in the covenant.

Article 4 (1): In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 12 (1): Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

Article 13: An alien lawfully in the territory of a state Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effect protection against discrimination on any ground such as race, colour,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with their other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

All in all, it is clear that where discrimination is based on issues of a person's right of citizenship, such discrimination could be challenged on the basis that it is unconstitutional unless that contrary is proved. Lesotho, being a member of the international community and having ratified these instruments, it has shown commitment to abide by their provisions and to afford her citizens all protective measures that would enable full attainment enjoyment of such rights. Since domestication of this international instruments is a requirement for them to be binding in Lesotho, it is therefore, as a matter of urgency and need, important for Lesotho to take such measures as are necessary to ensure domestication hence compliance, otherwise, it would be difficult or even impossible for Basotho to evoke such provisions in order to acclaim enforcement of their rights.

6.2 The International Convention on the Elimination of All Forms of Racial Discrimination

Article 1; In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2 of the Convention commits all States Parties to condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation. Similarly, Article 6 States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through

the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

6.3 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) normally referred to as the Women's Convention emphasises that discrimination against women violates the principle of equality of rights and respect for human dignity. The Women's Convention considers the fact that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women. Article 9 of CEDAW obliges state members to grant women equal rights with men to acquire, change or retain their nationality. In particular it commits countries to ensure that neither marriage to an alien nor change of nationality by the husband during marriage should automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. The Convention further commits state parties to grant women equal rights with men with respect to the nationality of their children.³⁵ In Lesotho however, the situation is that Lesotho ratified CEDAW with reservation on issues of customary law. Thus, Lesotho has allowed herself room to continue practising customary law principles that are discriminatory in nature. Unfortunately, when interrogating on this customary principles, it appears that a large group of individuals or citizens that fall prey of this practice are women. Thus, in essence Lesotho has made an undertaking by ratifying this Convention to afford to its citizens all the rights embodied therein. To ratify with reservation on the issues of permitting discrimination in some areas, is merely to defeat the very purpose for which this Convention came into place.

In ratifying these treaties, Lesotho assumed an immediate absolute obligation³⁶ of protecting the rights of all its citizens and doing away with all acts that promote discrimination in all its forms. The progressive delivery

³⁵ In the decision of the Appeal Court of Botswana, the Citizenship Case in Botswana, Dow was granted the right to have her children be granted Botswana citizenship on the basis that that was her identity even though her husband was an American citizen.

³⁶ Sieghart, Paul (1983) *The International Law of Human Rights* (Clarendon Press: Oxford). P 196

on these obligations through enactment of laws and adoption of policies that address issues of equality and non-discrimination in all spheres of human existence is the best way forward. The obligation to observe and implement these safeguards becomes crucial when determining the commitment and capacity of the Government to deliver on the undertakings it has committed itself to in order to uplift the development and growth of its citizens. The caveat on the justiciability of these treaties before domestic courts is that they have not as yet been incorporated into domestic law and therefore cannot be used as a weapon to force Government to deliver. At best, these treaties can be used as a lever to lobby the state to formulate implementable programmes that can change the status quo which places male supremacy to the detriment of women.

7. REGIONAL INSTRUMENTS

7.1 The African Charter on Human and People's Rights

The African Charter like other international instruments recognizes the principle of fundamental human rights to all persons. The Charter articulates that States Parties have;

“duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.”

The Charter further takes into consideration the fact that all persons must have the right to freedom of movement and residence within the borders of any state provided he abides by the law of that state. In as far as non-national are concerned.³⁷ The charter decrees that where such a non-national has been legally admitted in territory of a State Party to this Charter; he/she may only be expelled from it by virtue of a decision taken in accordance with the law.³⁸

³⁷ Art. 12 (1)

³⁸ Art. 12(4)

8. CONCLUSION

This study has shown that issues of citizenship and discrimination are embedded in the country's historical context given the origins of the citizens of Lesotho and their socio-economic circumstances. Lesotho has put in place the constitutional, legal and policy framework to address citizenship rights and to deal with discrimination. Notwithstanding, this exercise did not come across extensive case-law on discrimination and citizenship albeit a few cases analysed above. Similarly there was paucity of case-law in areas of ethnicity and racial discrimination and citizenship. This case can be argued to be a result of the racial and ethnic composition of Basotho people where homogeneity is a trademark. Further, this research indicates that legislation is inadequate in as far as issues of discrimination and citizenship are concerned. The law has not in clear and specific terms pronounced what the position should be if there is a dispute on that matter. The Constitution itself in recognizing the Lesotho Order of 1971 verbatim has fallen short of expanding on other matters otherwise not provided for under this law.³⁹ Further, Lesotho has ceded to international and regional instruments that promote and protect the rights of its citizens. Despite these initiatives, minimal efforts are currently being made to domesticate these international commitments into local law. Notwithstanding, the foregoing discussions have pointed to a number of issues that needs to be addressed in order to respond to 'restrictive citizenship polices that are either *prima facie* discriminatory or require individuals to meet effectively impossible conditions in order to prove their citizenship.' In a world of deep rooted and growing inequalities among nations, the question inevitably arises whether nations, bear any responsibility for ensuring that fundamental human rights of all individuals, men and women are respected and enhanced; whether all human beings are afforded equal and full rights and responsibilities. Indeed, citizenship should not be allowed to include one sector of a human race to the exclusion of another on the basis of sex, colour, race racial language etc.

³⁹ Sections 37, 38 and 41 of 1993 Lesotho Constitution replicates section 8 (1) of the **Lesotho Citizenship Order 1971**.

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